D
000 321 960
7
UC SOUTHERN REGIONAL LIBRARY FACILITY



UNIVERSITY
OF CALIFORNIA
LOS ANGELES

SCHOOL OF LAW
LIBRARY

THE

ENCYCLOPEDIA

OF

UNITED STATES SUPREME COURT REPORTS

BEING A

Complete Encyclopedia of All the Case Law of the Federal Supreme Court up to and including Volume 206 U. S. Supreme Court Reports (Book 51 Lawyers' Edition)

UNDER THE EDITORIAL SUPERVISION OF

THOMAS JOHNSON MICHIE

Volume I

THE MICHIE COMPANY, LAW PUBLISHERS
CHARLOTTESVILLE, VA.
1908

T
En 207
1908
v. 1

333399
11/14/57

COPYRIGHT 1908
BY
THE MICHIE COMPANY

RTF 19 Nov57

TABLES OF TITLES AND WORDS AND PHRASES.

I. TITLES.

Italics indicate cross-references.

ABANDONED AND CAPTURED PROPERTY, 1.
Abandonment and Total Loss, 11.
Abatement, 11.
ABATEMENT, REVIVAL AND SURVIVAL, 12.
Abbreviations, 47.
ABDUCTION AND KIDNAPING, 48.
Abiding the Event, 49.
Abode, 49.
Abolition, 49.
Abridgment, 49.
Absconding, 50.
Absent Defendants, 50.
Absentees, 50.
Abstract of Title, 50.
Abuse of Process, 50.
Abutting Owners, 50.
Academies, 50.
ACCESSION, ACCRETION AND RELICTION, 51.
Accessories, 57.
Accident in Equity, 57.
ACCIDENT INSURANCE, 58.
Accommodation Paper, 62.
ACCOMPLICES AND ACCESSORIES, 63.
ACCORD AND SATISFACTION, 69.
Account Render or Stated, 69.
ACCOUNTS AND ACCOUNTING, 70.
Accretion, 74.
Accumulations, 75.
Accusations, 75.
ACKNOWLEDGMENTS, 75.
Acquit, 95.
Action on the Case, 95.
ACTIONS, 96.
Acts of Bankruptcy, 115.
Acts of Congress, 115.
Actual Controversy, 116.
Actuaries, 116.
Additional Allowance of Costs, 116.
Additional Security on Appeal, 116.
Additional Servitude, 116.
Address, 116.
Adequate Remedy at Law, 116.
ADJOINING LANDOWNERS, 117.
ADJOURNMENTS, 118.
Administration of Estates, 118.
Administrators, 118.
ADMIRALTY, 119.
Admissions in Evidence, 194.
Adoption of Children, 194.
Adulteration, 194.
ADULTERY, FORNICATION AND LEWDNESS, 195.
ADVANCEMENTS, 198.
Adverse Possession, 199.
Advertisements, 199.
Advice of Counsel, 199.
Affidavit of Merits, 199.
AFFIDAVITS, 200.
Affinity, 203.
Affirmance, 203.
Affirmation, 203.
Affray, 203.
Affreightment, 203.
After-Acquired Property, 203.
After-Acquired Title, 203.
Afterborn Children, 203.
Age, 204.
Agency, 204.
Aggravation, 204.
Aggregation, 204.
Aggrieved Party, 204.
Agistment, 204.
AGREED CASE, 204.
Agriculture, 209.
Aider and Abettor, 209.
Aider by Verdict, 209.
Aid Societies, 209.
Air, 209.
Alabama, 209.
Alaska, 209.
Alcoholic Liquors, 209.
Alcoholism, 209.
Aldermen, 209.
Alias Writs, 209.
Alibi, 209.
Alienation in Mortmain, 209.
Alienation of Affections, 209.
ALIENS, 210.
Alimony, 256.
Allegata and Probata, 258.
Alleys, 259.

Allocatur, 259.
ALTERATION OF INSTRUMENTS, 261.
Alteration of Records, 272.
Alternative Judgment, 272.
Alternative Writ, 272.
AMBASSADORS AND CONSULS, 273.
Ambiguity, 287.
AMENDMENTS, 288.
Amicus Curiae, 312.
Amnesty, 312.
Amotion, 312.
Amount in Controversy, 312.
Amusements, 313.
Ancestor, 313.
Anchored Vessels, 313.
ANCIENT DOCUMENTS, 313.
Ancient Lights, 315.
Ancillary Administration, 315.
Ancillary Jurisdiction, 315.
Anguish, 315.
ANIMALS, 316.
Animus Manendi, 328.
Annexation of Territory, 328.
ANNUITY, 329.
Annulment of Marriage, 330.
Another Suit Pending, 330.
Answers, 330.
Antenuptial Contracts and Settlements, 330.
Anti-Trust Laws, 330.
Apaches, 332.
Apothecaries, 332.
APPEAL AND ERROR, 333.

II. WORDS AND PHRASES.

Italics indicate cross-references.

ABANDONMENT, 11.
ABET, 48.
ABEYANCE, 48.
ABIDING, 48.
ABOUT, 49.
ABROAD, 50.
ABSENCE—ABSENT, 50.
ABSINTHE, 50.
Absolutely, 50.
ABSOLUTE TITLE, 50.
ABSTRACT, 50.
ABSTRACTION, 50.
ACCEPT—ACCEPTANCE, 50.
ACCIDENT—ACCIDENTALLY, 57.
ACCRUE, 74.
ACID, 75.
Acknowledge, 75.
Acquainted, 95.
ACQUIESCENCE, 95.
ACROSS, 95.
ACT, 95.
ACT OF GOD, 115.
ACT OF LAW, 115.
ACTUAL, 115.
ACUERDO, 116.
ADDICTED, 116.
ADEMPTION, 116.
ADJACENT, 116.
ADJOURNED SESSION, 117.
ADJUDICATION, 118.
ADVANCE, 198.
ADVERSE INTEREST, 199.
ADVERSE PARTY, 199.
AFFECT, 199.
AFFECTION, 199.
AFORESAID, 203.
AFTER, 203.
AGREED, 204.
AGREEMENT, 208.
AID, 209.
AID AND COMFORT, 209.
AIDING AND ASSISTING TREASON, 209.
ALCALDE, 209.
ALIENATE—ALIENATION, 209.
ALL, 256.
ALLEGIANCE, 258.
ALLOT, 259.
ALLOW—ALLOWANCE, 259.
ALLUVION, 260.
ALONG, 260.
AMERICANS, 311.
AMICABLE ACTION, 311.
AMITY, 312.
AMONG, 312.
AMOUNT OF TAXES, 312.
ANARCHIST, 313.
ANARCHY, 313.
And, 315.
AND ALSO, 315.
ANHYDRID, 315.
ANTICHRESIS, 330.
ANTICIPATE, 330.
ANY, 330.
ANY ONE YEAR, 332.
APEX, 332.
APPAREL, 332.

Encyclopedia of United States Supreme Court Reports.

ABANDONED AND CAPTURED PROPERTY.

BY J. N. CLAYBROOK.

I. Nature, Object and Construction of Statute, 2.
- A. Nature and Object of Statute, 2.
- B. Construction of Statute, 2.

II. Collection and Sale of Property, 2.
- A. Powers of Secretary of Treasury, 2.
- B. Property Embraced within Statute, 2.
  - 1. Nature and Kind of Property, 2.
  - 2. What Constitutes Capture, 3.
- C. Contracts for Collection, 4.
  - 1. Who May Make, 4.
  - 2. Necessity of Writing, 4.
- D. Allowance to Collecting Agent, 4.
- E. Presumption as to Payment of Proceeds of Sale into Treasury, 4.
- F. Liability of Government for Acts of Agent, 5.
- G. Liability of Captors or Agents to Owner, 5.
- H. Approval of Accounts of Agent Engaged in Collection and Sale, 5.

III. Recovery of Proceeds by Loyal Owners after Suppression of War, 5.
- A. Right to Recover, 5.
  - 1. Who May Sue, 5.
    - a. As Dependent on Title or Ownership, 5.
    - b. Right of Aliens to Recover, 7.
    - c. Right of Corporation Created by Rebel State during War to Recover, 7.
  - 2. Loyalty of Claimant, 7.
    - a. Necessity for Claimant to Have Been Loyal during War, 7.
    - b. Loyalty of Person from Whom Title Derived, 7.
    - c. What Constitutes Disloyalty, 8.
    - d. Pardon as Dispensing with Proof of Loyalty, 8.
  - 3. Title Acquired Contrary to Law, 9.
  - 4. Waiver of Right by Failure to Plead Claim as Set-Off, 10.
- B. Proceedings to Recover, 10.
  - 1. Jurisdiction, 10.
  - 2. Time of Bringing Action, 10.
  - 3. Counterclaim, 10.
  - 4. Competency of Witnesses, 11.
  - 5. Judgment, 11.
  - 6. Appeal, 11.

CROSS REFERENCES.

See the titles ALIENS; CONFEDERATE STATES; LIMITATION OF ACTIONS; PARDON; PRINCIPAL AND AGENT; PUBLIC OFFICERS; STATUTES; TREASON; WAR.

I. Nature, Object and Construction of Statute.

A. Nature and Object of Statute.—The abandoned and captured property act authorized the secretary of the treasury to appoint special agents to receive and collect all abandoned or captured property in insurrectionary states, the property to be sold and the proceeds paid into the treasury, books of account to be kept showing from whom the property was received, the cost of transportation, and the proceeds of the sale, and further provided that persons claiming to be the owners of such property might within two years after the suppression of the rebellion recover the proceeds thereof, in a proceeding instituted in the court of claims, on proof of ownership of the property, and that they had never given any aid or comfort to the rebellion.[1]

B. Construction of Statute.—The abandoned and captured property act is remedial in its nature and requires such a liberal construction as will give effect to the beneficient intention of congress.[2]

II. Collection and Sale of Property.

A. Powers of Secretary of Treasury.—The entire administration of the system devised by congress for the collection of adandoned and captured property, within the insurrectionary districts, and its sale thereafter, was committed to the secretary of the treasury, and upon him alone was imposed the responsibility, in the first instance, of making rules and regulations for the "proper and economical execution" of the statutes in question, through agents whom he should designate.[3]

B. Property Embraced within Statute—1. NATURE AND KIND OF PROPERTY.—The abandoned and captured property act applied to private property

1. Nature and purpose of abandoned and captured property act.—United States *v.* Anderson, 9 Wall. 56, 65, 19 L. Ed. 615; Briggs *v.* United States, 143 U. S. 346, 357, 36 L. Ed. 180; United States *v.* Johnston, 124 U. S. 236, 250, 31 L. Ed. 389, United States *v.* Klein, 13 Wall. 128, 20 L. Ed. 519; New Orleans, etc., Mail Co. *v.* Flanders, 12 Wall. 130, 132, 20 L. Ed. 249; Mrs. Alexander's Cotton, 2 Wall. 404, 17 L. Ed. 915; Spratt *v.* United States, 20 Wall. 459, 22 L. Ed. 371; Haycraft *v.* United States, 22 Wall. 81, 22 L. Ed. 738; Lamar *v.* McCulloch, 115 U. S. 163, 182, 29 L. Ed. 366; United States *v.* Padelford, 9 Wall. 531, 538, 19 L. Ed. 788; United States *v.* Crusell, 14 Wall. 1, 20 L. Ed. 821; Lamar *v.* Browne, 92 U. S. 187, 193, 23 L. Ed. 650; Briggs *v.* United States, 143 U. S. 346, 358, 36 L. Ed. 180, 186; Young *v.* United States, 97 U. S. 39, 24 L. Ed. 992; Austin *v.* United States, 155 U. S. 417, 424, 39 L. Ed. 206.

"During the progress of the war it was expected that our forces in the field would capture property, and, as the enemy retreated, that property would remain in the country without apparent ownership, which should be collected and disposed of. In this condition of things congress acted. While providing for the disposition of this captured and abandoned property, congress recognized the status of the loyal southern people, and distinguished between property owned by them, and the property of the disloyal. It was not required to do this, for all the property obtained in this manner could, by proper proceedings, have been appropriated to the necessities of the war. But congress did not think proper to do this. In a spirit of liberality it constituted the government a trustee for so much of this property as belonged to the faithful southern people, and while directing that all of it should be sold and its proceeds paid into the treasury, gave to this class of persons an opportunity, at any time within two years after the suppression of the rebellion, to bring their suit in the court of claims, and establish their right to the proceeds of that portion of it which they owned, requiring from them nothing but proof of loyalty and ownership." United States *v.* Anderson, 9 Wall. 56, 65, 19 L. Ed. 615.

By the seizure the government constituted itself a trustee for those who were entitled or whom it should thereafter recognize as entitled. United States *v.* Klein, 13 Wall. 128, 20 L. Ed. 519; United States *v.* Padelford, 9 Wall. 531, 19 L. Ed. 788; Austin *v.* United States, 155 U. S. 417, 424, 39 L. Ed. 206.

The general policy of the act was to preserve, for loyal owners obliged by circumstances to remain in rebel states, all property or its proceeds which had come to the possession of the government or its officers. Mrs. Alexander's Cotton, 2 Wall. 404, 17 L. Ed. 915.

2. Construction of act.—United States *v.* Anderson, 9 Wall. 56, 19 L. Ed. 615; United States *v.* Padelford, 9 Wall. 531, 538, 19 L. Ed. 788. See, generally, the title STATUTES.

3. Powers of secretary of treasury.—United States *v.* Johnston, 124 U. S. 236, 250, 31 L. Ed. 389.

taken by a treasury agent as abandoned or captured,[4] property captured and sold by the military authorities, the proceeds of which were paid into the treasury,[5] and to property seized by the naval forces upon land,[6] or inland waters.[7] But the act does not apply to property which has been used in waging or carrying on war against the United States.[8] Cotton in the southern rebel districts was held to be subject to capture during the war.[9]

2. What Constitutes Capture.—Captured property is that which is seized

4. Private property taken by treasury agent as abandoned or captured.—Lamar *v.* McCulloch, 115 U. S. 163, 186, 29 L. Ed. 366.

5. Property captured and sold and proceeds paid into treasury.—United States *v.* Pugh, 99 U. S. 265, 25 L. Ed. 322.

The act of March 12, 1863 (12 Stat. 820), relative to abandoned and captured property, as extended by the act of July 2, 1864 (13 Stat. 375), authorizes the recovery in the court of claims of the proceeds of property captured and, without judicial condemnation, sold by the military authorities after July 17, 1862, and before March 12, 1863, if such proceeds were accounted for and credited by the secretary of the treasury to the abandoned and captured property fund. United States *v.* Pugh, 99 U. S. 265, 25 L. Ed. 322.

The capture of movable property on land changes the ownership of it without adjudication. Lamar *v.* Browne, 92 U. S. 187, 23 L. Ed. 650.

6. Seizure by naval force on land.—Mrs. Alexander's Cotton, 2 Wall. 404, 17 L. Ed. 915.

Property captured on land by the officers and crews of a naval force of the United States, is not "maritime prize;" even though, like cotton, it may have been a proper subject of capture generally, as an element of strength to the enemy. Under the act of congress of March 12th, 1863, such property captured during the rebellion should be turned over to the treasury department, by it to be sold, and the proceeds deposited in the national treasury, so that any person asserting ownership of it may prefer his claim in the court of claims under the said act; and on making proof to the satisfaction of that tribunal that he has never given aid or comfort to the rebellion, have a return of the net proceeds decreed to him. Mrs. Alexander's Cotton, 2 Wall. 404, 17 L. Ed. 915.

7. Seizure by naval force on inland waters.—Mrs. Alexander's Cotton, 2 Wall. 404, 422, 17 L. Ed. 915; The Cotton Plant, 10 Wall. 577, 19 L. Ed. 983.

Congress probably anticipated, especially in view of the state of the war when the act was passed, that most of the captures on the rivers would be made by the army, and thought it unwise to continue two modes for the disposition of the property taken. The Cotton Plant, 10 Wall. 577, 582, 19 L. Ed. 983.

What are captures on inland waters.—A capture made within the state of North Carolina on the Roanoke River, 130 miles from its mouth, by a naval force detached from two steamers that had proceeded up the river, one about 80 miles and the other about 100, where they stopped in consequence of the crookedness of the stream and apprehensions of low water, held to be a capture upon "inland waters" of the United States, as that phrase is used in the act of congress of July 2, 1864 (13 Stat. at Large 377), and therefore not to be regarded as maritime prize. The Cotton Plant, 10 Wall. 577, 19 L. Ed. 983.

8. Property used in war against United States.—Slawson *v.* United States, 16 Wall. 310, 21 L. Ed. 356.

Under the proviso to the first section of the abandoned and captured property act, excluding from its benefits property which "has been used in waging or carrying on war against the United States," the court of claims was held to have rightly dismissed a petition asking for the proceeds of a vessel which had been so used at Charleston, S. C., though on the evacuation of that place by the rebels, the quartermaster's department of the navy, in ignorance of how the boat had been used, chartered her and took her into the service of the government, and kept her in such service for twelve months, when disregarding the claims of her owner it turned her over to the treasury department for sale as captured property. Slawson *v.* United States, 16 Wall. 310, 21 L. Ed. 356.

9. Right to seize cotton.—Cotton in the southern rebel districts—constituting as it did the chief reliance of the rebels for means to purchase munitions of war, an element of strength to the rebellion—was a proper subject of capture by the government during the rebellion on general principles of public law relating to war, though private property; and the legislation of congress during the rebellion authorized such captures. Mrs. Alexander's Cotton, 2 Wall. 404, 17 L. Ed. 915; United States *v.* Padelford, 9 Wall. 531, 540, 19 L. Ed. 788; Haycroft *v.* United States, 22 Wall. 81, 22 L. Ed. 738; Lamar *v.* Browne, 92 U. S. 187, 194, 23 L. Ed. 650; Young *v.* United States, 97 U. S. 39, 24 L. Ed. 992.

Cotton owned by a British subject, although he never came to this country, was, if found during the rebellion within the confederate territory, a legitimate subject of capture by the forces of the United States, and the title thereto was transferred to the government as soon as the

or taken from hostile possession of a military or naval force.[10] Property cannot be considered as captured before actual seizure.[11] Rights of possession in private property are not disturbed by the capture of a district of country, or of a city or town, until the captor signifies by some declaration or act, and, generally, by actual seizure, his determination to regard a particular description of property as not entitled to the immunity usually conceded in conformity with the humane maxims of public law.[12]

C. Contracts for Collection—1. WHO MAY MAKE.—The regulations of the treasury department for the collection of abandoned and captured property giving a supervising special agent power to make contracts for the collection and delivery of such property did not give an assistant special agent authority to make such a contract.[13]

2. NECESSITY OF WRITING.—The regulations of the treasury department for the collection of abandoned and captured property provided that supervising special agents might enter into contracts in writing for the collection and delivery of such property, and an oral contract was not binding upon the government.[14]

D. Allowance to Collecting Agent.—Supervising special agents for the collection and delivery of abandoned and captured property could not allow an assistant special agent more than twenty-five per cent. of the value of the property. They could recommend an allowance of more than that amount, but this must have been approved by the secretary of war.[15]

E. Presumption as to Payment of Proceeds of Sale into Treasury.—Where the property has been collected and sold, it will be presumed that the

property was reduced to firm possession. Young *v.* United States, 97 U. S. 39, 24 L. Ed. 992.

Notwithstanding active hostilities had ceased in Georgia, cotton, although private property, seized there by the military forces of the United States, in obedience to an order of the commanding general, during their occupation and actual government of that state, was taken from hostile possession within the meaning of that term, and was, without regard to the status of the owner, a legitimate subject of capture. Lamar *v.* Browne, 92 U. S. 187, 23 L. Ed. 650.

10. Captured property defined.—United States *v.* Padelford, 9 Wall. 531, 540, 19 L. Ed. 788, dissenting opinion of Field, J., in Lamar *v.* Browne, 92 U. S. 187, 23 L. Ed. 650.

As early as the 3d of July, 1863, the secretary of the treasury in a circular letter of instructions addressed to the supervising special agents of the department, charged with the duty of collecting abandoned and captured property under the act of March 12th, 1863, defined captured property as property "which had been seized or taken from hostile possession by the military and naval forces of the United States." This definition must be taken as the interpretation practically given to the act by the department of the government charged with its execution. United States *v.* Padelford, 9 Wall. 531, 540, 19 L. Ed. 788.

Property is captured on land when seized or taken from hostile possession by military forces under orders from a commanding officer. Lamar *v.* Browne, 92 U. S. 187, 193, 23 L. Ed. 650; United States *v.* Padelford, 9 Wall. 531, 540, 19 L. Ed. 788.

11. Seizure necessary to constitute capture.—United States *v.* Padelford, 9 Wall. 531, 540, 19 L. Ed. 788.

12. Seizure of town, district or country not a capture of property there situate.—United States *v.* Padelford, 9 Wall. 531, 19 L. Ed. 788.

Taking possession of a city by the national forces was not, of itself, and without some actual seizure of it in obedience to the orders of the commanding general, a capture, within the meaning of the act, of the cotton which happened to be in the city at the time of the entry of the forces. United States *v.* Padelford, 9 Wall. 531, 19 L. Ed. 788.

13. Power of assistant agent to contract for collection of property.—Camp *v.* United States, 113 U. S. 648, 28 L. Ed. 1081.

An assistant special agent of the treasury department has no authority to bind the United States by contract, to repay the expenses of transporting, repairing, etc., abandoned or captured cotton. Whiteside *v.* United States, 93 U. S. 247, 23 L. Ed. 882.

The supervising special agent could not ratify a contract which he had no power to make. Whiteside *v.* United States, 93 U. S. 247, 253, 23 L. Ed. 882.

14. Writing necessary.—Camp *v.* United States, 113 U. S. 648, 28 L. Ed. 1081; Whiteside *v.* United States, 93 U. S. 247, 23 L. Ed. 882.

15. Allowance to collecting agents.—Whiteside *v.* United States, 93 U. S. 247, 250, 23 L. Ed. 882.

agents paid the proceeds into the treasury as required by the statute.[16]

F. Liability of Government for Acts of Agent.—The government was not bound by the act or declaration of an agent engaged in the collection of abandoned and captured property unless it manifestly appears that he acted within the scope of his authority, or was employed in his capacity as a public agent to do the act or make the declaration.[17]

G. Liability of Captors or Agents to Owner.—Neither the captors, nor the special agents of the treasury to whom they delivered the captured property, are liable to the owner thereof in an action at law for anything by them done within the scope of their delegated powers. Acting for the government, they are protected by its authoriy; he must look to it, and not to them, for indemnity.[18]

H. Approval of Accounts of Agents Engaged in Collection and Sale.—The approval by the secretary of the treasury of an account of expenses in relation to the collection and sale of any particular lot of captured and abandoned property should be deemed conclusive evidence that such expenses were proper and necessary, unless it appeared that the allowance of such expenses was procured by fraud, or that the expenses were incurred in violation of some positive statute, or of public policy.[19]

III. Recovery of Proceeds by Loyal Owners after Suppression of War.

A. Right to Recover—1. WHO MAY SUE—a. *As Dependent on Title or Ownership.*—It is only he who can claim as an owner of the property captured or abandoned and can prove such ownership, who is permitted to sue and recover.[20] And the ownership required in order to entitle a person to claim is that existing at the time of the capture.[21] An executory contract for the sale of

16. Presumption of payment into treasury.—United States *v.* Crusell, 14 Wall. 1, 20 L. Ed. 821. See, generally, the titles PRESUMPTIONS AND BURDEN OF PROOF; PUBLIC OFFICERS.

In United States *v.* Crusell, 14 Wall. 1, 20 L. Ed. 821, a judgment of the court of claims giving a loyal owner the proceeds of cotton seized under the abandoned and captured property act was affirmed, the case tending generally, though not in the most specific manner, to show that the cotton had been sold and its proceeds paid into the treasury, and an opposite conclusion being irreconcilable with the presumption that the military and fiscal officers of the United States had done their official duty.

17. Liability of government for acts of agent.—Whiteside *v.* United States, 93 U. S. 247, 23 L. Ed. 882.

18. Liability of captors or government agents to owner.—Lamar *v.* Browne, 92 U. S. 187, 23 L. Ed. 650.

19. Effect of approval of agent's account by secretary.—United States *v.* Johnston, 124 U. S. 236, 250, 31 L. Ed. 389. See, generally, the title PRINCIPAL AND AGENT.

"It would be an exceedingly dangerous doctrine that settled accounts where the United States had acted on the settlement and paid the balance found due on the basis of that settlement, could be opened or set aside, merely because some of the prescribed steps in the accounting which it was the duty of a head of a department to see had been taken, had been in fact omitted; or, if they could be so opened and set aside on account of technical irregularities in the allowance of expenses years afterwards, when the remedy of the party against the United States is barred by the statute of limitations, and the remedies of the United States on the other side are intact, owing to its not being subject to any act of limitation." United States *v.* Johnston, 124 U. S. 236, 254, 31 L. Ed. 389.

Prior to the joint resolution of March 31, 1868, the secretary of the treasury settled accounts with agents who had collected abandoned and captured property, and that act, which provided that in the future such money should be actually paid into the treasury, did not intend to disturb settlements previously made by the secretary. United States *v.* Johnston, 124 U. S. 236, 252, 31 L. Ed. 389.

Approval of accounts procured by fraud.—The approval by the secretary of the treasury of an agent's account of expenses in the collection and sale of captured and abandoned property would not be conclusive, if it appeared either that such approval was procured by fraud, or that such expenses were incurred in violation of some positive statute, or in contravention of public policy. United States *v.* Johnston, 124 U. S. 236, 253, 31 L. Ed. 389.

20. Owner.—United States *v.* Gillis, 95 U. S. 407, 24 L. Ed. 503; Carroll *v.* United States, 13 Wall. 151, 20 L. Ed. 565; Elgee Cotton Cases, 22 Wall. 180, 22 L. Ed. 863.

21. Ownership must have existed at time of capture.—United States *v.* Gillis,

the property made before its capture, does not deprive the original owner of the right to claim nor confer a right to claim upon the prospective purchasers,[22] And the personal representative of a deceased person in whose possession the property was at the time of the capture is the owner within the meaning of the statute.[23] But neither the assignee for the claim of the proceeds of captured or abandoned property,[24] nor a factor who has made advances on the property, there being another person who has the legal interest in the proceeds,[25] is to be regarded

95 U. S. 407, 24 L. Ed. 503; Carroll *v.* United States, 13 Wall. 151, 20 L. Ed. 565; Elgee Cotton Cases, 22 Wall. 180, 22 L. Ed. 863.

22. Effect of executory contract for sale of property.—Elgee Cotton Cases, 22 Wall. 180, 22 L. Ed. 863.

On the 31st of July, 1863, during the late rebellion, E. and C., owning certain crops of cotton in Wilkinson County, Mississippi, executed a paper thus: "We have, this 31st of July, 1863, sold unto Mr. L. our crops of cotton, now lying in the county aforesaid, numbering about 2100 bales, at the price of ten cents per pound, currency, the said cotton to be delivered at the landing of Fort Adams, and to be paid for when weighed. Mr. L. agreeing to furnish at his cost the bagging, rope, and twine necessary to bale the cotton unginned, and we do acknowledge to have received, in order to confirm this contract, the sum of thirty dollars. This cotton will be received and shipped by the house of D. & Co., New Orleans, and from this date is at the risk of Mr. L. This cotton is said to have weighed an average of 500 lbs. when baled." At the time of making the contract, the cotton baled was stored under a covering of boards, and a small part of the cotton (about twenty bales) not baled, was in the gin house on the Buffalo Bayou, about ten miles from the Mississippi River, at a place known as "The Rocks," or "Felter's Plantation," then without the federal military lines; and G. and L. were together there. Immediately after the sale L. employed a person, living near where the cotton was stored, to watch and take care of the same, and paid him therefor, and this person continued his care of it till it was taken possession of in the name of the United States. Held, that the paper of the 31st of July, 1863, was executory only and had not divested E. and C. of their property in the cotton; no money but the thirty dollars having been paid, and nothing else done in execution of the contract; and that in a suit for the proceeds of it under the captured and abandoned property act, which gives to the "owner" a right to recover, under certain circumstances, property captured or abandoned during the late civil war, they alone could sue. Elgee Cotton Cases, 22 Wall. 180, 22 L. Ed. 863.

The same E. and C. (or rather E. alone, who had now become sole owner of the cotton) subsequently to the above quoted contract with L., made another contract with N. (he not having notice of the first contract), by which E. contracted for the sale to N. "for so much of the 2100 bales as N. should get out in safety to a market, for the price of £15 per bale, to be paid at Liverpool. The risk of the cotton to be on the vendors." Held, equally, but as a matter even more plain than in the former case, that no property passed by the contract; no cotton ever having been got out. Held, further, that this was not altered by a letter in these words from the owners of the cotton: "It having been agreed on between you and myself that I sell to you all the cotton of E. and C. now baled and under shed, for the price £15 per bale, to be paid in Liverpool. The risk of the cotton to be on the vendors." Held, equally, but as a matter even more plain than in the former case, that no property passed by the contract; no cotton ever having been got out. Held, further, that this was not altered by a letter in these words from the owners of the cotton: "It having been agreed on between you and myself that I sell to you all the cotton of E. and C. now baled and under shed, for the price of £15 sterling per bale, payable in Liverpool, you will cause the same to be placed to my credit with J. A. J. & Co., of Liverpool." Elgee Cotton Cases, 22 Wall. 180, 22 L. Ed. 863. See, generally, the title SALES.

23. Personal representatives of deceased owner.—Carroll *v.* United States, 13 Wall. 151, 20 L. Ed. 565; United States *v.* Villalonga, 23 Wall. 35, 45, 23 L. Ed. 64. See, generally, the titles EXECUTORS AND ADMINISTRATORS.

24. Assignee.—United States *v.* Gillis, 95 U. S. 407, 24 L. Ed. 503. See, generally, the title ASSIGNMENTS.

Claims for the proceeds of captured and abandoned property cannot be assigned so as to give the assignee a standing in the court of claims. United States *v.* Gillis, 95 U. S. 407, 24 L. Ed. 503.

25. Factor who has made advances on property.—United States *v.* Villalonga, 23 Wall. 35, 23 L. Ed. 64. See, also, Glover *v.* United States, 164 U. S. 294, 301, 41 L. Ed. 440. See the title FACTORS AND COMMISSION MERCHANTS.

Plainly it was the intention of congress, manifested in the statute, that no person should be permitted to recover out of the treasury any of the proceeds of sale of the property captured or abandoned, except those who had given no aid or comfort to the rebellion. But if a factor who has made advances, no matter how small, may recover the entire proceeds of a consign-

as the owner so as to be entitled to maintain an action in the court of claims for the proceeds of abandoned and captured property.

b. *Right of Aliens to Recover.*—Citizens or subjects of foreign governments whose government accords to our citizens the right to prosecute claims against such governments in their courts, are entitled to prosecute claims against the government of the United States, and since citizens of the United States may prosecute claims against the government of Great Britain by petition of right, subjects of Great Britain are entitled to sue in the court of claims under the abandoned and captured property act.[26]

c. *Right of Corporation Created by Rebel State during War to Recover.*—Corporations created by the legislature of a rebel state while the state was in armed rebellion against the government of the United States, if the acts of incorporation had no relation to anything else than the domestic concerns of the state, and they were neither in their apparent purpose nor in their operation hostile to the union or in conflict with the constitution, may in proper cases sue under the captured and abandoned property act.[27]

2. Loyalty of Claimant.—a. *Necessity for Claimant to Have Been Loyal during War.*—In order for a person to be entitled to claim the proceeds of property seized under the abandoned and captured property act, it is necessary that he prove that he did not give aid or comfort to the rebellion.[28] And this rule is applicable as well to aliens as to citizens.[29]

b. *Loyalty of Person from Whom Title Derived.*—The claimant is not required to show the loyalty of the person from whom he derived title.[30]

ment made to him, not only what he has advanced, but the share of his principal, the intention of the law may be wholly defeated. He may have received consignments from persons most active in promoting the rebellion, and he may have advanced only one dollar on each bale of cotton consigned. If, now, he can recover the entire net proceeds of the sale of such cotton paid into the treasury, his consignors, through him, using him as a cover, escape entirely from the operation of the provision of the statute—that no one shall have a standing in the court of claims who has given aid and comfort to the rebellion. A construction of the law which admits of such a consequence cannot be correct. The intention of congress is not thus to be evaded." United States *v.* Villalonga, 23 Wall. 35, 44, 23 L. Ed. 64.

If a factor could claim, a debtor could defeat a set-off by consigning to factor and getting him to sue, and thus defeat the act of March 3, 1863, amending the act establishing the court of claims, providing for set-off and counterclaim in such proceedings. United States *v.* Villalonga, 23 Wall. 35, 23 L. Ed. 64.

26. Citizens of foreign government.—United States *v.* O'Keefe, 11 Wall. 178, 20 L. Ed. 131; Carlisle *v.* United States, 16 Wall. 147, 148, 21 L. Ed. 426; Young *v.* United States, 97 U. S. 39, 24 L. Ed. 992.

By the proceeding known as a "petition of right," the government of Great Britain accords to citizens of the United States the right to prosecute against that government in its courts, and therefore British subjects, if otherwise entitled, may, under the act of congress of July 27th, 1868, prosecute claims against the United States in the court of claims. Carlisle *v.* United States, 16 Wall. 147, 148, 21 L. Ed. 426. See the title ALIENS.

27. Corporations created by rebel state during war.—United States *v.* Insurance Cos., 22 Wall. 99, 22 L. Ed. 816.

28. Claimant must not have given aid to rebellion.—United States *v.* Anderson, 9 Wall. 56, 65, 19 L. Ed. 615; United States *v.* Padelford, 9 Wall. 531, 19 L. Ed. 788; Carrol *v.* United States, 13 Wall. 151, 20 L. Ed. 565; Sprott *v.* United States, 20 Wall. 459, 22 L. Ed. 371; Carlisle *v.* United States, 16 Wall. 147, 21 L. Ed. 426; Mrs. Alexander's Cotton, 2 Wall. 404, 17 L. Ed. 915; Haycraft *v.* United States, 22 Wall. 81, 22 L. Ed. 738; Elgee Cotton Cases, 22 Wall. 180, 22 L. Ed. 863; United States *v.* Gillis, 95 U. S. 407, 417, 24 L. Ed. 503.

29. Necessity for aliens not to have given aid or comfort to rebellion.—Carlisle *v.* United States, 16 Wall. 147, 148, 21 L. Ed. 426; Young *v.* United States, 97 U. S. 39, 24 L. Ed. 992.

Aliens domiciled in the United States owe a local and temporary allegiance to the government of the United States; they are bound to obey all the laws of the country, not immediately relating to citizenship, during their residence in it, and are equally amenable with citizens for any infraction of those laws. Those aliens who, being domiciled in the country prior to the rebellion, gave aid and comfort to the rebellion, were, therefore, subject to be prosecuted for violation of the laws of the United States against treason and for giving aid and comfort to the rebellion. Carlisle *v.* United States, 16 Wall. 147, 148, 21 L. Ed. 426. See, generally, the title ALIENS.

30. Effect of disloyalty of person from whom title derived.—United States *v.* An-

c. *What Constitutes Disloyalty.*—Proof of an involuntary act in aid of the rebellion is not sufficient to defeat the claimant.[31] Acting as surety on the bonds of officers in the confederate army,[32] furnishing munitions of war and supplies to,[33] or purchasing property from, the confederate government, with knowledge that the purchase price is to be used in sustaining the rebellion,[34] or selling to the government of the Confederate States an article to be used in the manufacture of gunpowder,[35] or any act which would render a party liable to punishment for treason,[36] are sufficient to bar a person from the right of claiming under the abandoned and captured property act. But the fact that a loyal citizen who left the enemy's country at the beginning of the war, carried on business in the enemy's country during the war, through an agent, does not prevent his recovering.[37]

d. *Pardon as Dispensing with Proof of Loyalty.*—A pardon granted to person, 9 Wall. 56, 19 L. Ed. 615; Carroll *v.* United States, 13 Wall. 151, 20 L. Ed. 565.

Purchaser need not prove loyalty of seller.—Under the act of March 12th, 1863, commonly called the "abandoned or captured property act," it is not necessary that a party preferring his claim in the court of claims for the proceeds of property taken and sold under it, to prove, in addition to his own loyalty, the loyalty of the persons from whom he bought the property taken and sold; the property having been purchased by him in good faith, and without intent to defraud the government or any one else. United States *v.* Anderson, 9 Wall. 56, 19 L. Ed. 615.

Administrator may claim, though decedent was disloyal.—In a claim by an administrator of a deceased person, against the United States, under the abandoned and captured property act of March 12th, 1863, which makes proof that the owner never gave aid or comfort to the rebellion, a condition precedent to recovery, it is no bar that the decedent gave such aid or comfort, the property having been taken after the decedent's death, and from the administrator, and not from him. The owner, within the sense of the statute, was the administratrix. Carroll *v.* United States, 13 Wall. 151, 20 L. Ed. 565.

31. Involuntary aid to rebellion.—Claimants under the captured and abandoned property act, of March 12th, 1863, are not deprived of the benefits of that act because of aid and comfort not voluntarily given by them to the rebellion. United States *v.* Padelford, 9 Wall. 531, 19 L. Ed. 788.

32. Acting as surety on bond of confederate officials.—Voluntarily executing as surety, through motives of personal friendship to the principals, the official bonds of persons acting as quartermasters or as assistant commissaries in the rebel army, was giving aid and comfort to the rebellion; although the principals, by their appointment to the offices named, escaped active military service, and were enabled to remain at home in the discharge of their offices respectively. United States *v.* Padelford, 9 Wall. 531, 19 L. Ed. 788.

33. Furnishing munitions of war and supplies.—Young *v.* United States, 97 U. S. 39, 24 L. Ed. 992.

34. Purchasing property from confederate government.—A purchaser of cotton from the Confederate States, who knew that the money he paid for it went to sustain the rebellion, cannot in the court of claims recover the proceeds, when it has been captured and sold, under the captured and abandoned property act. The moral turpitude of the transaction forbids that in a court of law he should be permitted to establish his title by proof of such a transaction. Sprott *v.* United States, 20 Wall. 459, 22 L. Ed. 371. See, also, Baldy *v.* Hunter, 171 U. S. 388, 398, 43 L. Ed. 208.

35. Persons manufacturing and selling saltpetre to Confederate States for use in making powder.—Persons engaged in manufacturing saltpetre in Alabama, and in selling that article to the Confederate States, knowing that it was to be used by them in the manufacture of gunpowder for the prosecution of the war of the rebellion, thus gave aid and comfort to the rebellion and are not entitled to claim under the abandoned and captured property act. Carlisle *v.* United States, 16 Wall. 147, 21 L. Ed. 426.

"He who being bound by his allegiance to a government, sells goods to the agent of an armed combination to overthrow that government, knowing that the purchaser buys them for that treasonable purpose, is himself guilty of treason or a misprision thereof." Carlisle *v.* United States, 16 Wall. 147, 21 L. Ed. 426, citing and approving Hanauer *v.* Doane, 12 Wall. 342, 20 L. Ed. 439. See, generally, the title TREASON.

36. Doing other treasonable acts.—Young *v.* United States, 97 U. S. 39, 24 L. Ed. 992.

37. Carrying on business in enemy's country by agent.—United States *v.* Quigley, 103 U. S. 595, 596, 26 L. Ed. 524. See, also, Carson *v.* Dunham, 121 U. S. 421, 430, 30 L. Ed. 992.

In 1860, the claimant, a native of Geor-

sons who participated in the rebellion, gives them the right to prosecute a claim under the abandoned and captured property act,[38] and this right is not affected by the repeal of the statute under which the pardon was granted.[39] An act providing that a pardon shall not operate to give the persons pardoned the right to claim in the court of claims is unconstitutional.[40]

3. TITLE ACQUIRED CONTRARY TO LAW.—Where a person claimed property

gia, was domiciled at Dalton in that state, and doing business as a merchant. About the time the state seceded he left his home and his business and went to Indiana, where he remained until the end of the war. Before leaving he appointed an agent to manage for him, while he was gone. This agent, in 1864, bought for him, with moneys collected or acquired on his account, cotton which was afterwards captured by the military forces of the United States at Savannah, and the proceeds paid into the treasury under the abandoned and captured property act. It was held, that if the claimant had remained in Georgia he could have recovered, and that his right to recover was not lost by his going to another state in order to avoid being implicated in a rebellion against his government, and that the conduct of buiness by his agent during his absence did not render him guilty of trading across the lines with the enemy. United States *v.* Quigley, 103 U. S. 595, 596, 26 L. Ed. 524.

38. Effect of pardon.—Pargoud *v.* United States, 13 Wall. 156, 20 L. Ed. 646; Armstrong *v.* United States, 13 Wall. 154, 20 L. Ed. 614; Carlisle *v.* United States, 16 Wall. 147, 148, 21 L. Ed. 426; United States *v.* Klein, 13 Wall. 128, 20 L. Ed. 519; United States *v.* Padelford, 9 Wall. 531, 19 L. Ed. 788. See, generally, the title PARDON.

Pardon to persons taking oath of allegiance.—By virtue of the act of July 17th, 1862, authorizing the president to offer pardon on such conditions as he might think advisable, and the proclamation of December 8th, 1863, which promised a restoration of all rights of property, except as to slaves, on condition that the prescribed oath be taken and kept inviolate, the persons who had faithfully accepted the conditions offered became entitled to the proceeds of their property thus paid into the treasury, on application within two years from the close of the war. United States *v.* Klein, 13 Wall. 128, 20 L. Ed. 519.

Where prior to seizure, an owner of cotton, who, though opposed to the rebellion, had given aid and comfort to it, but was not within any of the classes excepted by the president's proclamation of December 8th, 1863, and in regard to whose property in the cotton no rights of third persons had intervened—took the oath prescribed by that act and kept it. Held, after a seizure and sale of the cotton by the government, that he was entitled to the net proceeds as given to loyal owners under the abandoned and captured property act. Having been pardoned, his offense, in executing the bonds, could not be imputed to him. United States *v.* Padelford, 9 Wall. 531, 19 L. Ed. 788.

General proclamation granting pardon and amnesty.—The president's proclamation of the 25th of December, 1868, granting "unconditionally and without reservation to all and every person who directly or indirectly participated in the late insurrection or rebellion, a full pardon and amnesty for the offense of treason against the United States, etc., with restoration of all rights, privileges, and immunities under the constitution, and the laws which have been made in pursuance thereof," granted pardon unconditionally and without reserve; and enables persons otherwise entitled to recover from the United States, the proceeds of captured and abandoned property, under the abandoned and captured property act, to recover it though no proof be made, as was required by that act, that the claimant never gave any aid or comfort to the rebellion. Armstrong *v.* United States, 13 Wall. 154, 20 L. Ed. 614; Pargoud *v.* United States, 13 Wall. 156, 20 L. Ed. 646; Carlisle *v.* United States, 16 Wall. 147, 148, 21 L. Ed. 426.

The proclamation of the president of the United States, dated December 25th, 1868, includes aliens domiciled in the country who gave aid and comfort to the rebellion. Carlisle *v.* United States, 16 Wall. 147, 148, 21 L. Ed. 426. For a contrary holding, see Young *v.* United States, 97 U. S. 39, 24 L. Ed. 992.

The proclamation is a public act, of which all courts of the United States are bound to take notice, and to which all courts are bound to give effect. Armstrong *v.* United States, 13 Wall. 154, 20 L. Ed. 614.

39. Repeal of statute authorizing pardon.—United States *v.* Klein, 13 Wall. 128, 20 L. Ed. 519.

The repeal, by an act of 21st of January, 1867 (after the war had closed), of the act of 17th of July, 1862, authorizing the executive to offer pardon, did not alter the operation of the pardon, or the obligation of congress to give full effect to it if necessary by legislation. United States *v.* Klein, 13 Wall. 128, 20 L. Ed. 519.

40. Act providing that pardon shall not give right to claim unconstitutional.—United States *v.* Klein, 13 Wall. 128, 20 L. Ed. 519.

The proviso in the appropriation act of July 12, 1870 (16 Stat. 235), which is in

seized by the treasury agents under a contract in violation of the laws of the United States forbidding commercial intercourse between persons respectively residing in places occupied by the national forces, within districts the inhabitants whereof were declared to be in insurrection, it was held, that he could not recover.[41]

4. Waiver of Right by Failure to Plead Claim as Set-Off.—One having a claim against the government for the proceeds of abandoned and captured property, must, when sued by the government, interpose such claim by way of set-off, otherwise it will be deemed to have been waived.[42]

B. Proceedings to Recover—1. Jurisdiction.—A court of claims has jurisdiction to hear and determine all claims for the proceeds of property taken by agents of the treasury department as abandoned or captured property,[43] and such jurisdiction is exclusive, precluding the owner from suit at common law or any other mode of redress whatever in any other court.[44]

2. Time of Bringing Action.—An action in the court of claims for the proceeds of property sold under the abandoned and captured property act must have been brought within two years after the suppression of the rebellion.[45]

3. Counterclaim.—When the government means to set up any counterclaim

substance that an acceptance of a pardon without a disclaimer shall be conclusive evidence of the acts pardoned, but shall be null and void as evidence of rights conferred in the court of claims and in the supreme court, is unconstitutional and void as invading the powers both of the judiciary and executive departments of the government. United States *v.* Klein, 13 Wall. 128, 20 L. Ed. 519.

41. Title acquired contrary to law.—Walker *v.* United States, 106 U. S. 413, 27 L. Ed. 166.

42. Waiver of claim by failure to plead it as set-off.—During the rebellion the United States took possession of A's house in a rebel town as "captured and abandoned property," rented it from 1862 to 1865, and received rents, $7,000, which were in the federal treasury. After the suppression of the rebellion, A having returned home, the government sued him, and in March 1867, got judgment and issued execution against him, he not pleading as a set-off the $7,000 received by the United States. In May, 1869, he applied to the court to satisfy the judgment, and moved also for a writ of audita querela; assigning as a reason for not having pleaded a set-off, that he did not know until just before he filed his petition and made his present motion, that the money was in the treasury of the United States. Held, that the petition and motion were rightly denied; for that if A had a claim on the United States, he was in fault in not having discovered and pleaded it. Avery *v.* United States, 12 Wall. 304, 20 L. Ed. 405. See, generally, the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

43. Jurisdiction.—Lamar *v.* McCulloch, 115 U. S. 163, 186, 29 L. Ed. 366. See the titles COURTS; JURISDICTION.

44. Jurisdiction of court of claims exclusive.—Section 3, Act of July 27, 1868, ch. 276, 15 Stat. 243; Rev. Stat., § 1059; Lamar *v.* McCulloch, 115 U. S. 163, 186, 29 L. Ed. 366; Haycraft *v.* United States, 22 Wall. 81, 22 L. Ed. 738.

If property is taken in good faith as captured and abandoned, that is a good defense to an action of trover brought by the owner in a court other than the court of claims, whether it was wrongfully taken or not. Lamar *v.* McCulloch, 115 U. S. 163, 29 L. Ed. 366.

In New Orleans, etc., Mail Co. *v.* Flanders, 12 Wall. 130, 20 L. Ed. 249, it was held, that the circuit court of the United States had no jurisdiction under the act of March 12th, 1863, commonly known as the abandoned and captured property act, where both parties were citizens of the same state. See, generally, the titles COURTS; JURISDICTION.

45. Time of bringing action.—United States *v.* Anderson, 9 Wall. 56, 19 L. Ed. 615; Haycraft *v.* United States, 22 Wall. 81, 96, 22 L. Ed. 738; Ex parte Zellner, 9 Wall. 244, 248, 19 L. Ed. 665. See, generally, the title LIMITATION OF ACTIONS.

When rebellion deemed to have been suppressed.—As respects rights intended to be secured by the abandoned or captured property act, "the suppression of the rebellion" is to be regarded as having taken place on the 20th of August, 1866, on which day the president by proclamation declared it suppressed in Texas "and throughout the whole of the United States of America," that same date being apparently adopted by congress in a statute continuing a certain rate of pay to soldiers in the army "for three years after the close of the rebellion, as announced by the president of the United States, by proclamation bearing date August 20th, 1866." United States *v.* Anderson, 9 Wall. 56, 19 L. Ed. 615.

As to when war of rebellion was deemed to have been suppressed, in general, see, generally, the title WAR.

Right of person aiding in rebellion, par-

to the claim of a party suing in the court of claims, under the captured and abandoned property act, it must plead its claim by way of set-off or counterclaim to the suit, or move for a new trial.[46]

4. Competency of Witnesses.—The vendors of the property taken and sold are competent witnesses, on a claim preferred by the owners in the court of claims, in supporting such claim, if they themselves never had any title, claim, or right against the government, and are not interested in the suit.[47]

5. Judgment.—Under the captured or abandoned property act, the court of claims may render judgment not only generally for the claimant, but for a specific sum as due to him.[48]

6. Appeal.—Where, in a suit arising under the abandoned and captured property acts, no direct proof is given that the proceeds of the sale of the property was paid into the treasury, if the circumstantial facts which are established by the evidence are set forth in the finding of the court of claims, which it sends up as that upon which alone its judgment was rendered, and they are, in the absence of anything to the contrary, the legal equivalent of a direct finding that such proceeds were so paid, the supreme court will not on that account reverse the judgment.[49]

ABANDONMENT.—See, also, the titles Marine Insurance; Mines and Minerals; Prize; Trademarks, Tradenames and Unfair Competition. As to abandonment of rights, see the title Waiver. As a ground for divorce, see the title Divorce. See note 1.

ABANDONMENT AND TOTAL LOSS.—See the title Marine Insurance.

ABATEMENT.—As to abatement of nuisances, see the title Nuisances. As to abatement of legacies, see the title Wills. As to abatement of suits and actions, see the title Abatement, Revival and Survival. As to abatement of attachment, see the title Attachment and Garnishment. As to abatement of appeals, see the title Appeal and Error. As to abatement of purchase money, see the titles Sales; Vendor and Purchaser.

doned after two years from suppression thereof, to sue.—A person who did give aid and comfort to the rebellion, and who was not pardoned until two years from the suppression of the rebellion could not, on then preferring his petition, obtain the benefit of the act, even though in cases generally the limitation of actions in the said court is one of six years. The question is not one of limitation but of jurisdiction. And the inability of an unpardoned rebel to sue in the court of claims does not control the operation of the statute. Haycraft *v.* United States, 22 Wall. 81, 22 L. Ed. 738.

46. Counterclaim.—United States *v.* O'Grady, 22 Wall. 641, 22 L. Ed. 772 (holding that a claim for taxes on cotton should be set up by way of counterclaim to the proceedings in the court of claims).

It cannot, after judgment has been given for the amount claimed by the petitioner, irrespective of such counterclaim, and without any motion for a new trial having been made, set up and deduct at the treasury the counterclaim when the amount awarded by the decree of the court is asked for there. United States *v.* O'Grady, 22 Wall. 641, 22 L. Ed. 772. See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

47. Witnesses.—United States *v.* Anderson, 9 Wall. 56, 19 L. Ed. 615. See the title WITNESSES.

48. Judgment.—United States *v.* Anderson, 9 Wall. 56, 19 L. Ed. 615. See, generally, the title JUDGMENTS AND DECREES.

49. Appeal.—United States *v.* Pugh, 99 U. S. 265, 25 L. Ed. 322. See, generally, the title APPEAL AND ERROR.

1. Abandonment.—In Gaylor *v.* Wilder, 10 How. 501, it is said: "When an invention is abandoned, it is said to be given up to the public, and this is the sense in which the term **abandonment** is used in the patent law." See, also, the title PATENTS.

ABATEMENT, REVIVAL AND SURVIVAL.

BY J. N. CLAYBROOK.

I. Grounds of Abatement, 15.
- A. Nonresidence of Parties, 15.
- B. Another Suit Pending, 15.
  - 1. Statement of Rule, 15.
  - 2. Essentials of Defense, 16.
    - a. Necessity for Pending Proceeding to Be a Suit, 16.
    - b. Identity of Suits or Actions, 16.
      - (1) Test of Identity, 16.
      - (2) Identity of Parties, 17.
      - (3) Identity of Causes of Action, 17.
      - (4) Identity of Relief Sought, 17.
    - c. Necessity for Action to Be Pending in Courts of Same State, 18.
      - (1) In General, 18.
      - (2) Action in State Court as Barring Action in Federal Court, 18.
        - (a) In General, 18.
        - (b) Attachment, 18.
      - (3) Action in State Court as Barring Action in Court of District of Columbia, 18.
    - d. Effect of Pendency of Another Action in Same Court, 19.
    - e. Effect of Pendency of Appeal from First Suit, 19.
  - 3. Which of the Two Suits May Be Abated, 19.
- C. Effect of Death of Party, 20.
  - 1. As Dependent on Nature of Proceedings, 20.
    - a. Actions at Law, 20.
      - (1) Common-Law Rule, 20.
      - (2) Statutory Modification of Common-Law Rule, 20.
    - b. Proceedings in Equity, 20.
    - c. Proceedings in Admiralty, 21.
  - 2. What Law Governs, 21.
  - 3. Causes of Action Which Survive or Abate, 21.
    - a. Dependent on Substance Not Form of Action, 21.
    - b. Causes of Action Founded on Contract, 22.
    - c. Causes of Action Founded on Tort, 22.
      - (1) In General, 22.
      - (2) Tests of Survivorship, 22.
        - (a) Nature of Plea Required, 22.
        - (b) Benefit to Estate of Tortfeasor, 22.
        - (c) Election to Sue in Tort Rather than Contract Conclusive on Question of Abatement, 22.
      - (3) Waste, 22.
      - (4) Trover and Conversion, 23.
      - (5) Misfeasance of Sheriff or Jailer, 23.
      - (6) Taking or Injuring Goods or Property, 23.
    - d. Statutory Liability of Stockholders, 23.
  - 4. Actions or Proceedings Which Survive or Abate, 23.
    - a. Actions on Penal Statutes, 23.
    - b. Suits for Infringement of Patent, 23.
    - c. Recovery Back of Taxes, 24.
    - d. Fraud and Deceit, 24.

e. Personal Injuries, 24.
f. Death by Wrongful Act, 24.
g. Real Actions, 24.
h. Discovery, 25.
5. Effect of Death of One of Several Plaintiffs or Defendants, 25.
6. Death of Plaintiff before Filing of Petition, 25.
7. Death after Hearing and before Judgment, 25.
8. Death after Interlocutory Judgment, 26.
9. Death Pending Appeal or Error, 26.
10. Death after Termination of Suit, 26.
11. Death of Accused in Criminal Case, 26.
D. Termination, Change or Transfer of Interest, 26.
1. Termination of Official Authority, 26.
a. Actions or Suits by Officers, 26.
b. Actions or Suits against Officers or Boards, 26.
(1) Suits Involving Personal Delinquency of Officer, 26.
(2) Suits Involving Continuing Duty of Office or Board, 27.
2. Removal of Executor, 28.
3. Dissolution of Corporation, 29.
4. Assignment of Interest by Party Pending Suit, 29.
E. Insolvency of Estate of Decedent as Abating Suits against Representative, 29.
F. Statute Legalizing Nuisance as Abating Suit for Abatement, 30.
G. Grounds for Plea in Abatement, 30.

II. Raising and Waiving Grounds of Abatement, 30.
A. Raising Grounds of Abatement, 30.
1. Dilatory Plea, 30.
a. Pleas in Abatement, 30.
(1) In Civil Cases, 30.
(a) Nature of Plea, 30.
(b) Grounds for Plea, 30.
aa. Incapacity of Plaintiff to Maintain Action, 30.
bb. Nonjoinder of Parties, 31.
(aa) Plaintiffs, 31.
(bb) Defendants, 31.
aaa. In General, 31.
bbb. Joint Obligors, 31.
ccc. Joint and Several Obligors, 31.
cc. Misjoinder of Parties—Real Actions, 31.
dd. Objections to Service of Process, 32
ee. Misnomer of Parties, 32.
ff. Variance, 32.
gg. Another Suit Pending, 33.
hh. Premature Suit, 33.
(c) Time of Filing, 33.
(d) Form and Verification, 33
aa. Form, 33.
bb. Verification, 33.
(e) Construction, 34.
(f) Evidence, 34.
(g) Review of Decision on Plea, 34.
(2) In Criminal Cases, 34.
(a) Grounds for Plea, 34.
aa. Constitution of Grand Jury, 34.
bb. Swearing of Grand Jury, 34.
(b) Time of Filing, 34.

(c) Form and Sufficiency, 34.
(d) Trial or Hearing, 35.
b. Pleas to Jurisdiction, 35.
(1) Grounds for Plea, 35.
(a) In General, 35.
(b) Want of Diversity of Citizenship of Parties, 35.
aa. Rule under Judiciary Act, 35.
(aa) Diversity of Citizenship Properly Averred in Declaration or Bill, 35.
(bb) Diversity of Citizenship Not Properly Averred in Declaration or Bill, 36.
bb. Rule under Act of 1875, 36.
(c) Adequate Remedy at Law, 36.
(2) Time of Filing, 36.
(3) Form and Sufficiency, 37.
(a) In General, 37.
(b) Necessity for Plea to Give Better Writ, 37.
(c) Objection That Parties Are Not Citizens of Different States, 37.
(4) Waiver of Objection, 37.
(5) Burden of Proof, 37.
(6) Appeal and Error, 37.
2. Answer, 38.
3. Pleas Puis Darrein Continuance, 38.
a. Definition and Nature, 38.
b. Grounds for Plea, 38.
c. Effect of Plea, 39.
d. Effect of Refusal to Permit Plea to Be Filed, 39.
e. Judgment on Plea, 39.
B. Waiver of Grounds of Abatement, 39.
1. Appearance, 39.
2. Pleading in Bar, 39.
a. In General, 39.
b. Objections to Capacity of Plaintiff to Sue, 40.
c. Misnomer of Parties, 40.
d. Misjoinder of Parties, 40.
e. Variance or Defects in Writ, 40.
f. Objections to Jurisdiction, 40.
g. In Criminal Cases, 41.
3. Removal of Cause and Proceedings Subsequent to Removal, 41.
4. Going to Trial on Merits, 41.

III. Revival or Continuance of Suits or Actions, 42.
A. Necessity of Proceedings to Revive, 42.
B. Necessity for Suit to Be Pending, 42.
C. Time of Revival, 42.
D. Who May Revive, 43.
1. Successor in Interest, 43.
2. Assignee, 43.
3. Survivor, 43.
4. Personal Representative, 43.
a. Right to Revive, 43.
b. Necessity for Representative to Be Citizen of or Domiciled within State, 44.
c. Proof of Representative Character as Prerequisite to Revival, 44.

E. Against Whom Action May Be Revived, 44.
1. Personal Representatives, 44.
2. Successor, 45.
3. Survivor, 45.
4. Heirs and Terre Tenants, 45.
F. Proceedings to Revive or Continue, 45.
1. Actions at Law, 45.
a. Mode of Proceeding, 45.
(1) State Procedure as Governing in Federal Courts, 45.
(2) Suggestion of Death and Substitution of Parties, 45.
(a) Effect of Suggestion of Death and Order of Revival, 45.
(b) Bringing in Parties, 46.
aa. By Motion, 46.
bb. By Scire Facias, 46.
cc. Effect of Want of Service of Process on Decedent, 46.
dd. Right of Opposite Party to Continuance, 46.
b. Review of Order of Revival, 46.
2. Suits in Equity, 46.
a. Bill of Revivor, 46.
(1) Necessity, 46.
(2) Nature of Bill, 46.
b. Answer, 47.
c. Review of Decree of Revival, 47.
G. Effect of Removal, 47.
H. Proceedings Subsequent to Revival, 47.

CROSS REFERENCES.

See the titles ANSWERS; ASSIGNMENTS; BANKRUPTCY AND INSOLVENCY; COURTS; DEMURRERS; EJECTMENT; EXECUTORS AND ADMINISTRATORS; GRAND JURY; HUSBAND AND WIFE; JURISDICTION; MANDAMUS; PARTIES; PLEADING; REAL ACTIONS; REMOVAL OF CAUSES; SCIRE FACIAS; SUMMONS AND PROCESS; UNITED STATES COURTS; VARIANCE.

Effect of statutes of jeofails as preventing abatement for formal defects, see the title AMENDMENTS. As to review of judgment on pleas in abatement, see the title APPEAL AND ERROR. As to effect of death of party pending appeal or error, and revival of such proceedings, see the title APPEAL AND ERROR. Appearance as waiving matters in abatement, see the title APPEARANCES. As to pendency of bankruptcy proceedings as barring actions against debtor to recover debt, see the title BANKRUPTCY AND INSOLVENCY. As to actions for death by wrongful act, see the title DEATH BY WRONGFUL ACT. As to former adjudication, see the title FORMER ADJUDICATION OR RES ADJUDICTA. As to judgments and decrees, see the title JUDGMENTS AND DECREES. As to abatement of nuisances, see the title NUISANCES. As to abatement of legacies, see the title WILLS.

I. Grounds of Abatement.

A. Nonresidence of Parties.—If the marshal returns that the defendant is not an inhabitant of the district in which the bill is brought, the suit must abate as to such defendant.[1]

B. Another Suit Pending—1. STATEMENT OF RULE.—The principle is well settled, that where two or more tribunals have a concurrent jurisdiction over the same subject matter and the parties, a suit commenced in any one of them may be pleaded in abatement to an action for the same cause in any other.[2]

1. **Nonresidence of parties.**—Barton *v.* Petit, 7 Cranch 194, 3 L. Ed. 313. Bacon, 10 How. 56, 13 L. Ed. 326; Renner *v.* Marshall, 1 Wheat. 215, 4 L. Ed. 74;
2. **Another suit pending.**—Shelby *v.* Piquignot *v.* Pennsylvania R. Co., 16

This rule has been held to apply to suits in equity as well as to actions at law.[3]

2. ESSENTIALS OF DEFENSE—a. *Necessity for Pending Proceeding to Be a Suit.*—In order for a proceeding in one court to bar a proceeding in another between the same parties for the same cause of action, it is essential that the first proceeding be a suit or action.[4]

b. *Identity of Suits or Actions*—(1) *Test of Identity.*—When in courts of concurrent jurisdiction, the pendency of a suit in one is relied on to defeat a second suit in the other, the identity of the parties, of the case made, and of the relief sought, should be such that if the first suit had been decided it could be pleaded in bar as a former adjudication.[5]

How. 104, 14 L. Ed. 863; The Haytian Republic, 154 U. S. 118, 124, 38 L. Ed. 930; Watson *v.* Jones, 13 Wall. 679, 20 L. Ed. 666; Stanton *v.* Embrey, 93 U. S. 56, 23 L. Ed. 983; Gordon *v.* Gilfoil, 99 U. S. 168, 25 L. Ed. 383; Cook *v.* Burnley, 11 Wall 659, 20 L. Ed. 29; Insurance Co. *v.* Brune, 96 U. S. 588, 24 L. Ed. 737; Fleitas *v.* Cockrem, 101 U. S. 301, 25 L. Ed. 954; Wallace *v.* McConnell, 13 Pet. 136, 151, 10 L. Ed. 95; Memphis *v.* Dean, 8 Wall. 64, 19 L. Ed. 326; Buck *v.* Colbath, 3 Wall. 334, 18 L. Ed. 257; Stephens *v.* Monongahela Nat. Bank, 111 U. S. 197, 198, 28 L. Ed. 399; Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 595, 27 L. Ed. 1038. Hunt *v.* New York Cotton Exchange, 205 U. S. 322, 51 L. Ed. 821; dissenting opinion of Miller, J., in Riggs *v.* Johnson County, 6 Wall. 166, 205, 18 L. Ed. 768.

At law, the pendency of a former action between the same parties for the same cause is pleadable in abatement to a second action, because the latter is regarded as vexatious. Insurance Co. *v.* Brune, 96 U. S. 592, 24 L. Ed. 737; Buckner *v.* Finley, 2 Pet. 586, 7 L. Ed. 528.

The plea of another action pending is a plea in abatement.—Stephens *v.* Monongahela Nat. Bank, 111 U. S. 197, 28 L. Ed. 399; Piquignot *v.* Pennsylvania R. Co., 16 How. 104, 14 L. Ed. 863; Mutual Life Ins. Co. *v.* Harris, 97 U. S. 331, 335, 24 L. Ed. 959; Providence, etc., Steamship Co. *v.* Hill, Mfg. Co., 109 U. S. 578, 595, 27 L. Ed. 1038; Memphis *v.* Dean, 8 Wall. 64, 19 L. Ed. 326.

A judgment in an action to enforce a vendor's lien for a second installment of the purchase price of land, is not rendered void merely because of the pendency of an appeal from a judgment in an action to enforce the first installment. Marchand *v.* Frellsen, 105 U. S. 423, 26 L. Ed. 1057. See, generally, the title JUDGMENTS AND DECREES.

3. Application of rule in equity proceedings.—Mutual Life Ins. Co. *v.* Brune, 96 U. S. 588, 24 L. Ed. 737.

4. Necessity for pending proceeding to be a suit.—Shelby *v.* Bacon, 10 How. 56, 13 L. Ed. 326.

By a statute of Pennsylvania, passed in 1836, "assignees for the benefit of creditors and other trustees" were directed to record the assignment, file an inventory of the property conveyed, which should be sworn to, have it appraised, and give bond for the faithful performance of the trust, all of which proceedings were to be had in one of the state courts. That court was vested with the power of citing the assignees before it, at the instance of a creditor who alleged that the trust was not faithfully executed. The assignees of the bank of the United States chartered by Pennsylvania, recorded the assignment as directed, and filed accounts of their receipts and disbursements in the prescribed court, which were sanctioned by that court. A citizen of the state of Kentucky afterwards filed a bill in the circuit court of the United States for the eastern district of Pennsylvania, against these assignees, who pleaded to the jurisdiction of the court. Held, the proceedings in the state court cannot be considered as a suit. The statute was not complied with, and even if it had been, the circuit court would still have had jurisdiction over the matter. Shelby *v.* Bacon, 10 How. 56, 13 L. Ed. 326.

Where a suit was brought in the United States court by citizens of another state against a citizen of Mississippi, who appeared to the suit, pleaded and then died, after which the suit was revived against his administrators, and judgment obtained against them, the following proceeding of the probate court afford no bar to the recovery of the claim: A declaration by the probate court that the estate was insolvent, and a reference of the matter to a commissioner in insolvency; a publication notifying the creditors of the estate to appear and file their claims, or be forever barred of their demands; a report by the commissioner, leaving out the claim in question, which report was confirmed by the court; and, in such case where the estate turned out not to be insolvent, but a fund remained in hand for distributees, the creditors can recover by a bill in chancery against the administrators, notwithstanding the proceedings in the probate court. Union Bank *v.* Vaiden, 18 How. 502, 503, 15 L. Ed. 472.

As to what constitutes a suit or action in general, see the title ACTIONS.

5. Test of identity.—Watson *v.* Jones, 13 Wall. 679, 20 L. Ed. 666; Hunt *v.* New York Cotton Exchange, 205 U. S. 322.

(2) *Identity of Parties.*—There must be the same parties, or, at least, such as represent the same interest.[6]

(3) *Identity of Causes of Action.*—Not only identity of relief, but identity of cause of action, is essential to the plea of pending suit.[7]

(4) *Identity of Relief Sought.*—It is essential to the plea of another suit pending that the relief sought in both be identical.[8] The relief sought must be founded on the same facts, and the title, or essential basis of it must be the same.[9]

339, 51 L. Ed. 821; The Haytian Republic, 154 U. S. 118, 124, 38 L. Ed. 930.

In The Haytian Republic, 154 U. S. 118, 124, 38 L. Ed. 930, it was held, that the true test of the sufficiency of a plea "other suit pending" in another forum is the legal efficacy of the first suit, when finally disposed of, as "the thing adjudged," regarding the matters at issue in the second suit. Citing Watson *v.* Jones, 13 Wall. 679, 20 L. Ed. 666. See, generally, the title FORMER ADJUDICATION OR RES ADJUDICATA.

6. Identity of parties.—The Haytian Republic, 154 U. S. 118, 128, 38 L. Ed. 930; Watson *v.* Jones, 13 Wall. 679, 20 L. Ed. 666; Buck *v.* Colbath, 3 Wall. 334, 335, 18 L. Ed. 257; Hunt *v.* New York Cotton Exchange, 205 U. S. 322, 339, 51 L. Ed. 821; Memphis *v.* Dean, 8 Wall. 64, 19 L. Ed. 326; Cook *v.* Burnley, 11 Wall. 659, 20 L. Ed. 29.

A question which is pending in one court of competent jurisdiction cannot be raised and agitated in another by adding a new party and raising a new question as to him along with the old one as to the former party. The old question is in the hands of the court first possessed of it, and is to be decided by such court. The new one should be by suit in any proper court, against the new party. Memphis *v.* Dean, 8 Wall. 64, 19 L. Ed. 326.

A suit pending in a state court between parties not the same as in a suit here cannot be pleaded in abatement after a plea to the merits; nor where it is insufficient in law. Cook *v.* Burnley, 11 Wall. 659, 20 L. Ed. 29.

A suit against a telegraph company to enjoin them from refusing to furnish complainant with quotations of the cotton exchange, to which suit the exchange is not made a party, is no bar to a suit by the exchange against the complainant to enjoin him from receiving and using its quotations. Hunt *v.* New York Cotton Exchange, 205 U. S. 322, 323, 51 L. Ed. 821.

7. Identity of causes of action.—The Haytian Republic, 154 U. S. 118, 128, 38 L. Ed. 930; Watson *v.* Jones, 13 Wall. 679, 20 L. Ed. 666; Buck *v.* Colbath, 3 Wall. 334, 18 L. Ed. 257; Hunt *v.* New York Cotton Exchange, 205 U. S. 322, 339, 51 L. Ed. 821.

The rule among courts of concurrent jurisdiction, that one which first obtains jurisdiction of a case has the exclusive right to decide every question arising in the case, is subject to some limitations, and is confined to suits between the same parties, or privies, seeking the same relief or remedy, and to such questions or propositions as arise ordinarily and properly in the progress of the suit first brought; and does not extend to all matters which may by possibility become involved in it. Buck *v.* Colbath, 3 Wall. 334, 335, 18 L. Ed. 257.

Action on contract and to enforce maritime lien.—It is no objection to the assertion in the admiralty of a maritime lien against a vessel for necessary repairs and supplies to her in a foreign port that the libellant has brought a common-law action for the value of the repairs and supplies; the action not being yet determined. The Kalorama, 10 Wall. 204, 19 L. Ed. 941.

8. Identity of relief sought.—Watson *v.* Jones, 13 Wall. 679, 20 L. Ed. 666; Buck *v.* Colbath, 3 Wall. 334, 18 L. Ed. 257; Hunt *v.* New York Cotton Exchange, 205 U. S. 322, 339, 51 L. Ed. 821.

9. Relief sought must be founded on same facts.—The Haytian Republic, 154 U. S. 118, 124, 38 L. Ed. 930; Watson *v.* Jones, 13 Wall. 679, 20 L. Ed. 666.

Pendency of suit in equity as barring action at law.—An exception, that a suit in equity is pending in which the plaintiffs asked for a decree for the same money, is no ground for abatement of an action at law, as the result of the action may be necessary for the perfecting of a decree in that suit. Kittredge *v.* Race, 92 U. S. 116, 23 L. Ed. 488.

Right of mortgagee to pursue several remedies simultaneously.—A party having notes secured by a mortgage on real estate, may, unless restrained by statute, sue in a court of chancery to foreclose his mortgage, and in a court of law to recover a judgment on his notes, and in another court of law in an action of ejectment to get possession of the land. Here in all suits the only question at issue may be the existence of the debt mentioned in the notes and mortgage; but as the relief sought is different, and the mode of proceeding is different, the jurisdiction of neither court is affected by the proceeding in the other. And this is true, notwithstanding the common object of all the suits may be the collection of the debt. The true effect of the rule in these cases is, that the court of chancery cannot render a judgment for the debt, nor judgment of ejectment, but can only proceed in its

c. *Necessity for Action to Be Pending in Courts of Same State*—(1) *In General.*—In order for the plea of another suit pending to be available, the former action must be in a domestic court; that is, in a court of the state in which the second action has been brought.[10] The plea of a former suit pending in equity for the same cause in a foreign jurisdiction will not abate an action at law in a domestic tribunal, or authorize an injunction against prosecuting such action.[11]

(2) *Action in State Court as Barring Action in Federal Court*—(a) *In General.*—As a general rule, the pendency of a prior suit in a state court is not a bar to a suit in a circuit court of the United States by the same plaintiff against the same defendant for the same cause of action.[12]

(b) *Attachment.*—An attachment pending in a state court, prior to the commencement of a suit in the court of the United States, may be pleaded in abatement.[13] But the attachment must have preceded the commencement of the suit in which the plea is made.[14]

(3) *Action in State Court as Barring Action in Court of District of Columbia.*—The pendency of a prior suit in a state court is not a bar to a suit in the su-

own mode, to foreclose the equity of redemption by sale or otherwise. The first court of law cannot foreclose or give a judgment of ejectment, but can render a judgment for the payment of the debt; and the third court can give the relief by ejectment, but neither of the others. And the judgment of each court in the matter properly before it is binding and conclusive on all the other courts. Buck *v.* Colbath, 3 Wall. 345, 18 L. Ed. 257; Watson *v.* Jones, 13 Wall. 679, 20 L. Ed. 666. See the title MORTGAGES AND DEEDS OF TRUST.

Libel of vessel for forfeiture for distinct offenses.—A libel for the forfeiture of a vessel for an offense against the revenue laws by smuggling opium, and for violation of the Chinese exclusion act, was filed in the district court of Oregon. The vessel was released on stipulation, and subsequently a libel against it was filed in the district court of Washington for forfeiture for offenses similar to those set up in the first libel, but alleged to have been committed before. It was held that that first suit was not a bar to the second. The Haytian Republic, 154 U. S. 118, 124, 38 L. Ed. 930. See, also, The Oregon, 158 U. S. 186, 210, 39 L. Ed. 943.

"Of course, whilst concluding that the separate causes of the action here under consideration need not have been joined in one suit, and that the suit in Washington was no bar to the suit in Oregon, we must not be considered as intimating that there could be more than one forfeiture of the vessel. The distinct charges give rise to distinct causes of action, but the forfeiture for either would have consummated the proceedings." The Haytian Republic, 154 U. S. 118, 38 L. Ed. 930.

10. Actions must be pending in same state.—Mutual Life Ins. Co. *v.* Brune, 96 U. S. 588, 592, 24 L. Ed. 737.

11. Pendency of suit in foreign jurisdiction.—Mutual Life Ins. Co. *v.* Brune, 96 U. S. 588, 24 L. Ed. 737.

A bill in equity pending in a foreign jurisdiction has no effect when pleaded to another bill in equity in a domestic forum. Mutual Life Ins. Co. *v.* Brune, 96 U. S. 588, 24 L. Ed. 737.

12. Action in state court as barring action in federal court.—Stanton *v.* Embry, 93 U. S. 548, 23 L. Ed. 983; Gordon *v.* Gilfoil, 99 U. S. 168, 25 L. Ed. 383; Hunt *v.* New York Cotton Exchange, 205 U. S. 322, 339, 51 L. Ed. 821; Mutual Life Ins. Co. *v.* Brune, 96 U. S. 588, 24 L. Ed. 737; The Kalorama, 10 Wall. 204, 19 L. Ed. 941, 944. See, also, Bryar *v.* Campbell, 177 U. S. 649, 44 L. Ed. 926.

13. Attachment in state court as barring action in federal court.—Wallace *v.* McConnell, 13 Pet. 135, 136, 10 L. Ed. 95; Wabash R. Co. *v.* Tourville, 179 U. S. 322, 327, 45 L. Ed. 210; Mattingly *v.* Boyd, 20 How. 128, 131, 15 L. Ed. 845. See, generally, the title ATTACHMENT AND GARNISHMENT.

The attachment of the debt, in such case, in the hands of the defendant, would fix it there in favor of the attaching creditors, and the defendant cannot afterwards pay it over to the plaintiff. The attaching creditor, in such a case, acquires a lien on the debt, binding on the defendant, which the courts of all other governments, if they recognize such proceedings at all, will not fail to regard. The rule must be reciprocal; and when the suit in one court is commenced prior to proceedings under attachment in another court, such proceedings cannot arrest the suit. Wallace *v.* McConnell, 13 Pet. 135, 136, 10 L. Ed. 95.

14. Attachment must precede suit in which defense pleaded.—Wabash R. Co. *v.* Tourville, 179 U. S. 322, 327, 45 L. Ed. 210; Wallace *v.* McConnell, 13 Pet. 135, 136, 10 L. Ed. 95; Mattingly *v.* Boyd, 20 How. 128, 131, 15 L. Ed. 845.

An attachment commenced, and conducted to a conclusion, before the institution of a suit against the debtor in a court of the United States, may be set up as a defense to the suit; and the defendant will be protected pro tanto, under a recovery had by virtue of the at-

preme court of the District of Columbia, by the same plaintiff against the same defendant for the same cause of action.[15]

d. *Effect of Pendency of Another Action in Same Court.*—Where a statute authorizes an exception of lis pendens only where the former suit is pending "before another court of competent jurisdiction," such an exception, where the former suit is pending in the same court, is within the equity of that article.[16] Where the defendant files such an exception, the plaintiff may be compelled to elect whether he will submit to judgment on the exception, or discontinue the former suit and pay the costs thereof.[17]

e. *Effect of Pendency of Appeal from First Suit.*—Proceedings in an appellate court are part of the proceedings in the first court, and orders made by it to be enforced by the court of primary jurisdiction are, while unexecuted, a part of the case in the first suit, which may be relied on as lis pendens in reference to the second suit.[18]

3. Which of the Two Suits May Be Abated.—While a subsequent suit may be abated, by an allegation of the pendency of a prior suit, the converse of the proposition is, in personal actions, never true.[19] There are, however, certain special proceedings which have the effect of superseding prior actions or suits. For instance, the pendency of proceedings in bankruptcy may be pleaded in abatement of actions by creditors for the recovery of any debts provable,[20]

tachment; and may plead such recovery in bar. Wallace *v.* McConnell, 13 Pet. 135, 136, 10 L. Ed. 95.

15. Action in state court as barring action in District of Columbia.—Stanton *v.* Embry, 93 U. S. 548, 23 L. Ed. 983.

16. Effect of pendency of another action in same court.—Fleitas *v.* Cockrem, 101 U. S. 301, 25 L. Ed. 954 (construing § 335 of Code of Practice of Louisiana).

17. Election by plaintiff having two suits in same court.—Fleitas *v.* Cockrem, 101 U. S. 301, 25 L. Ed. 954.

"Since the exception in the case of suit pending in the same court is not within the words of the Code, but rests upon its equity, and since in such cases both suits are under the control of the court in which the exception is made, we think the court might well exercise the discretion which was done in the present case, in compelling the plaintiffs to elect whether they would submit to judgment on the exception, or discontinue the first suit and pay the costs thereof." Fleitas *v.* Cockrem, 101 U. S. 301, 303, 25 L. Ed. 954.

18. Effect of pendency of appeal from first suit.—Watson *v.* Jones, 13 Wall. 679, 20 L. Ed. 666.

An unexecuted order of this kind, made by a state court to restore possession to the parties who had been deprived of it by a decree which had been reversed, cannot be interfered with by another court by way of injunction, especially by a court of the United States, by reason of the act of congress of March 2d, 1793. Watson *v.* Jones, 13 Wall. 679, 20 L. Ed. 666.

But the nature and character of the possession so decreed to be delivered may be inquired into by another court, and if it was of a fiduciary character, and the trust was not involved in the first suit, a second suit may be sustained in any court of competent jurisdiction, to declare, define and protect the trust, though the first suit may be still pending. Watson *v.* Jones, 13 Wall. 679, 680, 20 L. Ed. 666.

19. The suit last instituted abates.—Renner *v.* Marshall, 1 Wheat. 215, 218, 4 L. Ed. 74; Wallace *v.* McConnell, 13 Pet. 135, 136, 10 L. Ed. 95; Beaston *v.* Farmers' Bank, 12 Pet. 102, 9 L. Ed. 1017. Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 595, 27 L. Ed. 1038.

The commencement of another suit, for the same cause of action, in the court of another state since the last continuance, cannot be pleaded in abatement of the original action. Renner *v.* Marshall, 1 Wheat. 215, 4 L. Ed. 74.

When a suit in one court is commenced prior to proceedings under attachment in another court, such proceedings cannot arrest the suit. Wallace *v.* McConnell, 13 Pet. 135, 136, 10 L. Ed. 95, citing Beaston *v.* Farmers' Bank, 12 Pet. 102, 9 L. Ed. 1017.

The jurisdiction of the district court of the United States for the district of Alabama, and the right of a plaintiff to prosecute his suit, having attached by the commencement of the suit in the district court, that right cannot be taken away or arrested by any proceedings in another court. An attachment of the debt by the process of a state court, after the commencement of the suit in a court of the United States, cannot affect the right of the plaintiff to recover in the suit. Wallace *v.* McConnell, 13 Pet. 135, 136, 10 L. Ed. 95.

20. Bankruptcy proceedings as superseding actions against bankrupt.—Aben-

and proceedings to limit the liability of shipowners supersede all actions for loss or damage in other courts.[21]

C. Effect of Death of Party—1. As Dependent on Nature of Proceedings—a. *Actions at Law*—(1) *Common-Law Rule.*—By the rule of the common law, actio personalis moritur cum persona, the death of the sole plaintiff or of the sole defendant before final judgment abated any personal action, except that, if the death occurred in vacation after verdict, judgment might be entered as of the preceding term.[22] But even at the common law, if the cause of action survived, death of a party did not finally conclude the case, as in such case a new action might be brought.[23]

(2) *Statutory Modification of Common-Law Rule.*—The common-law rule has been modified in England and in this country by various statutes, with the object of avoiding the necessity of bringing a new action when the cause of action survives to the personal representative.[24] By § 955 of the Revised Statutes of the United States, brought forward from the judiciary act of September 24, 1789, c. 20, § 31, 1 Stat. 730, 90, it is provided that "when either of the parties, whether plaintiff or petitioner or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment."[25]

b. *Proceedings in Equity.*—In courts of equity, an abatement of the suit, by the death of the party, has always been held to have a very different effect from the effect which it has at law; for such abatement amounts to a mere suspension, and not to a determination, of the suit; it may again be put in motion, by a bill

droth *v.* Van Dolsen, 131 U. S. 66, 33 L. Ed. 57. See, generally, the title BANKRUPTCY AND INSOLVENCY.

The pendency of proceedings in bankruptcy against a firm cannot be pleaded in abatement in an action against a special partner of the firm. Abendroth *v.* Van Dolsen, 131 U. S. 66, 33 L. Ed. 57.

21. Proceeding to limit liability of shipowners.—Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 587, 27 L. Ed. 1038. Generally, as to proceedings to limit liability of shipowners, see the title SHIPS AND SHIPPING.

The institution of proceedings in the district court of the United States, under the act of 1851, for procuring a decree of limited liability of the owners of a ship for the losses and injuries to goods on board of the vessel being properly pleaded, supersedes the prosecution of claims for the same losses and injuries in other courts, and no injunction from the district court is necessary to accomplish the result. Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 587, 27 L. Ed. 1038.

22. Common-law rule.—Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 697, 38 L. Ed. 311; Green *v.* Watkins, 6 Wheat. 260, 5 L. Ed. 256; In re Connaway, 178 U. S. 421, 430, 44 L. Ed. 1134; Clarke *v.* Mathewson, 12 Pet. 164, 9 L. Ed. 1041; Stewart *v.* Baltimore, etc., R. Co., 168 U. S. 445, 448, 42 L. Ed. 537; Baltimore, etc., R. Co. *v.* Joy, 173 U. S. 227, 43 L. Ed. 677; Ransom *v.* Williams, 2 Wall. 317, 17 L. Ed. 803; Macker *v.* Thomas, 7 Wheat. 530, 531, 5 L. Ed. 515; McCoul *v.* Lekamp, 2 Wheat. 111, 4 L. Ed. 196.

At common law, all actions abated by the death of parties before judgment. In re Connaway, 178 U. S. 421, 430, 44 L. Ed. 1134.

At common law, in real and personal actions, the death of either party, before judgment, abated the action. Macker *v.* Thomas, 7 Wheat. 530, 5 L. Ed. 515; Green *v.* Watkins, 6 Wheat. 260, 5 L. Ed. 256.

23. Right to bring new action.—Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 697, 38 L. Ed. 311.

24. Right to revive where cause of action survives.—Baltimore, etc., R. Co. *v.* Joy, 173 U. S. 226, 43 L. Ed. 677; Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 38 L. Ed. 311.

Right to revive dependent on cause of action surviving.—The personal representatives of a deceased party to a suit cannot prosecute or defend the suit after his death, unless the cause of action, on account of which the suit was brought, is one that survives by law. Rev. Stat., § 955. Schreiber *v.* Sharpless, 110 U. S. 76, 80, 28 L. Ed. 65.

25. Statutory provisions.—Baltimore, etc., R. Co. *v.* Joy, 173 U. S. 226, 228, 43 L. Ed. 677; Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 38 L. Ed. 311.

It requires the aid of some statutory provision, like that of the 31st section of the judiciary act of 1789 (Rev. Stat., § 995) to enable the suit to be prosecuted by, or against, the personal representative or heirs of the deceased, where the cause of action survives. Green *v.* Watkins, 6 Wheat. 260, 5 L. Ed. 256.

of revivor, and the proceedings being revived, the court proceeds to its determination as on an original bill.[26]

c. *Proceedings in Admiralty.*—As a proceeding in admiralty is one in rem against the property rather than against any particular party, death of one of the parties to a decree in admiralty, does not prevent its enforcement.[27]

2. What Law Governs.—As a general rule, whether a pending action may be revived upon the death of either party and proceed to judgment depends primarily upon laws of jurisdiction in which the action was commenced.[28] But if an action be brought in a federal court, and is based upon some act of congress or arises under some rule of general law recognized in the courts of the Union, the question of revivor will depend upon the statutes of the United States relating to that subject.[29]

3. Causes of Action Which Survive or Abate.—a. *Dependent on Substance Not Form of Action.*—The right to proceed against the representatives of a deceased person depends not on forms and modes of proceedings in a suit, but on the nature of the cause of action for which the suit is brought. Whether an action survives depends on the substance of the cause of action, not on the forms of proceedings to enforce it.[30]

26. Proceedings in equity.—Clarke *v.* Mathewson, 12 Pet. 164, 9 L. Ed. 1041. See, also, Illinois Central R. Co. *v.* Turville, 110 U. S. 301, 28 L. Ed. 154.

27. Proceedings in admiralty.—Penhallow *v.* Doane, 3 Dall. 54, 100, 1 L. Ed. 507.

28. What law governs—In general.—Baltimore, etc., R. Co. *v.* Joy, 173 U. S. 226, 229, 43 L. Ed. 677; Patton *v.* Brady, 184 U. S. 608, 612, 46 L. Ed. 713; United States *v.* Daniel, 6 How. 11, 12 L. Ed. 323; Schreiber *v.* Sharpless, 110 U. S. 76, 28 L. Ed. 65; Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 38 L. Ed. 311. See, generally, the title CONFLICT OF LAWS.

In an action in federal courts for personal injuries the question whether the administrator has a right of action depends upon the law of the state where the action was brought and the administrator appointed. Rev. Stat., § 721; Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 692, 38 L. Ed. 311; Henshaw *v.* Miller, 17 How. 212, 15 L. Ed. 222.

The question of the revivor of actions brought in the courts of Ohio for personal injuries is governed by the laws of that state, rather than by the law of the state in which the injuries occurred. Baltimore, etc., R. Co. *v.* Joy, 173 U. S. 226, 231, 43 L. Ed. 677.

"Congress has not, speaking generally, attempted to prescribe the causes which survive the death of either party. Section 955, Rev. Stat., provides that—when either of the parties, whether plaintiff, or petitioner, or defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute or defend any such suit to final judgment. This does not define the causes which survive. In the absence of some special legislation, the question in each case must be settled by the common law or the law of the state in which the cause of action arose. United States *v.* Daniel, 6 How. 11, 12 L. Ed. 323; Henshaw *v.* Miller, 17 How. 212, 15 L. Ed. 222; Schreiber *v.* Sharpless, 110 U. S. 76, 28 L. Ed. 65; Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 38 L. Ed. 311; Baltimore, etc., R. Co. *v.* Joy, 173 U. S. 226, 229, 43 L. Ed. 677." Patton *v.* Brady, 184 U. S. 608, 612, 46 L. Ed. 713.

29. Action based on act of congress or arising under general law.—Baltimore, etc., R. Co. *v.* Joy, 173 U. S. 226, 229, 43 L. Ed. 677.

Thus where the right in question is an action for a penalty under a statute of the United States, the question whether it survives is governed by the laws of the United States. Schreiber *v.* Sharpless, 110 U. S. 76, 28 L. Ed. 65; Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 38 L. Ed. 311.

30. Dependent on substance not form of action.—Patton *v.* Brady, 184 U. S. 608, 615, 46 L. Ed. 713; In re Connaway, 178 U. S. 421, 426, 44 L. Ed. 1134; Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 38 L. Ed. 311; Schreiber *v.* Sharpless, 110 U. S. 76, 28 L. Ed. 65. See, post, "Nature of Plea Required," I, C, 3, c, (2), (a).

An action for breach of promise of marriage, though in form ex contractu, is in substance ex delicto, and is not subject to rules governing actions ex contractu. Henshaw *v.* Miller, 17 How. 212, 219, 15 L. Ed. 222.

An action on an implied promise for money had and received is in substance an action ex contractu, and survives, although the declaration contains language appropriate to an action sounding in tort. Patton *v.* Brady, 184 U. S. 608, 615, 46 L. Ed. 713.

b. *Causes of Action Founded on Contract.*—Causes of action founded on contract generally survive.[31]

c. *Causes of Action Founded on Tort*—(1) *In General.*—At the common law, causes of action for damages for injuries to person or property died with the tort feasor.[32]

(2) *Tests of Survivorship*—(a) *Nature of Plea Required.*—At the common law, no cause of action survives where the plea of the defendant must be "not guilty."[33]

(b) *Benefit to Estate of Tort Feasor.*—At common law where, by means of a tort or offense, property is acquired which benefits the deceased, an action for the value of the property survives against the executor.[34] But if the deceased or person charged secures no benefit to himself at the expense of the sufferer by a tort or offense, the cause of action does not survive against the representatives of the deceased.[35]

(c) *Election to Sue in Tort Rather than Contract Conclusive on Question of Abatement.*—Where the plaintiff elects to go into court on an action sounding in tort, he must abide by his election and cannot be permitted to transform his action thereafter into one of contract in order to prevent abatement.[36]

(3) *Waste.*—An action of waste does not lie against an executor or administrator.[37]

31. Causes of action founded on contract.—Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 38 L. Ed. 311.

Action on implied promise.—An action of assumpsit on an implied promise to recover back taxes illegally assessed survives upon the death of the defendant. Patton *v.* Brady, 184 U. S. 608, 612, 46 L. Ed. 713.

Breach of promise of marriage.—Although an action for breach of promise of marriage is in form ex contractu, yet since the cause of action is in its nature personal, it is well settled at common law that the executor of the person to whom the promise is made cannot sue thereon. Henshaw *v.* Miller, 17 How. 219, 15 L. Ed. 222.

32. Causes of action founded on tort—In general.—Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 38 L. Ed. 311; Henshaw *v.* Miller, 17 How. 212, 15 L. Ed. 222; Macker *v.* Thomas, 7 Wheat. 530, 5 L. Ed. 515; Green *v.* Watkins, 6 Wheat. 260, 5 L. Ed. 256; United States *v.* Daniel, 6 How. 13, 12 L. Ed. 323; Irongate Bank *v.* Brady, 184 U. S. 665, 667, 46 L. Ed. 739.

The maxim of the common law is "actio personalis moritur cum persona," and, in England, it has been expounded to exclude all torts when the action is in form ex delicto, for the recovery of damages, and the plea not guilty, and in case of injury to the person, whether by assault, battery, false imprisonment, slander, or otherwise, if either party who received or committed the injury die, no action can be supported either by or against the executors or other personal representatives. Henshaw *v.* Miller, 17 How. 212, 219, 15 L. Ed. 222.

"All private criminal injuries or wrongs, as well as all public crimes, are buried with the offender." United States *v.* Daniel, 6 How. 11, 14, 12 L. Ed. 323.

33. Nature of plea required.—United States *v.* Daniel, 6 How. 11, 13, 12 L. Ed. 323. See ante, "Dependent on Substance Not Form of Action," I, C, 3, a.

34. Estate of tort feasor benefited.—United States *v.* Daniel, 6 How. 11, 13, 12 L. Ed. 323; Patton *v.* Brady, 184 U. S. 608, 614, 46 L. Ed. 713; Irongate Bank *v.* Brady, 184 U. S. 655, 667, 46 L. Ed. 739.

35. Estate of tort feasor not benefited.—United States *v.* Daniel, 6 How. 11, 13, 12 L. Ed. 232; Patton *v.* Brady, 184 U. S. 608, 614, 46 L. Ed. 713; Irongate Bank *v.* Brady, 184 U. S. 665, 667, 46 L. Ed. 739.

A tort by which the estate of the defendant was not increased and the estate of the plaintiff damaged only as an indirect consequence of the alleged wrongful act of the defendant, does not, either at common law or by the statutes of Virginia, survive the death of the wrongdoer. Irongate Bank *v.* Brady, 184 U. S. 665, 667, 46 L. Ed. 739.

36. Election to sue in tort rather than contract conclusive on question of abatement.—Irongate Bank *v.* Brady, 184 U. S. 665, 667, 46 L. Ed. 739.

A party cannot avail himself of the large amount claimed on account of a tort in order to vest jurisdiction in the circuit court, and then on the death of the alleged wrongdoer, prevent an abatement of the action, which would necessarily take place if the action was only for a tort, by reason of an averment of facts from which a contract to pay a small sum, one below the jurisdiction of the court, might be implied. In other words, he cannot call it tort to acquire jurisdiction, and contract to prevent abatement. Irongate Bank *v.* Brady, 184 U. S. 665, 667, 46 L. Ed. 739.

37. Waste.—United States *v.* Daniel, 6 How. 11, 13, 12 L. Ed. 323. See the title WASTE.

(4) *Trover and Conversion.*—No action will lie against an executor upon a trover and conversion by his testator, though a different form of action might lie for the same cause.[38]

(5) *Misfeasance of Sheriff or Jailer.*—An action against a marshal for damages sustained by a false return does not survive against his personal representatives,[39] nor will an action lie against the executor of a jailer for an escape.[40]

(6) *Taking or Injuring Goods or Property.*—Under statutes providing that an action may be maintained by or against personal representatives for taking or carrying away any goods or for the waste or destruction of or damage to any estate of or by the decedent, an action may be maintained against the personal representatives of a decedent by whose wrongful act the estate of the plaintiff has suffered a money damage, although no goods or property be taken or carried away.[41]

d. *Statutory Liability of Stockholders.*—The individual liability of a stockholder in a national bank survives against his personal representatives.[42]

4. Actions or Proceedings Which Survive or Abate—a. *Actions on Penal Statutes.*—At common law, actions on penal statutes do not survive, and there is no act of congress which establishes any other rule in respect to actions on the penal statutes of the United States.[43]

b. *Suits for Infringement of Patent.*—A suit for the infringement of a patent

38. Trover and conversion.—United States *v.* Daniel, 6 How. 11, 13, 12 L. Ed. 323. See the title TROVER AND CONVERSION.

39. Action against marshal for false return.—United States *v.* Daniel, 6 How. 11, 12 L. Ed. 323; Patton *v.* Brady, 184 U. S. 608, 614, 46 L. Ed. 713.

An action against one who had in his lifetime been marshal of a district, to recover damages which the plaintiffs had sustained by reason of false returns made on certain executions by one of defendant's deputies, did not survive where the decedent had received no benefit and had not increased his estate by means of the wrongful act. United States *v.* Daniel, 6 How. 11, 12 L. Ed. 323; Patton *v.* Brady, 184 U. S. 608, 614, 46 L. Ed. 713.

The provision in the 10th section of the North Carolina statute, "to prevent the abatement of suits in certain cases," which declares that an action of trespass on the case, etc., shall not abate by the death of either party, does not affect the above question. United States *v.* Daniel, 6 How. 11, 14, 12 L. Ed. 323. See the title EXECUTIONS.

40. Action for escape.—United States *v.* Daniel, 6 How. 11, 13, 12 L. Ed. 323. See the title ESCAPE.

41. Taking or injuring goods or property.—Patton *v.* Brady, 184 U. S. 608, 612, 46 L. Ed. 713 (construing § 2655, Va. Code of 1887).

The term "goods" is broad enough to include money, for it would be strange that a cause of action for taking and carrying away a thousand pieces of silver should survive the death of the defendant, while a like action for taking and carrying away a thousand dollars in money should not. Patton *v.* Brady, 184 U. S. 608, 612, 46 L. Ed. 713.

An action against the personal representatives of a decedent, where the estate of plaintiff was reduced to the amount of three thousand dollars and over, by the action of decedent, is a direct damage within the rule laid down by the court of appeals of Virginia in Mumpower *v.* Bristol, 94 Va. 737, in which the court held, that: "The damages allowed to be recovered by or against a personal representative by § 2655 of the Code are direct damages to property, and not those which are merely consequent upon a wrongful act to the person only." Patton *v.* Brady, 184 U. S. 608, 613, 46 L. Ed. 713.

42. Liability of stockholder in national bank.—Richmond *v.* Irons, 121 U. S. 27, 30 L. Ed. 864; Whitman *v.* Oxford Nat. Bank, 176 U. S. 559, 565, 44 L. Ed. 587; Matteson *v.* Dent, 176 U. S. 521, 44 L. Ed. 571. See, generally, the titles BANKS AND BANKING; STOCK AND STOCKHOLDERS.

43. Actions on penal statutes.—Schreiber *v.* Sharpless, 110 U. S. 76, 80, 28 L. Ed. 65; Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 38 L. Ed. 311: In re Connaway, 178 U. S. 421, 426, 44 L. Ed. 1134. Patton *v.* Brady, 184 U. S. 608, 615, 46 L. Ed. 713.

Effect of state statute permitting suits on penal statutes after death of offender.—As the nature of penalties and forfeitures imposed by acts of congress cannot be changed by state laws, it follows that state statute allowing suits on state penal statutes to be prosecuted after the death of the offender, can have no effect on suits in the courts of the United States for the recovery of penalties imposed by an act of congress. Schreiber *v.* Sharpless, 110 U. S. 76, 80, 28 L. Ed. 65.

does not abate by the death of the plaintiff but may be further prosecuted in the name of legal representatives of the decedent.[44]

c. *Recovery Back of Taxes.*—An action against a collector of internal revenue to recover a tax paid to him under protest by the plaintiff, upon the ground that the act of congress under which the tax is levied is invalid, is in substance an action on an implied promise, for which assumpsit is the appropriate remedy, and survives upon the death of the defendant and may be revived against his personal representatives.[45]

d. *Fraud and Deceit.*—An action for fraud or decit does not survive against the personal representatives of the defendant.[46] This rule has been held to apply to an action against one who fraudulently represents another to be worthy of credit.[47]

e. *Personal Injuries.*—At common law, an action for personal injuries abated by the death of the plaintiff pending the action,[48] but statutes in some states permit a revival of the action in such case,[49] and the right to revive in such case is not lost by a removal of the case to a federal court.[50] But it has been held, that statutes authorizing the personal representative to bring an action after the death of a person injured, have no tendency to show an intention of the legislature that the representative may prosecute a common-law action brought by that person in his lifetime.[51]

f. Death by Wrongful Act.—See, generally, the title DEATH BY WRONGFUL ACT.

g. *Real Actions.*—At common law, real actions abate by the death of the ancestor, without having appeared to the suit, and they cannot be revived and prosecuted against the heirs of the original defendant.[52] And this rule is not

44. Suit for infringement of patent.—Illinois Central R. Co. *v.* Turrill, 110 U. S. 301, 28 L. Ed. 154. See the title PATENTS.

45. Recovery back of taxes.—Patton *v.* Brady, 184 U. S. 608, 46 L. Ed. 713; Iron Gate Bank *v.* Brady, 184 U. S. 665, 667, 46 L. Ed. 739. See the titles REVENUE LAWS; TAXATION.

46. Fraud and deceit.—Henshaw *v.* Miller, 17 How. 212, 15 L. Ed. 222.

47. Fraudulent representation that person is worthy of credit.—Where an action on the case was brought in Virginia, against a person to recover damages for fraudulently recommending a third party as worthy of credit, whereby loss was incurred; and after issue joined upon the plea of not guilty, the defendant died, the action did not survive against the executor, but abated. Henshaw *v.* Miller, 17 How. 212, 15 L. Ed. 222. See the title FRAUD AND DECEIT.

48. Action for personal injuries abated at common law.—Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 38 L. Ed. 311; Baltimore, etc., R. Co. *v.* Joy, 173 U. S. 226, 229, 43 L. Ed. 677.

49. Statutes permitting revival of actions for personal injuries.—Baltimore, etc., R. Co. *v.* Joy, 173 U. S. 226, 229, 43 L. Ed. 677.

In Ohio.—An action pending in the circuit court of the United States sitting in Ohio, brought by the injured person as plaintiff to recover damages for injuries sustained by the negligence of the defendant in Indiana, does not finally abate upon the death of the plaintiff in view of the fact that, had no suit been brought at all, the cause of action would have abated both in Indiana and Ohio, and that, even if suit had been brought in Indiana, the action would have abated in that state. Baltimore, etc., R. Co. *v.* Joy, 173 U. S. 226, 228, 43 L. Ed. 677.

In West Virginia, an action for personal injuries abates by the death of the plaintiff pending the action. Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 38 L. Ed. 311.

50. Effect of removal of case to federal court.—A right given by the statute of a state to revive a pending action for personal injuries in the name of the personal representative of a deceased plaintiff is not lost upon the removal of the case into a federal court. Baltimore, etc., R. Co. *v.* Joy, 173 U. S. 226, 229, 43 L. Ed. 677. In re Connaway, 178 U. S. 421, 44 L. Ed. 1134.

51. Effect of statute authorizing action for death.—Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 696, 38 L. Ed. 311. See the title DEATH BY WRONGFUL ACT.

52. Real actions abate at common law.—Macker *v.* Thomas, 7 Wheat. 530, 5 L. Ed. 515; Green *v.* Watkins, 6 Wheat. 260, 5 L. Ed. 256.

If the heirs be made parties, by order of the court in which the suit is brought, and judgment is entered against them, by default, for want of a plea, upon a summons and count against the original defendant, they may sue out a writ of error, and reverse the judgment. Macker

changed by the 31st section of the judiciary act of 1789, ch. 20, which is clearly confined to personal actions, power to prosecute or defend being given to the executor or administrator of the deceased party, and not to the heir or devisee.[53]

h. *Discovery.*—After an answer and discovery, the rule is, that a suit brought merely for discovery, cannot be revived; the object is obtained, and the plaintiff has no motive for reviving it.[54]

5. Effect of Death of One of Several Plaintiffs or Defendants.—If there are two or more plaintiffs or defendants, in a suit where the cause of action survives to the surviving plaintiff, or against the surviving defendant, and one or more of them dies, the writ or action is not thereby abated, but, the death being suggested upon the record, the action may proceed at the suit of the surviving plaintiff or against the surviving defendant.[55] Thus in a suit by tenants in common for an indivisible thing, such as a slave, a right of action survives to one upon the death of the other.[56]

6. Death of Plaintiff before Filing of Petition.—If the plaintiff dies before the filing of the petition, subsequent proceedings in the action are of no effect, and a decree rendered therein is void.[57]

7. Death after Hearing and before Judgment.—Where the delay in rendering a judgment or a decree arises from the act of the court, that is, where the delay has been caused either for its convenience, by the multiplicity or press of business, the intricacy of the questions involved, or of any other cause not attributable to the laches of the parties, the judgment or the decree may be entered retrospectively, as of a time when it should or might have been entered up. In such cases, upon the maxim actus curiæ neminem gravabit—which has been well said to be founded in right and good sense, and to afford a safe and certain guide for the administration of justice—it is the duty of the court to see that the parties shall not suffer by the delay.[58]

v. Thomas, 7 Wheat. 530, 5 L. Ed. 515. See the titles EJECTMENT; REAL ACTIONS.

53. Effect of judiciary act on real actions.—Macker *v.* Thomas, 7 Wheat. 530, 5 L. Ed. 515.

Such a suit having abated by the death of the defendant, it is out of court and a new summons and count against the heirs is necessary. Macker *v.* Thomas, 7 Wheat. 530, 5 L. Ed. 515.

54. Discovery.—Horsburg *v.* Baker, 1 Pet. 232, 7 L. Ed. 125. See the title DISCOVERY.

55. Effect of death of one of several plaintiffs or defendants.—Rev. Stat., § 955; Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 691, 38 L. Ed. 311; In re Connaway, 178 U. S. 421, 435, 44 L. Ed. 1134. Shelby *v.* Guy, 11 Wheat. 361, 6 L. Ed. 495.

Even at common law, the death of one of several joint defendants did not abate the action, if the cause of action survived against the other. In re Connaway, 178 U. S. 421, 435, 44 L. Ed. 1134.

56. Death of one of several tenants in common suing for indivisible thing.—Shelby *v.* Guy, 11 Wheat. 361, 365, 6 L. Ed. 495. See, generally, the title JOINT TENANTS AND TENANTS IN COMMON.

"It is true, that tenants in common must ordinarily join in an action, and that the laws of Virginia produce a severance upon the death of a joint tenant, so that the right of survivorship is abolished. But it is also true, that in suits for an indivisible thing, a right of action survives to a tenant in common; and this, from the necessity of the case, as we conceive the authorities sufficiently maintain. (Co. Litt. 198a; Bro. Abr. tit. Tenant in Common, pl. 18.)" Shelby *v.* Guy, 11 Wheat. 361, 365, 6 L. Ed. 495.

57. Death of plaintiff before filing of petition.—Harter *v.* Twohig, 158 U. S. 448, 39 L. Ed. 1049.

58. Death after hearing and before judgment in general.—Mitchell *v.* Overman, 103 U. S. 62, 64, 26 L. Ed. 369. See, also, United States Bank *v.* Weisiger, 2 Pet. 481, 7 L. Ed. 441. See the title JUDGMENTS AND DECREES.

A judgment rendered after a defendant's death, without the plaintiff's fault, is not void. The irregularity or error may be cured by entering it nunc pro tunc of a date prior to the defendant's death; and even this has been held not necessary in a collateral proceeding. New Orleans *v.* Gaines, 138 U. S. 595, 612, 34 L. Ed. 1102.

Where a judgment rendered upon a verdict in favor of the plaintiff is erroneously set aside, the subsequent final judgment for the defendant must be reversed, and the former judgment for the plaintiff affirmed as of the date when it was rendered, in order to prevent the action from being abated by the subsequent death of the plaintiff. Coughlin *v.*

8. Death after Interlocutory Judgment.—In Virginia, if the defendant die after interlocutory judgment and a writ of inquiry awarded, his administrator, upon scire facias, can only plead what his intestate could have pleaded.[59]

9. Death Pending Appeal or Error.—See the title Appeal and Error.

10. Death after Termination of Suit.—It is a general rule that the death of a party to a suit after judgment and before execution abates the suit.[60] But the general rule does not apply where land has been sold upon execution and no deed delivered,[61] and after a decree of foreclosure of a mortgage and a sale, and the death of the defendant after the decree, it is not necessary to revive the proceedings against the heirs of the deceased party, before the sale of the property can be made.[62]

11. Death of Accused in Criminal Case.—A criminal case is abated by the death of the accused.[63]

D. Termination, Change or Transfer of Interest—1. Termination of Official Authority—a. *Action or Suits by Officers—Action by Foreign Sovereign.*—A change in the person of a foreign sovereign, pending a suit brought in his name in the United States courts for an injury to a public ship of war, does not abate the suit, but the change, if necessary, may be suggested on the record.[64]

b. *Actions or Suits against Officers or Boards*—(1) *Suits Involving Personal Delinquency of Officer.*—A suit against an individual in his official capacity for a personal delinquency abates by his death or retirement from office.[65]

District of Columbia, 106 U. S. 7, 11, 27 L. Ed. 74.

Death while court has case under advisment.—Where a party was alive when a cause was argued and submitted and was entitled at that time, or at the term of submission, to claim its final disposition, but a decree was not then entered because the case, after argument, was taken under advisement, the delay was altogether the act of the court and its duty, where the party died before entry of a decree, was to order a decree nunc pro tunc, so as to avoid entering an erroneous decree. Mitchell *v.* Overman, 103 U. S. 62, 65, 26 L. Ed. 369.

In an action for divorce and alimony, the wife's rights to alimony and costs are not impaired by the husband's death, pending a delay in entering judgment while the court has held the case under advisement, and may be preserved by entering judgment nunc pro tunc, as of the day when it was argued. Bell *v.* Bell, 181 U. S. 175, 178, 45 L. Ed. 804.

Death of one of several defendants during term.—If one of two defendants die after the commencement of the term, judgment may be entered against both defendants, on a day prior to the death, nunc pro tunc. McNutt *v.* Bland, 2 How. 28, 11 L. Ed. 159.

59. Death after interlocutory judgment.—McKnight *v.* Craig, 6 Cranch 183, 3 L. Ed. 193.

60. Death after judgment and before execution.—Insley *v.* United States, 150 U. S. 512, 516, 37 L. Ed. 1163; Ranson *v.* Williams, 2 Wall. 313, 317, 17 L. Ed. 803; See the title EXECUTIONS.

If there was but one defendant, and he died after judgment, no execution could issue unless it was tested before the death occurred. Ransom *v.* Williams, 2 Wall. 313, 317, 17 L. Ed. 803.

Where plaintiff sued for lands which he claimed as his own and which a city had sold to the defendants, and obtained judgment, and an order for an accounting of rents and profits, and pending a subsequent suit by the plaintiff against the city for the rents, profits, etc., some of the defendants in the first suit died, the fact that there was no revivor of the case does not affect the rights of the plaintiff in his suit against the city. New Orleans *v.* Gaines, 138 U. S. 595, 597, 34 L. Ed. 1102.

61. Land sold on execution and no deed delivered.—Insley *v.* United States, 150 U. S. 512, 516, 37 L. Ed. 1163.

62. Death after decree of foreclosure and before sale.—Whiting *v.* United States Bank, 13 Pet. 6, 10 L. Ed. 33. See the title MORTGAGES AND DEEDS OF TRUST.

63. Death of accused in criminal case.—List *v.* Pennsylvania, 131 U. S. 396; Menken *v.* Atlanta, 131 U. S. 405, 9 Sup. Ct. Rep. 794. (Death pending writ of error.)

64. Action by foreign sovereign.—The Sapphire, 11 Wall. 164, 20 L. Ed. 127.

If an injury to any party could be shown to arise from a continuation of the proceedings after a change in the person of the soverign, the court in its discretion would take order to prevent such a result. The Sapphire, 11 Wall. 164, 20 L. Ed. 127.

65. Suits involving personal delinquency of officer.—United States *v.* Bout-

(2) *Suits Involving Continuing Duty of Office or Board.*—Where there is a continuing duty irrespective of the incumbent, and the proceeding is undertaken to enforce an obligation of the corporation or municipality to which the office is attached, a suit against a public official, does not abate by his death or retirement from office.[66]

well, 17 Wall. 604, 21 L. Ed. 721; United States *v.* Lochren, 164 U. S. 701, 41 L. Ed. 319; Bernardin *v.* Butterworth, 169 U. S. 600, 42 L. Ed. 873; Commissioners *v.* Sellew, 99 U. S. 624, 25 L. Ed. 333; United States *v.* Schurz, 102 U. S. 407, 26 L. Ed. 219; Warner Valley Stock Co. *v.* Smith, 165 U. S. 28, 41 L. Ed. 621; Secretary *v.* McGarrahan, 9 Wall. 298, 19 L. Ed. 579; United States *v.* Chandler, 122 U. S. 643; Murphy *v.* Utter, 186 U. S. 95, 46 L. Ed. 1070. Thompson *v.* United States, 103 U. S. 480, 484, 26 L. Ed. 521; Smith *v.* Reynolds, 166 U. S. 717, 41 L. Ed. 1186.

In the absence of statutory provision to the contrary, a mandamus against an officer of the government abates on his death or retirement from office. His successor in office cannot be brought in by way of amendment of the proceeding or on an order for the substitution of parties. United States *v.* Boutwell, 17 Wall. 604, 21 L. Ed. 721.

"That a petition for a writ of mandamus to a public officer of the United States abates by his resignation of his office has been determined by a series of uniform decisions of this court, and has for years been considered as so well settled that in some of the cases no opinion has been filed and no official report published." Warner Valley Stock Co. *v.* Smith, 165 U. S. 28, 31, 41 L. Ed. 621; Secretary *v.* McGarrahan, 9 Wall. 298, 19 L. Ed. 579; United States *v.* Boutwell, 17 Wall. 604, 21 L. Ed. 721; Commissioners *v.* Sellew, 99 U. S. 624, 25 L. Ed. 333; United States *v.* Schurz, 102 U. S. 407, 26 L. Ed. 219; Thompson *v.* United States, 103 U. S. 480, 26 L. Ed. 521; United States *v.* Chandler, 122 U. S. 643; United States *v.* Lamont, 155 U. S. 303, 39 L. Ed. 160; United States *v.* Lochren, 164 U. S. 701, 41 L. Ed. 319. See the title MANDAMUS.

Secretary of treasury.—A mandamus against the secretary of the treasury abates on his death or retirement from office, and his successor cannot be brought in by way of amendment or order of substitution. United States *v.* Boutwell, 17 Wall. 604, 21 L. Ed. 721.

Secretary of interior.—Where, upon an application for a writ of mandamus against a person as secretary of the interior, it appears that such person has resigned some months before the decision of the court is announced, the suit abates by his resignation, because he no longer possesses the power to execute the commands of the writ, and his successor cannot be adjudged in default, as the judgment was rendered against him without notice or opportunity to be heard. Secretary *v.* McGarrahan, 9 Wall. 298, 19 L. Ed. 579.

Secretary of interior and commissioner of land office.—In Warner Valley Stock Co. *v.* Smith, 165 U. S. 28, 41 L. Ed. 621, a bill in equity against the secretary of the interior and the commissioner of the general land office, by their personal names, to restrain them from exercising jurisdiction with respect to the disposition of certain public lands, and to compel the secretary to issue patents therefor to the plaintiff, was held to abate, as to the secretary, upon his resignation from office, and could not afterwards be maintained against the commissioner alone. Murphy *v.* Utter, 186 U. S. 95, 101, 46 L. Ed. 1070. See, also, Smith *v.* Reynolds, 166 U. S. 717, 41 L. Ed. 1186.

Secretary of navy.—A writ of error for the review of a judgment of the supreme court of the District of Columbia refusing a mandamus against a certain person as secretary of the navy, to require of him the performance of certain alleged official duties, abates where such person ceases to be secretary pending the writ. United States *v.* Chandler, 122 U. S. 643.

Commissioner of patents.—In United States ex rel. Bernardin *v.* Butterworth, 169 U. S. 600, 42 L. Ed. 873, it was held, that a suit to compel the commissioner of patents to issue a patent abates by the death of the commissioner, and cannot be revived so as to bring in his successor, although the latter gives his consent. Murphy *v.* Utter, 186 U. S. 95, 101, 46 L. Ed. 1070.

State official.—An action against the auditor general of a state to remove a cloud upon the plaintiff's title to certain land which had been sold for taxes, upon the ground that the tax laws of the state under which they were sold were unconstitutional, cannot be maintained after the retirement of the officer from office. Chandler *v.* Dix, 194 U. S. 590, 48 L. Ed. 1129.

66. Suits involving continuing duty of office or board.—Thompson *v.* United States, 103 U. S. 480, 483, 26 L. Ed. 521; Commissioners *v.* Sellew, 99 U. S. 624, 25 L. Ed. 333; Murphy *v.* Utter, 186 U. S. 95, 101, 46 L. Ed. 1070; Warner Valley Stock Co. *v.* Smith, 165 U. S. 28, 33, 41 L. Ed. 621; Smith *v.* Reynolds, 166 U. S. 717, 41 L. Ed. 1186.

"The cases in which it has been held, by this court, that an abatement takes

2. Removal of Executor.—Where a decree is passed by the court below against an executor, being the defendant in a chancery suit, and before an appeal is prayed, the executor is removed by a court of competent jurisdiction, and an administrator de bonis non, with the will annexed, is appointed, all further proceedings, either by execution or appeal, are irregular, until the administrator be made a party to the suit.[67]

place by the expiration of the term of office, have been those of officers of the government, whose alleged delinquency was personal, and did not involve any charge against the government whose officers they were. A proceeding against the government would not lie." Thompson *v.* United States, 103 U. S. 480, 484, 26 L. Ed. 521; Secretary *v.* McGarrahan, 9 Wall. 298, 19 L. Ed. 579; United States *v.* Boutwell, 17 Wall. 604, 21 L. Ed. 721; Warner Valley Stock Co. *v.* Smith, 165 U. S. 28, 33, 41 L. Ed. 621.

"The case of a public officer of the United States differs in this respect from that of a municipal board, which is a continuing corporation (although its individual members may be changed) and to which in its corporate capacity a writ of mandamus may be directed. As was said, in Board of Commissioners *v.* Sellew, 99 U. S. 624, 627, 25 L. Ed. 333, by Chief Justice Waite: 'One of the objects creating such corporations, capable of suing and being sued, and having perpetual succession, is that the very inconvenience which manifested itself in United States *v.* Boutwell, 17 Wall. 604, 21 L. Ed. 721, may be avoided.'" Warner Valley Stock Co. *v.* Smith, 165 U. S. 28, 33, 41 L. Ed. 621.

Territorial board of loan commissioners.—Where a petition for mandamus was filed against the board of loan commissioners, a board organized for the purpose of refunding the territorial indebtedness of the territory of Arizona and the members of the board were changed after the filing of the petition and before the issuance of the writ, the proceedings did not abate by reason of such changes, the board being treated as a continuing body, and the members composing it compelled to obey the mandate. Murphy *v.* Utter, 186 U. S. 95, 46 L. Ed. 1070.

Township clerk.—In Thompson *v.* United States, 103 U. S. 480, 26 L. Ed. 521, there was a petition for a mandamus to compel the clerk of a township to certify a judgment obtained by the relator against the township, to the supervisor, in order that the amount thereof might be placed upon the tax roll. It was held, that the proceeding did not abate by the resignation of the clerk upon the appointment of his successor. Murphy *v.* Utter, 186 U. S. 95, 102, 46 L. Ed. 1070.

"A proceeding instituted against a township clerk, as a step in the enforcement of a township duty to levy the amount of a judgment against it, ought not to abate by the expiration of the particular clerk's term of office, but ought to proceed to final judgment, so as to compel his successor in office to do the duty required of him in order to obtain satisfaction from the township. The whole proceeding is really and in substance a proceeding against the township, as much as if it were named, and is in the nature and place of an execution. If the resignation of the officer should involve an abatement, we would always have the unseemly spectacle of constant resignations and reappointments to avoid the effect of the suit. Where the proceeding is in substance, as it is here, a proceeding against the corporation itself, there is no sense or reason in allowing it to abate by the change of individuals in the office. The writ might be directed to the township clerk by his official designation, and will not be deprived of its efficacy by inserting his individual name." Thompson *v.* United States, 103 U. S. 480, 484, 26 L. Ed. 521.

County commissioners.—An application for a mandamus against a board of county commissioners and its individual members to compel them to levy a tax to pay a judgment will lie, though the terms of the members had expired. Board of Commissioners *v.* Sellew, 99 U. S. 624, 25 L. Ed. 333, cited in Murphy *v.* Utter, 186 U. S. 95, 101, 46 L. Ed. 1070.

Levee board.—Where an act abolishing the offices of commissioners who previously constituted a corporation known as the levee board, did not dissolve or extinguish the corporation, but merely substituted the state treasurer and the auditor of accounts as the members of that corporation, it was held, that the suit might be prosecuted against the levee board as a corporation, notwithstanding the change in its members. Hemingway *v.* Stansell, 106 U. S. 399, 402, 27 L. Ed. 245.

Territorial judge.—Upon an application for mandamus to a territorial judge to compel him to perform a certain act, where the judge goes out of office pending an appeal, and his successor consents to the continuance of the action against him, the action may be revived against the successor. Caledonia Coal Co. *v.* Baker, 196 U. S. 432, 49 L. Ed. 540.

67. Removal of executor.—Taylor *v.* Savage, 1 How. 282, 11 L. Ed. 132; Taylor *v.* Savage, 2 How. 393, 394, 11 L. Ed. 313.

If an execution be issued before the proper parties are thus made, it is unauthorized and void; and no right of property will pass by a sale under it. Taylor

3. Dissolution of Corporation.—Where a corporation is dissolved, pending suits against it are thereby abated.[68]

4. Assignment of Interest by Party Pending Suit.—Where the original plaintiff assigns his interest in the cause of action pending suit, his assignee may be substituted as plaintiff,[69] and an assignment by a defendant of his interest in the subject matter of a pending suit does not necessarily defeat the suit; the assignee is bound by what is done against the assignor; and may either come in and assume the burden of the litigation in his own name, or act in the name of his assignor.[70]

E. Insolvency of Estate of Decedent as Abating Suits against Representative.—It has been held, that a state statute providing that no suit or action shall be prosecuted or sustained against any personal representative after the estate of the deceased has been represented as insolvent, does not abate a suit brought by a citizen of another state in the federal court against the personal representative of a decedent whose estate has been judicially declared to be insolvent.[71]

v. Savage, 1 How. 282, 11 L. Ed. 132; Taylor *v.* Savage, 2 How. 393, 394, 11 L. Ed. 313.

The administrator cannot obtain redress by application to this court, but must first be made a party in the court below. This may be done at the instance of either side. Taylor *v.* Savage, 1 How. 282, 11 L. Ed. 132; Taylor *v.* Savage, 2 How. 393, 394, 11 L. Ed. 313.

After he is thus made a party, he may stay proceedings by giving bond, or the complainants may enforce the decree, if the bond be not filed in time. Taylor *v.* Savage, 1 How. 282, 11 L. Ed. 132; Taylor *v.* Savage, 2 How. 393, 394, 11 L. Ed. 313.

68. Dissolution of corporation.—First National Bank *v.* Colby, 21 Wall. 609, 615, 22 L. Ed. 687; Pendleton *v.* Russell, 144 U. S. 640, 645, 36 L. Ed. 574. See, also, Gray *v.* National Steamship Co., 115 U. S. 116, 117, 29 L. Ed. 309.

With the forfeiture of its rights, privileges, and franchises, a corporation is necessarily dissolved. Its existence as a legal entity is thereupon ended; it is then a defunct institution, and judgment can no more be rendered against it in a suit previously commenced than judgment could be rendered against a dead man dying pendente lite. This is the rule with respect to all corporations whose chartered existence has come to an end, either by lapse of time or decree of forfeiture, unless, by statute, pending suits be allowed to proceed to judgment notwithstanding such dissolution. The prolongation of the corporate life for this specific purpose as much requires special legislative enactment as does the original creation of the corporation. First National Bank *v.* Colby, 21 Wall. 609, 615, 22 L. Ed. 687.

Where a corporation is dissolved and its franchises, rights and privileges forfeited in a proceeding brought by the state for that purpose, a suit pending against it is abated. Pendleton *v.* Russell, 144 U. S. 640, 645, 36 L. Ed. 574.

Where a suit is brought against a corporation in a circuit court of the United States, and a judgment recovered and an appeal taken to the supreme court, and a mortgage given by the corporation to indemnify the sureties on a supersedeas bond, and, pending the appeal, the corporation is dissolved by a decree of the supreme court of another state and a receiver appointed for it, and the receiver employs counsel, carries the case into the supreme court of the United States and a judgment of reversal is rendered upon the record as it stands in that court without the substitution of the receiver, the mere fact that he sends the remittitur from the supreme court of the United States to the circuit court and has it filed there does not make him a party to the new trial, and a judgment rendered in the second trial is invalid. Pendleton *v.* Russell, 144 U. S. 640, 645, 36 L. Ed. 574.

A suit against a national bank to enforce the collection of a demand, is abated by a decree of a district court of the United States dissolving the corporation and forfeiting its rights and franchises, rendered upon an information against the bank filed by the comptroller of the currency. First National Bank *v.* Colby, 21 Wall. 609, 22 L. Ed. 687.

69. Assignment of interest by plaintiff.—Amadeo *v.* Northern Assurance Co., 201 U. S. 194, 50 L. Ed. 722. See, also, Platt *v.* Jerome, 19 How. 384, 15 L. Ed. 623. See the title ASSIGNMENTS.

70. Assignment of interest by defendant.—Ex parte South, etc., R. Co., 95 U. S. 221, 24 L. Ed. 355. See, also, Platt *v.* Jerome, 19 How. 384, 15 L. Ed. 623. See the title ASSIGNMENTS.

71. Insolvency of estate as abating suits against representatives.—Suydam *v.* Broadnax, 14 Pet. 67, 10 L. Ed. 357.

The plaintiffs, merchants of New York, instituted a suit in the circuit court of

F. Statute Legalizing Nuisance as Abating Suit for Abatement.—A suit for the abatement of a nuisance is abated by the enactment of a statute, pending the suit, legalizing the nuisance.[72]

G. Grounds for Plea in Abatement.—See post, "Raising and Waiving Grounds of Abatement," II.

II. Raising and Waiving Grounds of Abatement.

A. Raising Grounds of Abatement—1. DILATORY PLEA—a. *Pleas in Abatement*—(1) *In Civil Cases*—(a) *Nature of Plea.*—Pleas to the person, like pleas to the jurisdiction, do not necessarily dispute the validity of the rights, which are made the subject of the suit, but object to the plaintiff's ability to sue, or the defendant's liability to be sued respecting them. They object to the plaintiff that he is by law disabled to sue in a court of justice, or that he cannot institute a suit alone, or that he is not the person he pretends to be, or that he does not sustain the character he assumes.[73]

(b) *Grounds for Plea*—aa. *Incapacity of Plaintiff to Maintain Action.*—Objections as to capacity of the plaintiff to sue must be by plea in abatement, and such an objection is not available under the general issue.[74] This rule has been held to apply to an objection for want of corporate capacity of plaintiff,[75] to an objection for want of authority of a person suing as executor or administrator,[76] to an objection setting up the marriage of a female plaintiff pending the

Alabama, against the administrators of the maker of a note, dated in New York, and payable in New York. The act of the assembly of Alabama provides, that the estate of a deceased person which is declared to be insolvent, shall be distributed by the executors or administrators, according to the provisions of the statute, among the creditors; and that no suit or action shall be commenced or sustained against any executor or administrator, after the estate of the deceased has been represented as insolvent, except in certain cases not of the description of that on which this suit was instituted. Held, that the insolvency of the estate, judicially declared under the statute of Alabama, was not sufficient in law to abate a suit instituted in the circuit court of the United States, by a citizen of another state, against the representatives of a citizen of Alabama. Suydam *v.* Broadnax, 14 Pet. 67, 10 L. Ed. 357.

The 11th section of the act to establish the judicial courts of the United States, carries out the constitutional right of a citizen of one state to sue a citizen of another state in the circuit courts of the United States; and gives to the circuit courts "original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law and in equity." It was certainly intended to give to suitors, having a right to sue in the circuit court, remedies coextensive with that right; these remedies would not be so, if any proceedings, under an act of state legislation, to which the plaintiff was not a party, exempting a person of such state from suit, could be pleaded to abate a suit in the circuit court. Suydam *v.* Broadnax, 14 Pet. 67, 10 L. Ed. 357. See the title EXECUTORS AND ADMINISTRATORS.

72. Statute legalizing nuisance as abating suit for abatement.—Clinton Bridge, 10 Wall. 454, 19 L. Ed. 969.

A suit in chancery praying an injunction against the building of a bridge over a river dividing two states upon the ground that it is a nuisance is abated by an act of congress providing that it shall be a lawful structure, and shall be recognized and known as a post route, although issue has been made up and proofs taken and the case ready for trial. Clinton Bridge, 10 Wall. 454, 19 L. Ed. 969.

73. Nature of dilatory plea.—Memphis *v.* Dean, 8 Wall. 64, 74, 19 L. Ed. 326.

Where a plea in answer is but notice of special matter by way of abatement of the amount claimed and so goes to but part of the cause of action, it cannot be relied on as a plea in bar. United States *v.* Dashiell, 4 Wall. 182, 18 L. Ed. 319.

74. Incapacity of plaintiff to maintain action.—Philadelphia, etc., R. Co. *v.* Quigley, 21 How. 202, 16 L. Ed. 73; Conard *v.* Atlantic Ins. Co., 1 Pet. 386, 7 L. Ed. 189; Wickliffe *v.* Owings, 17 How. 47, 15 L. Ed. 44; Evans *v.* Gee, 11 Pet. 80, 9 L. Ed. 639; Society, etc., *v.* Pawlet, 4 Pet. 480, 7 L. Ed. 927.

75. Want of corporate capacity of plaintiff.—Society, etc., *v.* Pawlet, 4 Pet. 480, 7 L. Ed. 927; Conard *v.* Atlantic Ins. Co., 1 Pet. 386, 387, 7 L. Ed. 189.

76. Want of authority of person suing as executor or administrator.—Childress *v.* Emory, 8 Wheat. 642, 5 L. Ed. 705; Noonan *v.* Bradley, 9 Wall. 394, 19 L. Ed. 757.

suit,[77] and to an objection that plaintiffs suing as husband and wife are not married.[78]

bb. *Nonjoinder of Parties*—(aa) *Plaintiffs.*—It has been held, that a suit for salvage cannot be abated on the objection of claimants that others as well as the libellants are entitled to share in the compensation.[79]

(bb) *Defendants*—aaa. *In General.*—Nonjoinder of a defendant in an action ex contractu can be taken advantage of only by a plea in abatement.[80]

bbb. *Joint Obligors.*—Generally speaking, all joint obligors, and other persons bound by covenants, contract or quasi contract, ought to be made parties to the suit; and the plaintiff may be compelled to join them all, by a plea in abatement for nonjoinder. But such an objection can only be taken advantage of by a plea in abatement; for if one party only is sued, it is not matter in bar of the suit, or in arrest of judgment, upon the finding of the jury, or of variance in evidence upon the trial.[81]

ccc. *Joint and Several Obligors.*—On a joint and several bond, the plaintiff may sue one or all of the obligors, and cannot sue an intermediate number, and if he does, the objection may be taken by plea in abatement, but is waived by pleading to the merits.[82]

cc. *Misjoinder of Parties—Real Actions.*—At common law, a writ of right will not lie, except against the tenant of the freehold demanded, and if there be several tenants, claiming several parcels of land, by distinct titles, they cannot lawfully be joined in one writ; and if they are, they may plead in abatement of

77. Marriage of female plaintiff a ground for plea in abatement.—Chirac *v.* Reinicker, 11 Wheat. 280, 303, 6 L. Ed. 474; McCoul *v.* LeKamp, 2 Wheat. 111, 4 L. Ed. 196.

A brought an action of assumpsit in the circuit court, and after issue joined, the plaintiff died and the suit was revived by scire facias in the name of his administratrix; while the suit was still depending, the administratrix intermarried with B, which marriage was pleaded puis darrein continuance. Held, that the scire facias was thereupon abated, and a new scire facias might be issued to revive the original suit, in the name of B and wife, as the personal representative of A, in order to enable her to prosecute the suit, until a final judgment under the judiciary act of 1789, § 31. McCoul *v.* LeKamp, 2 Wheat. 111, 4 L. Ed. 196.

78. Objection that persons suing as husband and wife are not married.—The defense that the plaintiffs suing as husband and wife are not married goes to the form of the writ, rather than to the cause of the action, and it should, therefore, be pleaded in abatement, and not in bar. Northwestern Union Packet Co. *v.* Clough, 20 Wall. 528, 538, 22 L. Ed. 406.

79. Nonjoinder of plaintiffs.—The Camanche, 8 Wall. 448, 19 L. Ed. 397.

The remedy of such others is to become parties to the suit, or to make a claim against the proceeds, if any, in the registry of the court. The Camanche, 8 Wall. 448, 19 L. Ed. 397.

80. Nonjoinder of defendants.—Metcalf *v.* Williams, 104 U. S. 93, 95, 26 L. Ed. 665. See, also, Kittredge *v.* Race, 92 U. S. 116, 119, 23 L. Ed. 488.

81. Nonjoinder of joint obligors.—Gilman *v.* Rives, 10 Pet. 298, 9 L. Ed. 432; Barton *v.* Petit, 7 Cranch 194, 201, 3 L. Ed. 313.

Raising objection by demurrer or motion in arrest of judgment.—If it should appear upon the face of the declaration, or other pleading of the plaintiff, that another jointly sealed the bond with the defendant, and that both are still living, the court will arrest the judgment, and the objection may be taken by demurrer; because the plaintiff himself shows, that another ought to be joined; and it would be absurd to compel defendant to plead the facts, which are already admitted. Gilman *v.* Rives, 10 Pet. 298, 300, 9 L. Ed. 432.

And in cases of recognizance and judgments, and other matters of record, such as bonds to the crown, if, it appears by the declaration, or other pleadings, that there is another joint debtor, who is not sued, although it is not averred that he is living, the objection need not be pleaded in abatement, but it may be taken advantage of, upon the demurrer, or in arrest of judgment. Gilman *v.* Rives, 10 Pet. 298, 300, 9 L. Ed. 432.

82. Nonjoinder of joint and several obligors.—Minor *v.* Mechanics' Bank, 1 Pet. 46, 47, 7 L. Ed. 47; Barry *v.* Foyles, 1 Pet. 309, 311, 7 L. Ed. 157.

The principle is, that a contract made by copartners is several as well as joint, and the assumpsit is made by all and by each; it is obligatory on all, and on each of the partners. If, therefore, the defendant fails to avail himself of the variance in abatement, when the form of his plea obliges him to give the plaintiff a proper action; the policy of the law does not permit him to avail himself of it, at the time of trial. Barry *v.* Foyles, 1 Pet. 309, 311, 7 L. Ed. 157.

the writ. If the demandant demands against any tenant more land than he holds, he may plead non tenure as to the parcel not holden; but the writ will abate only as to the parcel whereof non tenure is pleaded, and admitted or proved.[83]

dd. *Objections to Service of Process.*—It seems that an objection for want of service of process may be pleaded in abatement.[84]

ee. *Misnomer of Parties.*—Misnomer, or mere mistake in the name of a plaintiff, which does not affect his capacity to sue in the right name, is pleadable in abatement only, and is waived by pleading to the merits.[85] If a mistake be made in the name of a defendant, and he fails to plead it in abatement, the judgment binds him, though called by a wrong name.[86] The objection cannot be raised after judgment or assigned for error in the supreme court.[87]

ff. *Variance.*—Variance between the writ and declaration is matter pleadable in abatement only.[88] It cannot be taken advantage of by general demurrer to the declaration,[89] or by motion in arrest of judgment,[90] nor can it be assigned for error.[91]

83. Misjoinder of parties—Real actions.—Green *v.* Liter, 8 Cranch 229, 3 L. Ed. 545.

The act of Virginia, of 1786, reforming the method of proceeding in writs of right, did not vary the rights, or legal predicament, of the parties, as they existed at the common law. It did not, therefore, change the nature and effect of the pleadings; and notwithstanding that act, the tenant may still have the benefit of the ordinary pleas in abatement. Green *v.* Liter, 8 Cranch 229, 3 L. Ed. 545.

Waiver of objection.—In a writ of right, brought under the statute of Kentucky, where the demandant described his land by metes and bounds, and counted against the tenants jointly, it was held, that this was matter pleadable in abatement only, and that by pleading in bar, the tenants admitted their joint seisin, and lost the opportunity of pleading a several tenancy. Liter *v.* Green, 2 Wheat. 306, 4 L. Ed. 246.

84. Objections to service of process.—Fitzgerald, etc., Construction Co. *v.* Fitzgerald, 137 U. S. 98, 34 L. Ed. 608. See the title SUMMONS AND PROCESS.

85. Misnomer of parties.—Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 137 U. S. 568, 572, 34 L. Ed. 784.

Where an action was brought by "The Fifth Baptist Church of Washington, D. C., by its trustees," and the corporate name of the church was Fifth Baptist Church of Washington, D. C., it was held, that the words "by its trustees" even if taken as part of plaintiff's name, only showed mistake in that name, and objection, in order to be available, was required to be taken by plea in abatement. Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 137 U. S. 568, 34 L. Ed. 784.

86. Effect of judgment recovered against defendant in wrong name.—Lafayette Ins. Co. *v.* French, 18 How. 404, 409, 15 L. Ed. 451.

If the judgment was recovered in Ohio against the company by an erroneous name, but the suit upon the judgment was brought in Indiana against the company using its chartered name correctly, accompanied with an averment that it was the same company, this mistake is no ground of error; it could only be taken advantage of by a plea in abatement, in the suit in which the first judgment was recovered. Lafayette Ins. Co. *v.* French, 18 How. 404, 15 L. Ed. 451.

87. Objection cannot be raised after judgment or assigned for error.—Where the plaintiff was denominated in the petition and writ "J. J. Sigg," the omission of his Christian name at full length was alleged as error. The court said that he might have had no Christian name and have assumed the letters "J. J." as distinguishing him from other persons of the name of Sigg, and that in any event the objection could not be taken after judgment or assigned as error in the supreme court. Breedlove *v.* Nicolet, 7 Pet. 413, 8 L. Ed. 731.

88. Variance to be pleaded in abatement.—Duvall *v.* Craig, 2 Wheat. 45, 4 L. Ed. 180; McKenna *v.* Fisk, 1 How. 240, 247, 11 L. Ed. 117; Chirac *v.* Rheinicker, 11 Wheat. 280, 302, 6 L. Ed. 474; Smith *v.* Clapp, 15 Pet. 125, 128, 10 L. Ed. 684.

If in any case, a variance between the writ and declaration can be taken advantage of by the defendant, in the court below, it seems to be an established rule, that it cannot be done, except upon oyer of the original writ, granted in some proper stage of the cause. Chirac *v.* Rheinicker, 11 Wheat. 280, 302, 6 L. Ed. 474. See the title VARIANCE.

89. Variance not ground for demurrer.—Duvall *v.* Craig, 2 Wheat. 45, 4 L. Ed. 180; Smith *v.* Clapp, 15 Pet. 125, 128, 10 L. Ed. 684; McKenna *v.* Fisk, 1 How. 240, 247, 11 L. Ed. 117.

90. Motion in arrest of judgment.—Smith *v.* Clapp, 15 Pet. 125, 128, 10 L. Ed. 684.

91. Variance not assignable for error.—Smith *v.* Clapp, 15 Pet. 125, 128, 10 L. Ed. 684.

gg. *Another Suit Pending.*—See ante, "Another Suit Pending," I, B.

hh. *Premature Suit.*—If a suit be brought against a seizing officer, for a supposed trespass, while the suit for the forfeiture is depending, the fact of such pendency may be pleaded in abatement, or as a temporary bar of the action.[92]

(c) *Time of Filing.*—A plea in abatement must be filed at an early stage in the proceeding,[93] it cannot be united with pleas to the merits,[94] nor filed thereafter.[95] But after the defendants have put in a plea in bar, they may move the court for leave to withdraw the plea, and to plead in abatement.[96]

(d) *Form and Verification*—aa. *Form.*—That a plea in abatement is not artistically drawn is not a sufficient reason for reversing the judgment of the court below rendered for the defendant on such plea.[97]

bb. *Verification.*—In Pennsylvania, it was held in an early case, that a plea in abatement setting up that the plaintiff is a feme covert and therefore incapable of maintaining an action should be verified by affidavit, otherwise it would be stricken out.[1]

92. Pendency of action for forfeiture as abating action for wrongful seizure.—Gelston *v.* Hoyt, 3 Wheat. 247, 4 L. Ed. 380. See the titles PREMATURE SUIT; REVENUE LAWS.

93. At early stage of proceeding.—Rapp *v.* Elliott, 2 Dall. 184, 1 L. Ed. 341.

94. Plea not to be joined with pleas in bar.—Sheppard *v.* Graves, 14 How. 505, 14 L. Ed. 518; Spencer *v.* Lapsley, 20 How. 264, 15 L. Ed. 902; Kern *v.* Huidekoper, 103 U. S. 485, 494, 26 L. Ed. 354; Bailey *v.* Dozier, 6 How. 23, 12 L. Ed. 328.

The refusal of the court below to allow a plea in abatement to be filed in connection with pleas in bar is not subject to the review by the supreme court. Spencer *v.* Lapsley, 20 How. 264, 15 L. Ed. 902; Breedlove *v.* Nicolet, 7 Pet. 413, 8 L. Ed. 731.

Where after issue joined the defendants filed a plea that the firm, the plaintiffs in the suit, consisted of other persons in addition to those named in the writ and petition, who were not citizens of the state with those named, and the court after receiving the plea directed that it be taken from the files, it was held, that this was a proceeding in the discretion of the court, and not assignable as error. Breedlove *v.* Nicolet, 7 Pet. 413, 8 L. Ed. 731.

95. Pleading in abatement after plea in bar.—Sheppard *v.* Graves, 14 How. 505, 14 L. Ed. 518; Spencer *v.* Lapsley, 20 How. 264, 267, 15 L. Ed. 902; Bailey *v.* Dozier, 6 How. 23, 12 L. Ed. 328.

And if after pleas in abatement, a defense be interposed, going to the merits of the controversy, the grounds alleged in abatement become thereby immaterial and are waived. Sheppard *v.* Graves, 14 How. 505, 14 L. Ed. 518.

As a plea in abatement pleaded, without an affidavit, five years after pleas in bar had been filed, and which were still undisposed of, and filed, its connection with other matter, in bar, is contrary to the rule and practice of the courts, and should be disallowed. Spencer *v.* Lapsley, 20 How. 264, 267, 15 L. Ed. 902; Sheppard *v.* Graves, 14 How. 505, 14 L. Ed. 518; Bailey *v.* Dozier, 6 How. 23, 12 L. Ed. 328. See post, "Pleading in Bar," II, B, 2.

On day set for trial.—Where the defendant filed a peremptory exception after the case was at issue, and on the day set for trial before a jury, praying that the suit be dismissed because a partner with the plaintiff in the transaction was the foundation of the suit was not made a party plaintiff in the case, it was held that the exception came too late. Burbank *v.* Bigelow, 154 U. S. 558, approving Breedlove *v.* Nicolet, 7 Pet. 413, 8 L. Ed. 731.

96. Withdrawal of plea in bar.—Eberly *v.* Moore, 24 How. 147, 16 L. Ed. 612.

Asking leave to plead to the jurisdiction is in effect a withdrawal of a former plea to the merits, for after a plea in bar the defendant cannot plead to the jurisdiction of the court, for by pleading in bar he submits to the jurisdiction. Kern *v.* Huidekoper, 103 U. S. 485, 494, 26 L. Ed. 354.

97. Form of plea.—Eberly *v.* Moore, 24 How. 147, 148, 16 L. Ed. 612.

An action was brought in the circuit court of Mississippi, against the Commercial and Railroad Bank of Vicksburg, Mississippi, by parties who were citizens of the state of Louisiana; the defendants pleaded in abatement, by attorney, that they were an aggregate corporation, and that two of the stockholders resided in the state of Mississippi; the affidavit to the plea was sworn to by the cashier of the bank, before the "deputy clerk;" it was not entitled as of any term of the court; the plaintiffs demurred to the plea. Held, that the appearance of the defendants in the circuit court, by attorney, was proper; and that if any exceptions existed to this form of the plea, they should have been urged to the receiving of it, when it was offered, and were not causes of demurrer. Commercial, etc., Bank *v.* Slocomb, 14 Pet. 60, 10 L. Ed. 354.

1. Verification.—Rapp *v.* Elliot, 2 Dall. (Pa.) 184, 1 L. Ed. 341.

(e) *Construction.*—Pleas in bar are not to receive a narrow and merely technical construction, but are to be construed according to their entire subject matter. In this respect there is a difference between pleas in bar and pleas in abatement.[2]

(f) *Evidence.*—Where a plea in abatement is relied upon, the burden of proof rests upon the defendant.[3]

(g) *Review of Decision on Plea.*—As to whether a judgment on a plea in abatement is final so as to permit review, see the title APPEAL AND ERROR.

(2) *In Criminal Cases*—(a) *Grounds for Plea*—aa. *Constitution of Grand Jury.*—When the defendant has had no opportunity to challenge the grand jury which found the indictment against him, the objection to the constitution of the grand jury may be taken by plea in abatement as well as by motion to quash the indictment.[4]

bb. *Swearing of Grand Jury.*—Objection that the grand jury were improperly sworn may be taken by plea in abatement.[5]

(b) *Time of Filing.*—A plea in abatement in a criminal case must be filed at an early stage of the proceedings.[6]

(c) *Form and Sufficiency.*—A plea in abatement must be pleaded with exactness.[7] A plea in abatement is fatally defective where, although it is stated that the

2. Construction of plea.—Withers *v.* Greene, 9 How. 211, 214, 13 L. Ed. 109.

3. Evidence.—De Sobry *v.* Nicholson, 3 Wall. 420, 423, 18 L. Ed. 263; Sheppard *v.* Graves, 14 How. 505, 14 L. Ed. 518.

On an issue of fact raised by a plea in abatement, where the defendant holds the affirmative of the issue, and where the evidence (introduced by the defendant himself) is all in favor of the plaintiff, positive and uncontradicted, the court properly instructs the jury when it directs them, as matter of law, to find the issue for the plaintiff. Grand Chute *v.* Winegar, 15 Wall. 355, 21 L. Ed. 170.

4. Objections to constitution of grand jury.—Carter *v.* Texas, 177 U. S. 442, 477, 44 L. Ed. 839; United States *v.* Gale, 109 U. S. 65, 27 L. Ed. 857; Agnew *v.* United States, 165 U. S. 36, 41 L. Ed. 624.

The proper mode of taking objection to the personnel of the grand jury when the matter does not appear of record, is by plea in abatement. United States *v.* Gale, 109 U. S. 65, 69, 27 L. Ed. 857.

An objection to an indictment because of the disqualification of some of the jurors is properly made by plea in abatement filed before the arraignment of the accused. Crowley *v.* United States, 194 U. S. 461, 48 L. Ed. 1075.

5. Objection to swearing of grand jury.—Bram *v.* United States, 168 U. S. 532, 567, 42 L. Ed. 568.

Where by plea and supplemental plea in abatement, and by motion to quash, defendant, preliminary to the trial, attacked the sufficiency of the indictment, because one of the grand jurors was permitted to affirm and the indictment failed to state that such juror was "conscientiously scrupulous" of being sworn, and because the indictment recited that it was presented upon the "oath" of the jurors, when, in fact, it was presented upon the oath and affirmation of the jurors, and at the hearing of the pleas in abatement, it appeared that when the grand jurors were impaneled one of them, upon being called to be sworn, stated that he affirmed, and declined to take an oath, and after his fellows had been regularly sworn he was formally affirmed to the same duties specified in the oath administered to the others, it was held, that the objection was without merit. Bram *v.* United States, 168 U. S. 532, 567, 42 L. Ed. 568.

An objection that neither in the indictment nor in the proof at the hearing of the pleas in abatement was it affirmatively stated or shown that the grand juror, before being permitted to affirm, was proven to have possessed conscientious scruples against taking an oath, is immaterial. The mode of ascertaining the existence or nonexistence of such conscientious scruples was committed to the discretion of the officer who affirmed the juror, and such affirmation conclusively established that the officer had properly exercised his discretion. Bram *v.* United States, 168 U. S. 532, 568, 42 L. Ed. 568.

6. At early stage of proceeding.—Agnew *v.* United States, 165 U. S. 36, 44, 41 L. Ed. 624.

An original venire was issued November 18, and the second venire issued December 2, 1895. The court opened December 3, 1895, and an indictment was returned December 12. The defendant did not file his plea in abatement until December 17. The plea did not allege want of knowledge of threatened prosecution on the part of defendant, nor want of opportunity to present his objection earlier, nor assign any ground why exception was not taken or objection made before. Held, that it was filed too late. Agnew *v.* United States, 165 U. S. 36, 44, 41 L. Ed. 624.

7. Plea to be exact.—Agnew *v.* United States, 165 U. S. 36, 41 L. Ed. 624.

drawing of the grand jury "tended to his injury and prejudice," no grounds whatever are assigned for such a conclusion, and none appear on the record.[8]

(d) *Trial or Hearing.*—If the defendant is entitled to a jury trial on his plea in abatement he must object in the lower court to a refusal to allow such trial, otherwise the objection is waived.[9]

b. *Pleas to Jurisdiction*—(1) *Grounds of Plea*—(a) *In General.*—When the objection goes to the power of the court over the parties, or the subject matter, the defendant need not plead in abatement, for he cannot give the plaintiff a better writ or bill.[10]

(b) *Want of Diversity of Citizenship of Parties*—aa. *Rule under Judiciary Act*—(aa) *Diversity of Citizenship Properly Averred in Declaration or Bill.*—Under the judiciary act of 1789, an issue that the parties were not citizens of different states, and were, therefore, not entitled to sue in the federal courts, could only be made by plea in abatement, when the pleadings properly averred that the parties were citizens of different states.[11]

8. Objection on ground of improper drawing of grand jury.—Agnew *v.* United States, 165 U. S. 36, 44, 41 L. Ed. 624.

9. Objection for failure to allow jury trial on plea.—Bolln *v.* Nebraska, 176 U. S. 83, 44 L. Ed. 382.

An objection based upon the ground that the defendant in a criminal case was refused a jury trial on his plea in abatement, and was thus denied due process of law, cannot be raised for the first time in the supreme court of the United States, no objection having been made upon the ground until final judgment by the supreme court of the state. Bolln *v.* Nebraska, 176 U. S. 83, 44 L. Ed. 382.

10. When defendant cannot give better writ.—Rhode Island *v.* Massachusetts, 12 Pet. 657, 719, 9 L. Ed. 1233.

Where no inferior court can have jurisdiction of a case in law or equity, the ground of the objection is not taken by plea in abatement, as an exception of the given case, from the otherwise general jurisdiction of the court; appearance does not cure the defect of judicial power, and it may be relied on by plea, answer, demurrer, or at the trial or hearing, unless it goes to the manner of bringing the defendant into court, which is waived by submission to the process. Rhode Island *v.* Massachusetts, 12 Pet. 657, 719, 9 L. Ed. 1233.

11. Diversity of citizenship averred in declaration or bill.—Steigleder *v.* McQuesten, 198 U. S. 141, 142, 49 L. Ed. 986; Morris *v.* Gilmer, 129 U. S. 315, 32 L. Ed. 690; Little *v.* Giles, 118 U. S. 596, 30 L. Ed. 269; Farmington *v.* Pillsbury, 114 U. S. 138, 29 L. Ed. 114; Williams *v.* Nottawa, 104 U. S. 209, 26 L. Ed. 719; Susquehanna, etc., Coal Co. *v.* Blatchford, 11 Wall. 172, 20 L. Ed. 179; Scott *v.* Sandford, 19 How. 393, 402, 15 L. Ed. 691; Jones *v.* League, 18 How. 76, 15 L. Ed. 263; Evans *v.* Gee, 11 Pet. 80, 9 L. Ed. 639; Clarke *v.* Mathewson, 12 Pet. 164, 9 L. Ed. 1041; Whyte *v.* Gibbes, 20 How. 541, 542, 15 L. Ed. 1016; Washington Bridge Co. *v.* Stewart, 3 How. 413, 11 L. Ed. 658; Breedlove *v.* Nicolet, 7 Pet. 413, 432, 8 L. Ed. 731; Sheppard *v.* Groves, 14 How. 505, 14 L. Ed. 518; Carter *v.* Bennett, 15 How. 353, 357, 14 L. Ed. 727; Wickliffe *v.* Owings, 17 How. 47, 51, 15 L. Ed. 44; De Sobry *v.* Nicholson, 3 Wall. 420, 423, 18 L. Ed. 263; Smith *v.* Kernochen, 7 How. 198, 216, 12 L. Ed. 666; Jackson *v.* Ashton, 8 Pet. 148, 8 L. Ed. 898; Bingham *v.* Cabot, 3 Dall. 382, 1 L. Ed. 646; Pollard *v.* Dwight, 4 Cranch 421, 2 L. Ed. 666; Barry *v.* Foyles, 1 Pet. 309, 311, 7 L. Ed. 157; Lexington *v.* Butler, 14 Wall. 282, 20 L. Ed. 809; Claflin *v.* Commonwealth Ins. Co., 110 U. S. 81, 28 L. Ed. 76; Charlotte Nat. Bank *v.* Morgan, 132 U. S. 141, 33 L. Ed. 282; Fitzgerald, etc., Construction Co. *v.* Fitzgerald, 137 U. S. 98, 34 L. Ed. 608; St. Louis, etc., R. Co. *v.* McBride, 141 U. S. 127, 35 L. Ed. 659.

Generally, as to jurisdiction of federal courts in cases of diverse citizenship, see the titles COURTS; JURISDICTION; REMOVAL OF CAUSES.

If it is intended to deny the jurisdiction of the court, on account of the citizenship of the parties to the action, that being averred on the record, a plea to the jurisdiction should be filed, and such evidence is inadmissible under the general issue. Evans *v.* Gee, 11 Pet. 80, 83, 9 L. Ed. 639.

Where a bill in chancery avers that the defendant is a citizen of another state, this averment can only be impugned in a special plea to the jurisdiction of the court. The answer is not the proper place for it, under the 33d rule of equity practice established by this court. Wickliffe *v.* Owings, 17 How. 47, 15 L. Ed. 44.

Where the defendant appeared to a bill in chancery, and defended the suit, and no want of jurisdiction appeared in the record, and then the complainant died, an objection that the defendants were citizens of another state comes too late when made to a bill of revivor, which is only a continuance of the suit. Whyte *v.* Gibbes, 20 How. 541, 15 L. Ed. 1016; Washington Bridge Co. *v.* Stewart, 3 How. 413, 11 L. Ed. 658.

(bb) *Diversity of Citizenship Not Properly Averred in Declaration or Bill.*—If the declaration or bill does not contain proper averments showing that the parties are citizens of different states, the defect may be taken advantage of by demurrer, or without demurrer on motion, at any stage of the proceedings.[12]

bb. *Rule under Act of* 1875.—It is now made the duty of the circuit court, at any time in the progress of a cause, to dismiss the suit, if it appears that it does not involve a dispute or controversy properly within the jurisdiction of the court, or that the parties were improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under the act of congress.[13]

(c) *Adequate Remedy at Law.*—See the title EQUITY.

(2) *Time of Filing.*—Pleas in abatement because of want of jurisdiction should be filed at an early stage of the proceeding, and should not be filed in connection with pleas in bar,[15] or during the trial,[16] and an objection for want of jurisdiction cannot be raised for the first time in the supreme court.[17] And

12. Diversity of citizenship not properly averred in declaration or bill.—Susquehanna, etc., Coal Co. *v.* Blatchford, 11 Wall. 172, 20 L. Ed. 179; Scott *v.* Sandford, 19 How. 393, 394, 15 L. Ed. 691; Capron *v.* Van Noorden, 2 Cranch 126, 2 L. Ed. 229.

When the citizenship of the parties is averred in the bill of complaint, and it thus appears that some of the plaintiffs are disqualified by their citizenship from maintaining the suit, the defect may be taken advantage of by demurrer, or without demurrer, on motion, at any stage of the proceedings. A plea in abatement is required only when the citizenship averred is such as to support the jurisdiction of the court and the defendant desires to controvert the averment. Susquehanna, etc., Coal Co. *v.* Blatchford, 11 Wall. 172, 20 L. Ed. 179.

Where the objection to the citizenship of the plaintiff is apparent on the record, as he himself, in making out his case, states that he is of African descent, was born a slave, and claims that he and his family became entitled to freedom by being taken, by their owner, to reside in a territory where slavery is prohibited by act of congress—and that, in addition to this claim, he himself became entitled to freedom by being taken to Rock Island, in the state of Illinois—and being free when he was brought back to Missouri, he was by the laws of that state a citizen, if the facts he states do not give him or his family a right to freedom, the plaintiff is still a slave, and not entitled to sue as a "citizen" without any reference to the plea in abatement. Scott *v.* Sandford, 19 How. 393, 394, 15 L. Ed. 691.

Where it is apparent upon the record that the court below erred in its judgment on a plea in abatement, filed upon the ground that the plaintiff is not a citizen, and also erred in giving judgment for the defendant, when the exception shows that the plaintiff was not a citizen of the United States, and the circuit court had no jurisdiction, either in the case stated in the plea in abatement, or in the one stated in the exception, its judgment in favor of the defendant will be reversed. Scott *v.* Sandford, 19 How. 393, 396, 15 L. Ed. 691.

13. Rule under act of 1875.—Steigleder *v.* McQuesten, 198 U. S. 141, 142, 49 L. Ed. 986; Sheppard *v.* Graves, 14 How. 505, 14 L. Ed. 518; Williams *v.* Nottawa, 104 U. S. 209, 26 L. Ed. 719; Farmington *v.* Pillsbury, 114 U. S. 138, 29 L. Ed. 114; Little *v.* Giles, 118 U. S. 596, 30 L. Ed. 269; Morris *v.* Gilmer, 129 U. S. 315, 32 L. Ed. 690.

15. Not to be joined with pleas in bar.—Sheppard *v.* Graves, 14 How. 505, 509, 14 L. Ed. 518.

It has ever been received as a canon of pleading, that matters which appertain solely to the jurisdiction of a court, should never be blended with questions which enter essentially into the subject matter of the controversy; and that all defenses involving inquiries into that subject matter imply and admit the authority of the court to adjudicate upon them. Hence it is, that pleas to the jurisdiction are deemed inconsistent with those which appertain to the merits of a cause. Sheppard *v.* Graves, 14 How. 505, 509, 14 L. Ed. 518.

16. During trial.—It is within the discretion of the court to refuse to allow a plea to be filed, during the trial, setting up that the court is without jurisdiction because of want of diversity of citizenship of parties. Mexican Central R. Co. *v.* Pinkney, 149 U. S. 194, 37 L. Ed. 699.

17. Objection cannot be made for first time in supreme court.—Burbank *v.* Bigelow, 154 U. S. 558. See the titles APPEAL AND ERROR; EXCEPTIONS AND OBJECTIONS.

The objection in an action at law that the matter of plaintiff's demand is one of equitable cognizance in the federal courts cannot prevail, where no objection was raised in the court below at any stage of the proceedings, and it cannot be permitted to a defendant to go to trial before a jury on the facts of a case involving fraud, and let it pro-

a plea to the jurisdiction comes too late after a mandate has gone down from the supreme court to the court below.[18]

(3) *Form and Sufficiency*—(a) *In General.*—A plea to the jurisdiction, though not a precise, distinct, or a formal plea, which denies the truth of the averment of the citizenship of the plaintiffs, as they had affirmed it to be in the petition is sufficient.[19] But where a court has acquired jurisdiction over the subject matter of a suit by attachment, a defendant wishing to object to the jurisdiction over the person must make a separate objection upon that ground, and cannot join it with an objection to the jurisdiction over the subject matter.[20]

(b) *Necessity for Plea to Give Better Writ.*—If a plea in abatement is put in, it must not only make out the exception, but point to the particular court to which the case belongs. A plaintiff in law or equity, is not to be driven from court to court by such pleas; if a defendant seeks to quash a writ, or dismiss a bill for such cause, he must give the plaintiff a better one, and shall never put in a second plea to the jurisdiction of that court, to which he has driven the plaintiff by his plea.[21]

(c) *Objection That Parties Are Not Citizens of Different States.*—A plea to the jurisdiction of the circuit court upon the ground that the parties are not citizens of different states must show that the parties were citizens of the same state, at the time the action was brought, and not merely at the time of the plea pleaded; the jurisdiction depends upon the state of things at the time of the action brought; and after it is once vested, it cannot be ousted by a subsequent change of residence of either of the parties.[22]

(4) *Waiver of Objection.*—See post, "Waiver of Grounds of Abatement," II, B.

(5) *Burden of Proof.*—Where a plea is filed to the jurisdiction of the court, upon the ground that the plaintiff is a resident of the same state with the defendant, it is incumbent on the defendant to prove the allegation.[23]

(6) *Appeal and Error.*—A writ of mandamus cannot be used to bring up for review a judgment of the circuit court on a plea to the jurisdiction.[24] A judg-

ceed to judgment on the verdict without any attempt to assert the equitable character of the suit, and then raise that question for the first time in the supreme court. Burbank *v.* Bigelow, 154 U. S. 558, 559.

18. After return of mandate to lower court.—Whyte *v.* Gibbes, 20 How. 541, 15 L. Ed. 1016.

19. Form and sufficiency of plea in general.—Eberly *v.* Moore, 24 How. 147, 158, 16 L. Ed. 612.

"We may say as Lord Denman said, in Horner *v.* Keppel, 10 A. and E. 17: 'Where a plea is clearly frivolous on the face of it, that is a good ground for setting it aside; but the plea here is not quite bad enough to warrant that remedy.'" Eberly *v.* Moore, 24 How. 147, 158, 16 L. Ed. 612.

20. Objections to service of process.—Fitzgerald, etc., Construction Co. *v.* Fitzgerald, 137 U. S. 98, 34 L. Ed. 608.

21. Necessity for plea to give better writ.—Rhode Island *v.* Massachusetts, 12 Pet. 657, 719, 9 L. Ed. 1233.

22. Objection that parties are not citizens of different states.—Mullen *v.* Torrance, 9 Wheat. 537, 6 L. Ed. 154.

A and B were in partnership, as merchants, in the state of Louisiana, and upon dissolution of the connection, B purchased the stock giving A, in payment for the same, a promissory note, payable, after its date, to the order of A and B. Although the note was made payable to the order of A and B, B was in no wise interested in it, as the payee thereof; A was a citizen of Ohio, and B a citizen of the state of Louisiana. In a suit by A against B on the note it was held that an objection to the jurisdiction of the United States court by plea in abatement on the ground, that the note was given to A and B and as B was a citizen of Louisiana, the suit was interdicted by the prohibition of the judiciary act, which declared that the courts of the United States shall not have cognizance of a suit in favor of an assignee of a chose in action, unless a suit should have been prosecuted in said court, for the same, if no assignment had been made, except in cases of foreign bills of exchange, could not be sustained, since B never had any interest, as payee, in the note. McMicken *v.* Webb, 11 Pet. 25, 9 L. Ed. 618.

Generally, as to federal jurisdiction in case of diverse citizenship of parties, see the titles COURTS; JURISDICTION.

23. Burden of proof.—Sheppard *v.* Graves, 14 How. 505, 14 L. Ed. 518.

24. Review by mandamus.—Ex parte Baltimore, etc., R. Co., 108 U. S. 566, 567, 27 L. Ed. 812; Ex parte Des Moines, etc.,

ment overruling a plea in abatement is open to review on proceedings in error brought by the plaintiff,[25] and no assignment of error is required in order for the supreme court to review a judgment overruling the plea.[26]

2. ANSWER.—Matters in abatement cannot be taken advantage of by averments in the answer, even under the 23rd rule of the supreme court regulating proceedings in equity.[27]

3. PLEAS PUIS DARREIN CONTINUANCE—a. *Definition and Nature.*—When matter of defense has arisen, after the commencement of a suit, it cannot be pleaded in bar of the action, generally, but must, when it has arisen after issue joined, be pleaded puis darrein continuance.[28]

b. *Grounds for Plea.*—Matters arising after the institution of the action, such as revocation of the plaintiff's letters testamentary,[29] the termination of the defendant's official authority,[30] that the defendant has paid the claim sued upon on

R. Co., 103 U. S. 794, 26 L. Ed. 461. See the titles APPEAL AND ERROR; MANDAMUS.

25. Review on error brought by plaintiff.—Scott *v.* Sandford, 19 How. 393, 15 L. Ed. 691.

When a plea to the jurisdiction, in abatement, is overruled by the court upon demurrer, and the defendant pleads in bar, and upon these pleas the final judgment of the court is in his favor—if the plaintiff brings a writ of error, the judgment of the court upon the plea in abatement is before the supreme court, although it was in favor of the plaintiff—and if the court erred in overruling it, the judgment must be reversed, and a mandate issued to the circuit court to dismiss the case for want of jurisdiction. Scott *v.* Sandford, 19 How. 393, 15 L. Ed. 691.

26. Assignment of error.—Pennsylvania R. Co. *v.* St. Louis R. Co., 116 U. S. 472, 29 L. Ed. 696.

Where a plea to the jurisdiction on the ground that parties were not citizens of different states was overruled by the circuit court, but no error was assigned on the ruling and no reference made to it in the argument on appeal, the court of its own motion gave counsel time to file printed arguments on that question. Pennsylvania R. Co. *v.* St. Louis R. Co., 116 U. S. 472, 29 L. Ed. 696.

As to assignments of error, see the title APPEAL AND ERROR.

27. Raising objections in abatement by answer.—Livingston *v.* Story, 11 Pet. 351, 352, 9 L. Ed. 746.

The 23d rule of the supreme court, for the regulation of equity practice in the circuit courts, is understood by the supreme court to apply to matters applicable to the merits, and not to mere pleas to the jurisdiction, and especially, to those founded on any personal disability, or personal character of the party suing; or to any pleas, merely in abatement. The rule does not allow a defendant, instead of filing a formal demurrer or a plea, to insist on any special matter in his answer; and have also the benefit thereof, as if he had pleaded the same matter, or had demurred to the bill; in this respect, the rule is merely affirmative of the general rule of the court of chancery; in which, matters in abatement, and to the jurisdiction, being preliminary in their nature, must be taken advantage of by a plea, and cannot be taken advantage of in a general answer; which necessarily admits the right and capacity of the party to sue. Livingston *v.* Story, 11 Pet. 351, 352, 9 L. Ed. 746.

28. Definition and nature of plea.—Yeaton *v.* Lynn, 5 Pet. 224, 8 L. Ed. 105; Thompson *v.* United States, 103 U. S. 480, 483, 26 L. Ed. 521.

If any matter of defense has arisen, after an issue in fact, it may be pleaded by the defendant, puis darrein continuance; as, that the plaintiff has given him a release, or, in an action by an administrator, that the plaintiff's letters of administration have been revoked. Yeaton *v.* Lynn, 5 Pet. 224, 8 L. Ed. 105.

Where a plea differs from a technical plea of puis darrein continuance, only in the circumstance, that the satisfaction is alleged to have been after the commencement of the suit, instead of after the last continuance of the suit, it in principle is the same, since each of them requires the same commencement and conclusion; that is, instead of actio non, generally, each must be pleaded with the prayer of action non ulterius habere, etc.; and the judgment must follow the prayer, and is repugnant to, and incompatible with, that of a general judgment upon matters before the suit brought. United States Bank *v.* Carneal, 2 Pet. 540, 548, 7 L. Ed. 513.

29. Revocation of letters testamentary.—Where the plaintiff was executor, when the suit was brought, and when issue was joined, and could then rightfully maintain the action, the revocation of letters testamentary should be brought before the court by a plea, since the last continuance, and if it is not done the defendant must be considered as waiving this defense, and resting his cause on the general issue. Yeaton *v.* Lynn, 5 Pet. 224, 8 L. Ed. 105.

30. Termination of official authority.—Where in a proceeding in mandamus

process from a state court,[31] or that the defendant, in a real action, has acquired title since the institution of the suit,[32] should be pleaded by a plea puis darrein continuance.

c. *Effect of Plea*.—A plea puis darrein continuance waives all prior pleas, and amounts to an admission of the cause of the action set up in the plaintiff's declaration.[33]

d. *Effect of Refusal to Permit Plea to Be Filed*.—A defendant who is not permitted to plead puis darrein continuance, the satisfaction of the penalty of a bond upon which he is sued, is entitled to relief in equity.[34]

e. *Judgment on Plea*.—If matter in abatement be pleaded puis darrein continuance, the judgment, if against the defendant, is peremptory.[35]

B. Waiver of Grounds of Abatement—1. APPEARANCE.—Appearance as waiving matters in abatement is treated elsewhere in this work.[36]

2. PLEADING IN BAR—a. *In General*.—In the proper order of pleading which is obligatory, a plea in bar waives all pleas, and the right to plead, in abatement.[37]

against a township clerk, the defendant desires to set up that his successor has been appointed since the issue was made up in the case, it should be set up by a plea puis darrein continuance, or its equivalent. Thompson *v.* United States, 103 U. S. 480, 483, 26 L. Ed. 521.

31. Payment of claim on process from state court.—Humphreys *v.* Leggett, 9 How. 297, 313, 13 L. Ed. 145.

Where a surety has been compelled to pay the whole amount of his bond by process from the state courts, before another judgment is obtained against him, but after the institution of the suit, this would be a good defense to the action if pleaded puis darrein continuance. Humphreys *v.* Leggett, 9 How. 297, 313, 13 L. Ed. 145.

32. Acquisition of title by defendant in real action pending suit.—Hardy *v.* Johnson, 1 Wall. 371, 17 L. Ed. 502.

According to the system of pleading and practice in common-law cases which prevails in the courts of California, and which has been adopted by the circuit court of the United States in that state, a title acquired by the defendant in ejectment after issue joined in the action can only be set up by a supplemental answer in the nature of a plea puis darrein continuance. Hardy *v.* Johnson, 1 Wall. 371, 17 L. Ed. 502.

33. Waiver of prior pleas.—Crawford *v.* Burke, 195 U. S. 176, 185, 49 L. Ed. 147; Wallace *v.* McConnell, 13 Pet. 135, 137, 10 L. Ed. 95; Yeaton *v.* Lynn, 5 Pet. 224, 8 L. Ed. 105; Renner *v.* Marshall, 1 Wheat. 215, 218, 4 L. Ed. 74.

The effect of a plea puis darrein continuance is that on the record, the cause of action is admitted, to the same extent as if no other defense had been urged than that contained in this plea. Wallace *v.* McConnell, 13 Pet. 135, 152, 10 L. Ed. 95.

A plea puis darrein continuance is always pleaded by way of substitution for the former plea, on which no proceeding is afterwards had. United States Bank *v.* Carneal, 2 Pet. 540, 548, 7 L. Ed. 513.

An action was instituted on a promissory note against the maker, by which the latter promised to pay, at the office of discount and deposit of the bank of the United States, at Nashville three years after date, $4,080. In the declaration, which set out the note according to its terms, and alleged the promise to pay, according to the tenor of the note, there was no averment that the note was presented at the bank, or demand of payment made there; the defendant pleaded payment and satisfaction of the note, and issue was joined thereon. Afterwards, at the succeeding term, the defendant interposed a plea of puis darrein continuance, stating, that $4,204, part of the amount of the note, had been attached by B. & W. in a state court of Alabama, under the attachment law of the state, and a judgment had been obtained against him for $4,204, and costs, with a stay of proceedings until the further proceedings in the case, which remained undetermined. The plaintiff demurred to this plea, and the circuit court sustained the demurrer; and judgment was given for the plaintiff for $679, the residue of the note beyond the amount attached, and a final judgment for the whole amount of the note. Held, that there was no error in the judgment of the circuit court. Wallace *v.* McConnell, 13 Pet. 135, 136, 10 L. Ed. 95.

34. Effect of refusal to permit plea to be filed.—Leggett *v.* Humphreys, 21 How. 66, 67, 16 L. Ed. 50.

35. Judgment on plea.—Renner *v.* Marshall, 1 Wheat. 215, 4 L. Ed. 74.

36. Appearance as waiver of matters in abatement.—As to appearance as waiving matters in abatement, see the title APPEARANCES.

37. Pleading in bar in general.—Baltimore, etc., R. Co. *v.* Harris, 12 Wall. 65, 84, 20 L. Ed. 354; Young *v.* Martin, 8 Wall. 354, 19 L. Ed. 418; Aurora City *v.* West, 7 Wall. 82, 92, 19 L. Ed. 42; Clear-

b. *Objections to Capacity of Plaintiffs to Sue.*—Pleading to the merits, has been held by this court to be an admission of the capacity of the plaintiffs to sue; the general issue admits, not only the competency of the plaintiffs to sue, but to sue in the particular action which they bring.[38] This rule has been held to apply to want of corporate capacity on the part of the plaintiff,[39] and to the want of authority on the part of a person suing as personal representative.[40]

c. *Misnomer of Parties.*—A misnomer of parties is waived by pleading to the merits.[41]

d. *Misjoinder of Parties.*—A failure to sue one or all of several joint and several obligors, suit being brought against an intermediate number, if not taken advantage of, by plea in abatement, is waived, by pleading to the merits.[42]

e. *Variance or Defects in Writ.*—To allow a defendant, after the general issue has been pleaded, to avail himself of any defect or mistake in the writ, or variance or repugnancy between the count and the writ, would be, not to try the cause at issue, but would have the effect to take it from the jury and to place it before the court, upon a point of pleading which has not been pleaded, and which is unconnected with the merits of the cause.[43]

f. *Objections to Jurisdiction.*—Formerly if a plea to the jurisdiction and a plea in bar were put in and upon this state of the pleading the cause went on to trial, the plea to the jurisdiction was considered as waived.[44] But under the act of

water *v.* Meredith, 1 Wall. 25, 42, 17 L. Ed. 604; Fitzgerald, etc., Construction Co. *v.* Fitzgerald, 137 U. S. 98, 105, 34 L. Ed. 608; Bell *v.* Mobile, etc., R. Co., 4 Wall. 598.

If a plea in abatement be filed with the general issue, the latter waives the former. De Sobry *v.* Nicholson, 3 Wall. 420, 423, 18 L. Ed. 263; Bailey *v.* Dozier, 6 How. 23, 30, 12 L. Ed. 328; Sheppard *v.* Graves, 14 How. 505, 14 L. Ed. 518.

Effect of withdrawal of plea in bar.—Where the defendant appeared, and pleaded to the action, and at the trial withdrew his plea, it was held that the court could take no notice of any matter of abatement in the writ or declaration. Smith *v.* Clapp, 15 Pet. 125, 128, 10 L. Ed. 684.

38. Pleading in bar as waiver of objection for incapacity of plaintiff.—Society, etc., *v.* Pawlet, 4 Pet. 480, 7 L. Ed. 927; Yeaton *v.* Lynn, 5 Pet. 224, 8 L. Ed. 105; Philadelphia, etc., R. Co. *v.* Quigley, 21 How. 202, 214, 16 L. Ed. 73; Conard *v.* Atlantic Ins. Co., 1 Pet. 386, 7 L. Ed. 189; Evans *v.* Gee, 11 Pet. 80, 9 L. Ed. 639; Wickliffe *v.* Owings, 17 How. 47, 15 L. Ed. 44.

39. Plea to merits as admitting corporate capacity.—Conard *v.* Atlantic Ins. Co., 1 Pet. 386, 387, 7 L. Ed. 189.

Ejectment to recover a lot of land, being the first division lot laid out to the right of the Society in the Town of Pawlet. The plaintiffs were described in the writ as "The Society for the Propagation of the Gospel in Foreign parts, a corporation duly established in England, within the dominions of the king of the United Kingdom of Great Britain and Ireland, the members of which society are aliens, and subjects of the said king;" the defendants pleaded the general issue of not guilty. The general issue admits the competency of the plaintiffs to sue, in the corporate capacity in which they have sued. Society, etc., *v.* Pawlet, 4 Pet. 480, 7 L. Ed. 927.

40. Plea to merits as admitting representative capacity.—In an action by a plaintiff as administrator, a plea to the merits admits the representative character of the plaintiff to the extent stated in the declaration, and if that statement is consistent with the grant of letters within the state, it also admits his right to sue in that capacity; but such a plea admits nothing more than the title stated in the declaration. Noonan *v.* Bradley, 9 Wall. 394, 19 L. Ed. 757.

When a suit is brought by an administrator, during the minority of the executor, his powers as administrator are determined, when the executor has attained his full age; and the fact that he has not attained his full age must be averred in the declaration; but if this averment be omitted, and the defendant pleads in bar, he admits the ability of the plaintiff to sue, and the judgment is not void. Yeaton *v.* Lynn, 5 Pet. 224, 8 L. Ed. 105.

41. Misnomer of parties.—Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 137 U. S. 568, 572, 34 L. Ed. 784; Lafayette Ins. Co. *v.* French, 18 How. 404, 409, 15 L. Ed. 451.

42. Misjoinder of parties.—Minor *v.* Mechanics' Bank, 1 Pet. 46, 47, 7 L. Ed. 47; Barry *v.* Foyles, 1 Pet. 309, 311, 7 L. Ed. 157.

43. Variance or defects in writ.—McKenna *v.* Fish, 1 How. 240, 247, 11 L. Ed. 117.

44. Objections to jurisdiction.—Bailey *v.* Dozier, 6 How. 23, 12 L. Ed. 328; Smith *v.* Kernochen, 7 How. 198, 216, 12 L. Ed.

1875, the court will dismiss the suit at any time where it appears that it does not involve a controversy within its jurisdiction.[45]

g. *In Criminal Cases.*—By pleading not guilty to the indictment, and going to trial without making any objection to the mode of selecting the grand jury, such objection is waived.[46]

3. Removal of Cause, and Proceedings Subsequent to Removal.—A defendant, by filing a petition in a state court for removal of the cause to the United States court, in general terms, unaccompanied by a plea in abatement, and without specifying or restricting the purpose of his appearance, does not thereby waive objection to the jurisdiction of the court for want of sufficient service of the summons.[47] And where the case has been properly removed, and the state court thereafter asserts jurisdiction and proceeds to adjudicate the case, against the protest of the party removing it, such party does waive his right to object to the jurisdiction of the state court by appearing and contesting the suit.[48]

4. Going to Trial on Merits.—Going to trial on merits without objecting is a waiver of matters pleadable in abatement.[49] This rule has been applied to

666; Rhode Island *v.* Massachusetts, 12 Pet. 657, 719, 9 L. Ed. 1233; St. Louis, etc., R. Co. *v.* McBride, 141 U. S. 127, 35 L. Ed. 659; Texas, etc., R. Co. *v.* Saunders, 151 U. S. 105, 38 L. Ed. 90.

A party against whose property a foreign attachment has issued in a circuit court of the United States, although the circuit court had no right to issue such an attachment, having appeared to the suit, and pleaded to issue, cannot afterwards deny the jurisdiction of the court; the party has, as a personal privilege, a right to refuse to appear; but it is also competent to him to waive the objection. Toland *v.* Sprague, 12 Pt. 300, 9 L. Ed. 1093.

An objection to jurisdiction, on the ground of exemption from the process of the court in which the suit is brought, or the manner in which a defendant is brought into it, is waived, by appearance and pleading to issue; but when the objection goes to the power of the court over the parties, or the subject matter, the defendant need not, for he cannot, give the plaintiff a better writ or bill. Rhode Island *v.* Massachusetts, 12 Pet. 657, 9 L. Ed. 1233.

45. Rule under act of 1875.—See ante, "Rule under Act of 1875." II, A, 1, b, (1), (b), bb.

A defendant does not preclude himself from raising a question of jurisdiction, by inviting the action of the court upon a plea of former adjudication and by waiting until the court has ruled upon that plea. Morris *v.* Gilmer, 129 U. S. 315, 326, 32 L. Ed. 690.

46. In criminal cases.—United States *v.* Gale, 109 U. S. 65, 67, 27 L. Ed. 857.

47. Petition for removal as waiver of matters in abatement.—National Accident Society *v.* Spiro, 164 U. S. 281, 41 L. Ed. 435; Wabash Western Railway *v.* Brow, 164 U. S. 271, 41 L. Ed. 431; Fitzgerald, etc., Construction Co. *v.* Fitzgerald, 137 U. S. 98, 105, 34 L. Ed. 608; Goldey *v.* Morning News, 156 U. S. 518, 523, 39 L. Ed. 517.

The theory that a defendant, by filing in the state court a petition for removal into the circuit court of the United States, necessarily waives the right to insist that for any reason the state court had not acquired jurisdiction of his person, is inconsistent with the terms, as well as with the spirit, of the existing act of congress regulating removals from a court of a state into the circuit court of the United States. Goldey *v.* Morning News, 156 U. S. 518, 523, 39 L. Ed. 517. See, generally, the title REMOVAL OF CAUSES.

48. Participation in trial in state court after removal.—When a case has been properly removed from a state into a United States court, and the state court still goes on to adjudicate the case, against the resistance of the party at whose instance the removal was made, such action on its part is a usurpation, and the fact that such a party has, after the removal, contested the suit, does not, after judgment against him, constitute a waiver on his part of the question of the jurisdiction of the state court to try the case. Kern *v.* Huidekoper, 103 U. S. 485, 492, 26 L. Ed. 354; Home Life Ins. Co. *v.* Dunn, 19 Wall. 214, 22 L. Ed. 68; Removal Cases, 100 U. S. 457, 25 L. Ed. 593; New Orleans, etc., Co. *v.* Mississippi, 102 U. S. 135, 26 L. Ed. 96.

By the proceedings for the removal of a case, jurisdiction over it was transferred to the United States circuit court, and the filing by the plaintiffs below of a replication in the state court, after such removal, and the prosecution of the action to a final hearing in that court, did not reinvest the state court with jurisdiction of the cause, nor amount to a waiver of any rights resulting to the plaintiffs from the removal. Kern *v.* Huidekoper, 103 U. S. 485, 493, 26 L. Ed. 354. See, generally, the title REMOVAL OF CAUSES.

49. Going to trial on merits as waiver of grounds of abatement.—Conard *v.* Atlantic Ins. Co., 1 Pet. 386, 387, 7 L. Ed.

the objections for the plaintiffs want of capacity to sue,[50] to objections for nonjoinder or misjoinder of parties,[51] and to objections for want of service of process.[52]

III. Revival or Continuance of Suits or Actions.

A. Necessity of Proceedings to Revive.—In order to continue a suit or action by or against the personal representatives of a deceased party, the proper course of proceedings to effect the revival of the suit or action must be followed.[53]

B. Necessity for Suit to Be Pending.—In order to permit a revival, the suit or action must be actually pending at the time the proceedings to revive are had, and, for this purpose, a suit is deemed to be pending from the moment of its commencement.[54]

C. Time of Revival.—In order to revive a proceeding upon the death of a party, the steps necessary to effect the revival must be taken in proper time, otherwise the right to revive is lost.[55]

189; Bell *v.* Mobile, etc., R. Co., 4 Wall. 598.

As an objection to the institution of the suit against the defendants in three distinct capacities, even if it would have been valid, not having been taken in the court below at any stage in the case, cannot be taken in the supreme court. Kittredge *v.* Race, 92 U. S. 116, 23 L. Ed. 488.

50. Want of capacity of plaintiff to sue.—Conard *v.* Atlantic Ins. Co., 1 Pet. 386, 387, 7 L. Ed. 189; Bell *v.* Mobile, etc., R. Co., 4 Wall. 598; Yeaton *v.* Lynn, 5 Pet. 224, 8 L. Ed. 105.

51. Nonjoinder or misjoinder of parties.—Burbank *v.* Bigelow, 154 U. S. 558, 23 L. Ed. 542; Smith *v.* Kernochen, 7 How. 198, 216, 12 L. Ed. 666; D'Wolf *v.* Rabaud, 1 Pet. 474, 7 L. Ed. 227; Evans *v.* Gee, 11 Pet. 80, 9 L. Ed. 639; Simms *v.* Hundley, 6 How. 1, 12 L. Ed. 319.

A question of joinder of parties should be taken in limine, and if it is not taken at all in the court below, it cannot be taken for the first time in the supreme court, even if it would have been valid in the court below at any stage in the cause. Kittredge *v.* Race, 92 U. S. 116, 119, 23 L. Ed. 488.

52. Want of service of process.—In a proceeding in rem the defendant having denied the power of the court to proceed at all, and upon decision against it having joined issue and gone to trial on the merits, as jurisdiction existed over the subject matter, it was properly maintained over the person, even though the service on the person might have been set aside. Fitzgerald, etc., Construction Co. *v.* Fitzgerald, 137 U. S. 98, 34 L. Ed. 608.

53. Necessity for proceedings to revive.—Dolan *v.* Jennings, 139 U. S. 385, 35 L. Ed. 217; Bigler *v.* Waller, 14 Wall. 297, 307, 20 L. Ed. 891; Macker *v.* Thomas, 7 Wheat. 530, 5 L. Ed. 515.

Where a suit by two parties was prosecuted to a final decree, and one died, and an appeal was taken by the defendant, and it did not appear that any order was procured directed to the proper representatives of the estate of one of the plaintiffs, or notifying them of the appeal, nor that they had voluntarily appeared, and so far as disclosed by the record, the cause of action did not on the death of one of the complainants survive to the other, and there was no severance between the surviving complainant and the legal representatives of the other, it was held, that the proper course of proceeding had been wholly disregarded. Dolan *v.* Jennings, 139 U. S. 385, 35 L. Ed. 217.

Generally, as to effect of death of party pending appeal or proceedings in error, see the title APPEAL AND ERROR.

A decree cannot be rendered against heirs unless they are made parties on death of the defendant. Bigler *v.* Waller, 14 Wall. 297, 307, 20 L. Ed. 891.

54. When suit is deemed to be pending.—In re Connaway, 178 U. S. 421, 427, 44 L. Ed. 1134.

Under § 955 of the Revised Statutes providing that an executor or administrator of plaintiff or petitioner or defendant in any suit in any court of the United States may be made a party by scire facias served from the office of the clerk of the court where the suit is pending, the suit is deemed to be pending from the moment of its commencement. In re Connaway, 178 U. S. 421, 427, 44 L. Ed. 1134.

Under § 405 of the California Code of Civil Procedure the filing of the complaint is the commencement of the action, and a suit is deemed to be pending within the above rule from that time. In re Connaway, 178 U. S. 421, 427, 44 L. Ed. 1134.

55. Time of revival.—Dolan *v.* Jennings, 139 U. S. 385, 35 L. Ed. 217; Horsburg *v.* Baker, 1 Pet. 232, 7 L. Ed. 125; Barribeau *v.* Brant, 17 How. 43, 15 L. Ed. 34.

After an answer and discovery, the rule is, that a suit brought merely for discovery, cannot be revived; the object is

D. Who May Revive—1. Successor in Interest.—The only persons who, upon principles of law and the rules of the supreme court, can be permitted to appear in the stead of a deceased plaintiff are those who, upon his death, succeed to the interest he then had, and upon whom his estate then devolves.[56] A person having no interest in the matter in controversy is not entitled to revive the suit.[57]

2. Assignee.—Where an original party has assigned the cause of action, his assignee may be substituted.[58]

3. Survivor.—If one of several joint obligees be dead, a suggestion of that fact is sufficient to show a right to sue in the names of the survivors.[59]

4. Personal Representative—a. *Right to Revive.*—When the plaintiff, or petitioner, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, prosecute any such suit to final judgment.[60]

obtained, and the plaintiff has no motive for reviving it. Horsburg *v.* Baker, 1 Pet. 232, 7 L. Ed. 125.

Where more than four years elapsed after a final decree, it was held too late for the supreme court on appeal to obtain jurisdiction over the legal representatives of one of the complainants who died after final decree. Dolan *v.* Jennings, 139 U. S. 385, 35 L. Ed. 217.

Where the death of a party complainant was suggested at December term, 1851, of this court, and his legal representatives did not appear by the tenth day of this term, the bill must, as to him, be entered, abated under the 61st rule of this court. Barribeau *v.* Brant, 17 How. 43, 15 L. Ed. 34.

As to revival of proceedings on appeal or writ of error, see the title APPEAL AND ERROR.

56. Successors in interest.—Barribeau *v.* Brant, 17 How. 43, 45, 15 L. Ed. 34; Terry *v.* Sharon, 131 U. S. 40, 46, 33 L. Ed. 94.

Libel for prize money filed by admiral for himself and others.—Where a libel in prize was filed by an admiral in his own behalf and in behalf of all the officers and enlisted men of the navy taking part in an engagement, and the admiral dies pending the suit, the personal representatives of the deceased need not come in but any one interested in the proceedings may be substituted. United States *v.* Sampson, 187 U. S. 436, 47 L. Ed. 248. See the title PRIZE.

57. Person without interest in matter in controversy.—Terry *v.* Sharon, 131 U. S. 40, 46, 33 L. Ed. 94.

The idea cannot be sustained that when a judgment or decree is rendered against a defendant, and it remains wholly unexecuted, anybody, without any right, authority, or interest in the matter, can come in, and, by filing a bill of revivor, or by making a motion, have himself substituted for the plaintiff who has deceased, with all the rights which that plaintiff would have had to enforce the judgment or decree. Two questions must always present themselves in such a case, or at least may be presented; the one is, whether the decree is in condition that any further action can be had, or any right asserted under it by those who succeed the plaintiff as heirs, devisees, executors or otherwise; and the other is, whether the party who thus asserts the right to the benefit of the decree is entitled to such right, and is by law the person who can claim its enforcement, or should in any action or matter arising out of the decree, represent the rights of the original plaintiff. Terry *v.* Sharon, 131 U. S. 40, 46, 33 L. Ed. 94.

Railroad company deriving title by purchase at foreclosure sale.—A railroad company which derived its title from the foreclosure of a mortgage of another railroad is not entitled to revive a suit in equity originally instituted by stockholders of the latter company, the suit having been instituted before it acquired title. Keokuk, etc., R. Co. *v.* Scotland County, 152 U. S. 318, 38 L. Ed. 457; Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301, 38 L. Ed. 450.

58. Assignee.—Amadoe *v.* Northern Assur. Co., 201 U. S. 194, 50 L. Ed. 722; Ex parte South, etc., R. Co., 95 U. S. 221, 24 L. Ed. 355.

59. Survivor.—Farni *v.* Tesson, 1 Black 309, 17 L. Ed. 67.

60. Right of personal representative to revive.—Rev. Stat., § 955; Patton *v.* Brady, 184 U. S. 608, 612, 46 L. Ed. 713; Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 691, 38 L. Ed. 311; McCoul *v.* LeKamp, 2 Wheat. 111, 4 L. Ed. 196; Clarke *v.* Mathewson, 12 Pet. 164, 9 L. Ed. 1041; Mandeville *v.* Riggs, 2 Pet. 482, 7 L. Ed. 493; Hemingway *v.* Stansell, 106 U. S. 399, 402, 27 L. Ed. 245; Richards *v.* Maryland Ins. Co., 8 Cranch 84, 93, 3 L. Ed. 496; Green *v.* Watkins, 6 Wheat. 260, 5 L. Ed. 256; Macker *v.* Thomas, 7 Wheat. 530, 5 L. Ed. 515; In re Connaway, 178 U. S. 421, 434, 44 L. Ed. 1134; Griffith *v.* Frazier, 8 Cranch 8, 3 L. Ed. 471; Taylor *v.* Savage, 1 How. 282, 11 L. Ed. 132; Taylor *v.* Savage, 2 How. 393, 394, 11 L. Ed. 313.

Executor of assignee in bankruptcy.—Upon the death of an assignee under the

b. *Necessity for Representative to Be Citizen of, or Domiciled within, State.*—In the 31st section of the judiciary act of 1789 (Rev. Stat., § 995), congress manifestly treats the revivor of a suit, by the representative of the deceased party, as a matter of right, and as a mere continuance of the original suit; without any distinction as to the citizenship of the representative, whether he belongs to the same state where the cause is pending or to another state.[61] And a court which has once acquired jurisdiction of a suit does not lose it by a change of domicile of the parties, and may, when the suit is of a nature that survives, bring in the representatives or successors of a party who has died or ceased to exist, without regard to their domicile.[62]

c. *Proof of Representative Character as Prerequisite to Revival.*—Unquestionably, an executor must show himself to be executor, unless the fact be admitted by the parties; and the defendant may insist on the production of his letters testamentary, before he shall be permitted to prosecute.[63] But if the order for his admission, as a party, be made, it is too late to contest the fact of his being an executor.[64]

F. Against Whom Action May Be Revived.—1. PERSONAL REPRESENTATIVES.—When a defendant, in any suit in any court of the United States, dies before final judgment, the executor or administrator of such deceased party may, in case the cause of action survives by law, defend any such suit to final judgment, and upon scire facias judgment may be rendered against him.[65] The fact that

bankrupt law of the United States, the right of action, for a debt due to the bankrupt, vested in the executor of the assignee. Richards *v.* Maryland Ins. Co., 8 Cranch 84, 3 L. Ed. 496.

Representative of receiver.—Where a receiver who was a party to a cause died after the case had been carried to the circuit court of appeals and before it was finally decided and his receivership had in fact terminated before that time, it was held that the case might be revived in the name of his executor. Cake *v.* Mohun, 164 U. S. 311, 41 L. Ed. 447.

Rivival by substitution of personal representative a substitute for journey's account.—The mode of continuing a suit in the name of the executor or administrator, provided for by statute, is a complete substitute for the continuance by journey's account. But even at common law, such a continuance or connection of suit was allowed in no case of voluntary abandonment, and if the benefit of it was intended to be asserted, it was necessary to claim it, in the form of renewing the action. Richards *v.* Maryland Ins. Co., 8 Cranch 84, 93, 3 L. Ed. 496.

61. Representatives need not be citizens.—Clarke *v.* Mathewson, 12 Pet. 164, 9 L. Ed. 1041.

A bill was filed by W., a citizen of Connecticut, against M. and others, citizens of Rhode Island, in the circuit court of the United States for the district of Rhode Island; an answer was put in to the bill, and the cause was referred to a master for an account; pending these proceedings, the complainant died; and administration of his effects was granted to C., a citizen of Rhode Island, who filed a bill of revivor in the circuit court. The laws of Rhode Island do not permit a person residing out of the state to take out administration of the effects of a deceased person within the state; and make such administration indispensable to the prosecution and defense of any suit in the state, in right of the estate of the deceased. Held, that the bill of revivor was in no just sense an original suit but was a mere continuation of the original suit; the parties to the original suit were citizens of different states; and the jurisdiction of the court completely attached to the controversy; having so attached, it could not be divested by any subsequent proceedings; and the circuit court of Rhode Island had rightful authority to proceed to its final determination. Clarke *v.* Mathewson, 12 Pet. 164, 9 L. Ed. 1041.

62. Change of domicile, by representative.—Hemingway *v.* Stansell, 106 U. S. 399, 402, 27 L. Ed. 245.

63. Proof of representative character as prerequisite to revival.—Wilson *v.* Codman, 3 Cranch 193, 207, 2 L. Ed. 408.

64. Admission of representative as party without proof of official character.—Wilson *v.* Codman, 3 Cranch 193, 207, 2 L. Ed. 408.

65. Revival against personal representatives.—Rev. Stat., § 995; Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 691, 38 L. Ed. 311; Green *v.* Watkins, 6 Wheat. 260, 5 L. Ed. 256; In re Connaway, 178 U. S. 421, 435, 44 L. Ed. 1134; Macker *v.* Thomas, 7 Wheat. 530, 5 L. Ed. 515; Patton *v.* Brady, 184 U. S. 608, 612, 46 L. Ed. 713; McCoul *v.* LeKamp, 2 Wheat. 111, 4 L. Ed. 196; Clarke *v.* Mathewson, 12 Pet. 164, 9 L. Ed. 1041; Mandeville *v.* Riggs, 2 Pet. 482, 7 L. Ed. 493; Hemingway *v.* Stansell, 106 U. S. 399, 402, 27 L. Ed. 245; Richards *v.* Maryland Ins.

the personal representative of the defendant is not a citizen of or domiciled in the state, wherein the cause of action is pending does not affect the right to revive the suit against him.[66]

2. Successor.—An action may be revived against the successor of the person against whom it was originally brought, where it involves a question with respect to which the successor occupies the same position as that occupied by the original defendant.[67]

3. Survivor.—Where one of two defendants dies before the commencement of the term, upon the suggestion of his death entered of record, the cause of action surviving, the judgment may be entered against the surviving defendant.[68]

4. Heirs and Terre Tenants.—The law is well settled, that where a defendant in ejectment dies, the judgment must be revived against both his heirs and the terre tenants.[69]

F. Proceedings to Revive or Continue—1. Actions at Law—a. *Mode of Proceeding*—(1) *State Procedure as Governing in Federal Courts.*—If a cause of action survives, the practice, pleadings, and forms and modes of proceeding in the courts of the state may be resorted to in the courts of the United States for the purpose of keeping the suit alive and bringing in the proper parties.[70]

2. Suggestion of Death and Substitution of Parties.—a. *Effect of Suggestion of Death and Order of Revival.*—Where the death of a sole plaintiff is suggested, both parties being present, and the court makes the order, without objection, that his successors in interest be made plaintiffs in the case, the suggestion, made without objection, and the order of the court thereon, settle prima facie, for the purposes of the case, the fact of the death of the original plaintiff.[71]

Co., 8 Cranch 84, 93, 3 L. Ed. 496; Griffith *v.* Frazier, 8 Cranch 8, 3 L. Ed. 471; Taylor *v.* Savage, 1 How. 282, 11 L. Ed. 132; Taylor *v.* Savage, 2 How. 393, 394, 11 L. Ed. 313; Wilson *v.* Codman, 3 Cranch 193, 207, 2 L. Ed. 408.

Upon the death of some of the parties to the bill, who have been served with process, a suit ought to be revived against their personal representatives, if they can be brought before the court; unless some good reason, such as absolute insolvency, could be assigned to justify the omission. Mandeville *v.* Riggs, 2 Pet. 482, 7 L. Ed. 493.

Upon the death of the administrator, a suit pending against him for property which afterwards goes to the administrator de bonis non, may be revived against the latter, instead of the administrator of the first administrator. De Valengin *v.* Duffy, 14 Pet. 282, 10 L. Ed. 457.

66. Effect of nonresidence of representative.—Clarke *v.* Mathewson, 12 Pet. 164, 9 L. Ed. 1041; Hemingway *v.* Stansell, 106 U. S. 399, 402, 27 L. Ed. 245.

67. Successor.—Hemingway *v.* Stansell, 106 U. S. 399, 27 L. Ed. 245; Caledonia Coal Co. *v.* Baker, 196 U. S. 432, 49 L. Ed. 540.

A proceeding in mandamus to compel a territorial judge to perform a certain act, may be revived against his successor, where the former dies pending an appeal, and the latter consents to the revival. Caledonia Coal Co. *v.* Baker, 196 U. S. 432, 49 L. Ed. 540.

Where a board of levee commissioners is abolished and two state officers are designated by statute, as an ex officio levee board, a suit pending against the former may be revived against the latter, although both of the officers constituting the board reside out of the district. Hemingway *v.* Stansell, 106 U. S. 399, 27 L. Ed. 245.

68. Survivor.—McNutt *v.* Bland, 2 How. 9, 28, 11 L. Ed. 159.

69. Revival of ejectment against heirs and terre tenants.—Walden *v.* Craig, 14 Pet. 147, 10 L. Ed. 393.

70. State procedure as governing in federal courts.—Rev. Stat. § 914; Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 692, 38 L. Ed. 311; Schreiber *v.* Sharpless, 110 U. S. 76, 28 L. Ed. 65; In re Connaway, 178 U. S. 421, 426, 44 L. Ed. 1134.

The mode of bringing in the representative, if the cause of action survives, is governed by the law of the state, except so far as congress has regulated the subject. In re Connaway, 178 U. S. 421, 426, 44 L. Ed. 1134; Martin *v.* Baltimore, etc., R. Co., 151 U. S. 673, 38 L. Ed. 311.

71. Effect of suggestion of death and order of revival.—Stebbins *v.* Duncan, 108 U. S. 32, 38, 27 L. Ed. 641.

"It certainly cannot be the fair construction of the statute that a party may stand by and see the suggestion of the death of the opposing party entered of record and his heir or devisee substituted in his stead, and upon final trial require further proof of the death, at least without some notice of his purpose to raise that particular issue. The death of the plaintiff, after the order of the court, may be considered as settled between the

(b) *Bringing in Parties*—aa. *By Motion.*—The executor may be made a party on motion.[72]

bb. *By Scire Facias.*—Scire facias may also be employed to bring in the personal representatives of a deceased party.[73]

cc. *Effect of Want of Service of Process on Decedent.*—The representative of a deceased party may be brought in by the same procedure, whether the death of a party occur before or after service.[74]

dd. *Right of Opposite Party to Continuance.*—Upon the death of a plaintiff, and appearance of his executor, the defendant is not entitled to a continuance.[75]

b. *Review of Order of Revival.*—A plaintiff may assign for error the order of the court reviving the suit, even though they failed in that court to appear and except to the opinion of the court in relation to the order.[76]

2. SUITS IN EQUITY—a. *Bill of Revivor*—(1) *Necessity.*—When in the progress of a suit in equity, the proceedings are suspended for the want of proper parties, it is necessary to file a bill of revivor.[77]

(2) *Nature of Bill.*—A bill of revivor is not the commencement of a new suit, but is the mere continuance of the old suit.[78]

parties for that case, unless some motion is made or issue raised on the part of the defendant, by which the fact of the death is controverted." Stebbins *v.* Duncan, 108 U. S. 32, 38, 27 L. Ed. 641.

72. Bringing in executor by motion.—Wilson *v.* Codman, 3 Cranch 193, 206, 2 L. Ed. 408.

73. Bringing in executor by scire facias.—Wilson *v.* Codman, 3 Cranch 193, 206, 2 L. Ed. 408.

The statute (Rev. Stat., § 995), determines when the representative of a deceased party may be brought into an action, and that scire facias is the procedure whereby he may be brought in. It is a process of notice to the executor or administrator to come in, and if he should not come in, gives jurisdiction to the court to "render judgment against the estate of the deceased party, in the same manner as if the executor or administrator had voluntarily made himself a party." Green *v.* Watkins, 6 Wheat. 260, 5 L. Ed. 256; Macker *v.* Thomas, 7 Wheat. 530, 5 L. Ed. 515; In re Connaway, 178 U. S. 421, 434, 44 L. Ed. 1134; Wilson *v.* Codman, 3 Cranch 193, 206, 2 L. Ed. 408.

74. Effect of want of service of process on decedent.—In re Connaway, 178 U. S. 421, 431, 44 L. Ed. 1134.

75. Right of opposite party to continuance.—Wilson *v.* Codman, 3 Cranch 193, 2 L. Ed. 408.

"It is contended, on the part of the defendant, that on the suggestion of the death of either plaintiff or defendant, a scire facias ought to issue, in order to bring in his representative; or, if a scire facias should not be required, yet, that the opposite party should have the same time to plead and make a proper defense, as if such process had been actually sued. The words of the act of congress do not seem to countenance this opinion. They contemplate the coming in of the executor, as a voluntary act, and give the scire facias to bring him in, if it shall be necessary, and to enable the court 'to render such judgment against the estate of the deceased party,' 'as if the executor or administrator had voluntarily made himself a party to the suit.' From the language of the act, this may be done instanter. The opinion that it is to be done, on motion, and that the party may immediately proceed to trial, derives strength from the provision that the executor or administrator, so becoming a party, may have one continuance. This provision shows that the legislature supposed the circumstances of making the executor a party to the suit, to be no cause of delay. But as the executor might require time to inform himself of the proper defense, one continuance was allowed him for that purpose. The same reason not extending to the other party, the same indulgence is not extended to him." Wilson *v.* Codman, 3 Cranch 193, 206, 2 L. Ed. 408. See the title CONTINUANCES.

76. Review of order of revival.—Macker *v.* Thomas, 7 Wheat. 530, 533, 5 L. Ed. 515. See the title APPEAL AND ERROR.

An exception to the opinion of the court is only necessary, when the alleged error could not otherwise appear upon the record, and in such case the error is in ordering the suit to be revived and prosecuted against the heirs of the original defendant, and proceeding to render judgment against them, upon a summons and count against the original defendant, all of which appear upon the face of the record. Macker *v.* Thomas, 7 Wheat. 530, 533, 5 L. Ed. 515.

77. Necessity of bill of revivor.—Kennedy *v.* Georgia State Bank, 8 How. 586, 609, 12 L. Ed. 1209.

78. Nature of bill of revivor.—Clarke *v.* Mathewson, 12 Pet. 164, 9 L. Ed. 1041.

A bill seeking to revive a suit by in-

b. *Answer.*—New defenses, i. e., defenses not made in an answer to the original bill, cannot be first set up in an answer to a bill of revivor. Such bill puts in issue nothing but the character of the new party brought in.[79] A portion of the answer to a bill or revivor entirely impertinent to the will is not entitled to any weight as evidence, and no formal replication is required to avoid its effect as evidence.[80]

c. *Review of Decree of Revival.*—A decree reviving a suit in equity is a final decree and appealable,[81] but on appeal from a decree reviving a suit in equity, the supreme court will not go into the merits.[82]

G. Effect of Removal.—A right to revive a case given by state statute is not lost by a removal of the case to the federal court.[83]

H. Proceedings Subsequent to Revival.—Where the new parties to a proceeding in chancery are the legal representatives of an original party, and the proceedings have been revived in their names, by the order of the court, on a bill of revivor, the representatives take the place of those whom they represent, and the suit proceeds in the new form, unaffected by the change of name, and the settled practice is to use all the testimony which might have been used, if no alatement had occurred.[84] The representative can only plead what his intestate could have pleaded.[85] And the judgment is to be rendered against the persons substituted as parties and not against the deceased eo nomine.[86]

ABBREVIATIONS.—See the titles INDICTMENTS, INFORMATIONS AND PRESENTMENTS; JUDICIAL NOTICE; NAMES; PAROL EVIDENCE.

troducing the heirs of a party before the court, is, to that extent, a bill of revivor. Whiting *v.* United States Bank, 13 Pet. 6, 10 L. Ed. 33.

79. **Contents of answer to bill of revivor.**—Fretz *v.* Stover, 22 Wall. 198, 22 L. Ed. 769. See the title ANSWERS.

80. **Answer as evidence.**—Gunnell *v.* Bird, 10 Wall. 304, 308, 19 L. Ed. 913. See the title EQUITY.

81. **Decree of revivor a final decree.**—Terry *v.* Sharon, 131 U. S. 40, 33 L. Ed. 94. See the title APPEAL AND ERROR.

82. **Hearing on merits on appeal from decree of revivor.**—Terry *v.* Sharon, 131 U. S. 40, 33 L. Ed. 94. See, generally, the title APPEAL AND ERROR.

83. **Effect of removal.**—Baltimore, etc., R. Co. *v.* Joy, 173 U. S. 226, 43 L. Ed. 677; In re Connaway, 178 U. S. 421, 44 L. Ed. 1134. See, generally, the title REMOVAL OF CAUSES.

84. **Evidence subsequent to revival.**—Vattier *v.* Hinde, 7 Pet. 252, 253, 8 L. Ed. 675; Green *v.* Watkins, 6 Wheat. 260, 5 L. Ed. 256; Osborn *v.* United States, 9 Wheat. 739, 832, 6 L. Ed. 204.

If an ancestor die, pending a suit, and the proceedings be revived against his heirs, or if a suit be revived against an executor or administrator, the answer of the deceased person, or any other evidence, establishing any fact against him, might be read also against the person who succeeds to him. Osborn *v.* United States, 9 Wheat. 739, 832, 6 L. Ed. 204.

85. **Defenses available.**—McKnight *v.* Craig, 6 Cranch 183, 187, 3 L. Ed. 193.

86. **Against whom judgment rendered.**—Montgomery *v.* Sawyer, 100 U. S. 571, 25 L. Ed. 692; Greenleaf *v.* Queen, 1 Pet. 135, 138, 7 L. Ed. 85.

Where a bill had been filed against a trustee of real estate, and after his death, administration had been granted to A; who, on the petition of creditors, interested in the trust, was also appointed by the court, the substituted trustee, and the court went on to decree, that A., as trustee, should execute certain conveyances; the decree was held to be invalid; the course of proceeding, being rather to make the decree against A., in the character of administrator, because he claimed, as administrator, under a title derived from the original trustee, and was the person designated by law to represent him; or that a supplemental bill, in the nature of a bill of revivor, should have been filed against the substituted trustee; in which all the proceedings should have been stated, and he required to answer the charges contained in the original and supplemental bill. Greenleaf *v.* Queen, 1 Pet. 135, 138, 7 L. Ed. 85.

In Louisiana, if a person dies pending suit against him, and the proceedings are continued by his heirs becoming parties, the judgment should be against his succession or them; if, without reference to the revival of the suit, it be entered only against the deceased eo nomine, and be so recorded, it is, as a judicial mortgage, void against third persons. Montgomery *v.* Sawyer, 100 U. S. 571, 25 L. Ed. 692.

ABDUCTION AND KIDNAPPING.

CROSS REFERENCES.

See the title EXTRADITION.

As to abduction and kidnapping slaves, see the title SLAVES.

DEFINITION.—In the treaty with Mexico, kidnapping is thus defined: "The taking and carrying away of a free person by force or deception."[1]

ABET.—See note 2.
ABEYANCE.—See note 3.
ABIDING.—See note 4.

1. Benson *v.* McMahon, 127 U. S. 457, 32 L. Ed. 234.

2. **Abet.**—See, also, the title ACCOMPLICES AND ACCESSORIES.

In United States *v.* Gooding, 12 Wheat. 476, 6 L. Ed. 693, it is said: "In the present indictment, the offense is in the third and fourth counts laid, by aiding and **abetting,** in the very terms of the act of congress. If the crime, therefore, could be supposed to be of an accessorial nature, it is truly alleged, according to the fact, and not merely according to the intendment of law. We do not consider that the terms 'aid' and abet, used in this statute, are used as technical phrases belonging to the common law, because the offense is not made a felony, and therefore, the words require no such interpretation. The statute punishes them as substantive offenses, and not as accessorial, and the words are, therefore, to be understood as in the common parlance, and import assistance, co-operation and encouragement." This case arose upon the construction of a statute against the slave trade.

In Hicks *v.* United States, 150 U. S. 442, 455, 37 L. Ed. 1137, Brewer, J., dissenting said: "Does not the word **abet** imply an intent that the party shall do that which he is **abetted** to do? Bouvier (vol. 1, p. 39) says: 'To **abet** another to commit a murder is to command, procure, or counsel him to commit it.' We are not dealing with the mock scenes and shows of the stage, but with real life, and in that who does not understand that the significance of the word **abet** is as Bouvier defines it, and carries with it the intent that the party shall do that which he is commanded, counselled or encouraged to do?"

3. **Abeyance.**—In Illinois Cent. R. Co. *v.* Bosworth, 133 U. S. 92, 100, 33 L. Ed. 550, it is said: "Blackstone says: 'Sometimes the fee may be in **abeyance,** that is (as the word signifies) in expectation, remembrance and contemplation of law; there being no person in esse in whom it can vest and abide; though the law considers it as always potentially existing, and ready to vest when a proper owner appears. Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, nam nemo est hæres viventis; it remains, therefore, in waiting or **abeyance** during the life of Richard.' 2 Bl. Com. 107." See, also, the titles ESTATES; REMAINDERS, REVERSIONS AND EXECUTORY INTERESTS.

In Wallach *v.* Van Riswick, 92 U. S. 202, 212, 23 L. Ed. 473, it is said: "It is a maxim of the common law, that a fee cannot be in **abeyance.** It rests upon reasons that now have no existence, and it is not now of universal application. But if it were, being a common-law maxim, it must yield to statutory provisions inconsistent with it."

4. **Abiding.**—The ordinance of the 16th of July, 1776, declares "that all persons **abiding** within the state of New York, and deriving protection from the laws of the same, owe allegiance to the said laws, and are members of the state." In Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99, 165, 7 L. Ed. 617, Story, J., dissenting said: "By **abiding,** in the ordinance, is meant, not merely present inhabitants, but present inhabitancy, coupled with an intention of permanent residence. This is apparent, from the next clause of ordinance, where it is declared, 'that all persons passing through, visiting, or making a temporary stay in the state, being entitled to the protection of the laws, during the time of such passage, visitation or temporary stay, owe, during the same, allegiance thereto.' Their 'temporary stay' is manifestly used in contradiction to **abiding,** and shows that the latter means permanent intentional residence." See, generally, the title ALIENS.

Abiding conviction.—The trial court instructed the jury that if they had an **abiding** conviction of the defendant's guilt, such as they would be willing to act upon in the most weighty and important matters relating to their own affairs, they had no reasonable doubt. Mr. Justice

ABIDING THE EVENT.—See the titles ADMIRALTY; APPEAL AND ERROR; ATTORNEY AND CLIENT; BAIL AND RECOGNIZANCE; COSTS; PAYMENT INTO COURT; STIPULATIONS. As to another suit pending, see the title ABATEMENT, REVIVAL AND SURVIVAL, ante, p. 12.

ABODE.—See the title DOMICILE.

ABOLITION.—See the title SLAVES.

ABOUT.—See, also, the titles SALES; VENDOR AND PURCHASER. And see MORE OR LESS. The mention of the quantity, accompanied by the qualification of "about" or "more or less" is regarded as a mere estimate of the probable amount, as to which good faith is all that is required of the party making it.[1] But the words about, more or less, do not justify a quantity materially and designedly greater or less than that contracted for.[2] In ascertaining a place to be found by its distance from another place, the vague words about or nearly have been discarded.[3]

ABRIDGMENT.—See the title COPYRIGHT.

Field said: "The word **'abiding'** here has the signification of settled and fixed, a conviction which may follow a careful examination and comparison of the whole evidence. It is difficult to conceive what amount of conviction would leave the mind of a juror free from a reasonable doubt, if it be not one which is so settled and fixed as to control his action in the more weighty and important matters relating to his own affairs." Hopt *v.* Utah, 120 U. S. 430, 439, 30 L. Ed. 708. See, also, the title REASONABLE DOUBT.

1. Norrington *v.* Wright, 115 U. S. 188, 204, 29 L. Ed. 366.

In Pine River Logging, etc., Co. *v.* United States, 186 U. S. 279, 288, 46 L. Ed. 1164, it is said: "There is no doubt whatever of the general proposition that where the words **about**, or 'more or less' are used as estimates of an otherwise designated quantity, and the object of the parties is the sale or purchase of a particular lot, as a pile of wood or coal, or the cargo of a particular ship, or a certain parcel of land, the words 'more or less,' used in connection with the estimated quantity, are susceptible of a broad construction, and the contract would be interpreted as applying to the particular lot or parcel, provided it be sufficiently otherwise identified."

An agreement was for the transportation of a certain quantity of stores "supposed to amount to **about** 3,700 barrels." It was held, that 3,105 barrels fulfilled this agreement. Robinson *v.* Noble, 8 Pet. 181, 196, 8 L. Ed. 910.

Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named, with the qualification of **about** or "more or less," or words of like import, the contract applies to the specific lot, and the naming of the quantity is regarded not as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it. Brawley *v.* United States, 96 U. S. 168, 24 L. Ed. 622.

2. Quantity materially greater or less.—Pine River Logging, etc., Co. *v.* United States, 186 U. S. 279, 46 L. Ed. 1164.

In Moore *v.* United States, 196 U. S. 157, 168, 49 L. Ed. 428, it is said: "The only question can be, is 366 tons less than 5,000 tons, **about** 5,000 tons? We think not. The difference is too great. We said in Brawley *v.* United States, 96 U. S. 168, 172, 24 L. Ed. 622, that in engagements to furnish goods to a certain amount, the quantity specified is material and governs the contract. 'The addition of the qualifying words **about** "more or less," and the like, in such cases, is only for the purpose of providing against accidental variations arising from slight and unimportant excesses or deficiencies in number, measure or weight.'" See, also, the titles SALES; VENDOR AND PURCHASER.

3. Boundaries.—See, generally, the titles BOUNDARIES; PUBLIC LANDS.

Where an entry upon public lands is to begin at a designated point **about** seven miles from another well-known point, and the former cannot be found, **about** seven miles may be taken to mean seven miles. Bodley *v.* Taylor, 5 Cranch 191, 224, 3 L. Ed. 75.

In Johnson *v.* Pannel, 2 Wheat. 207, 211, 4 L. Ed. 221, it is said: "And in ascertaining a place to be found by its distance from another place, the vague words **about** or 'nearly,' and the like, are to be discarded, if there are no other words rendering it necessary to retain them; and the distance mentioned is to be taken positively." To the same effect, see Shipp *v.* Miller, 2 Wheat. 316, 323, 4 L. Ed. 248.

ABROAD.—See note 1.

ABSCONDING.—See the titles ATTACHMENT AND GARNISHMENT; BANKRUPTCY.

ABSENCE—ABSENT.—See, also, the title LIMITATION OF ACTIONS. See note 2.

ABSENT DEFENDANTS.—See the title ATTACHMENT AND GARNISHMENT.

ABSENTEES.—As to right of absentees to notice of proceedings, and the manner of acquiring jurisdiction over, see the titles CONSTITUTIONAL LAW; JURISDICTION; SUMMONS AND PROCESS.

ABSINTHE.—Absinthe, according to the Century Dictionary, is "the common name of a highly aromatic liqueur of an opaline green color and bitter taste," and is prepared by "steeping in alcohol or strong spirit bitter herbs," the chief of them being wormwood.[3]

ABSOLUTELY.—See NECESSARY.

ABSOLUTE TITLE.—See note 4.

ABSTRACT.—See note 5.

ABSTRACTION.—See note 6.

ABSTRACT OF TITLE.—As to liability of examiners of titles, see the title ATTORNEY AND CLIENT.

ABUSE OF PROCESS.—See the title SUMMONS AND PROCESS.

ABUTTING OWNERS.—See the titles ADJOINING LANDOWNERS; BRIDGES; EMINENT DOMAIN; MUNICIPAL CORPORATIONS; SPECIAL ASSESSMENTS; STREET RAILROADS; STREETS AND HIGHWAYS; TELEGRAPHS AND TELEPHONES.

ACADEMIES.—See the titles COLLEGES AND UNIVERSITIES; SCHOOLS.

ACCEPT—ACCEPTANCE.—See note 7. See the titles BILLS, NOTES AND CHECKS; CONTRACTS.

1. **Abroad.**—In United States *v.* Hutchins, 151 U. S. 542, 544, 38 L. Ed. 264, it is said: "An officer is to be understood as travelling **abroad** when he goes to a foreign port or place under orders to proceed to that place, or from one foreign port to another, or from a foreign port to a home port." See, also, the title ARMY AND NAVY.

2. **Absence—Absent.**—An Ohio statute provided that in case of the **absence** of the county judge, the county clerk should supply his place. In Lynde *v.* County of Winnebago, 16 Wall. 6, 14, 21 L. Ed. 272, it is said: "The **absence** spoken of is doubtless **absence** from the county seat."

In Bingham *v.* Cabbot, 3 Dall. 19, 36, 1 L. Ed. 491, it is said: "We are perfectly clear in the opinion, that although the district judge was on the bench, yet, if he did not sit in the cause, he was **absent,** in contemplation of law."

Absent from duty with leave.—See the title ARMY AND NAVY. And see United States *v.* Williamson, 23 Wall. 411, 414, 23 L. Ed. 89.

3. Erhardt *v.* Steinhardt, 153 U. S. 177, 182, 38 L. Ed. 678. See, also, the title REVENUE LAWS.

4. **Absolute title.**—In Johnson *v.* McIntosh, 8 Wheat. 543, 588, 5 L. Ed. 681, it is said: "An **absolute title** to lands cannot exist, at the same time, in different persons, or in different governments. An **absolute,** must be an exclusive title, or at least a **title** which excludes all others not compatible with it."

5. **Abstract.**—Section 5209, Revised Statutes, is as follows: "Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, **abstracts,** or willfully misapplies any of the moneys, funds, or credits of the association," etc. In construing this provision the court in United States *v.* Northway, 120 U. S. 327, 334, 30 L. Ed. 664, said: "It is true that the word **'abstract,'** as used in this statute, is not a word of settled technical meaning like the word 'embezzle' as used in statutes defining the offense of embezzlement, and the words 'steal, take and carry away,' as used to define the offense of larceny at common law. It is a word, however, of simple, popular meaning, without ambiguity. It means to take or withdraw from, so that to **abstract** the funds of the bank, or a portion of them, is to take and withdraw from the possession and control of the bank the moneys and funds alleged to be so **abstracted.** This, of course, does not embrace every element of that which under this section of the statute is made the offense of criminally **abstracting** the funds of the bank." See, also, the titles BANKS AND BANKING; EMBEZZLEMENT.

6. **Abstraction.**—See dissenting opinion of Daniel, J., in Marshall *v.* Baltimore, etc., R. Co., 16 How. 314, 346, 14 L. Ed. 953.

7. **Accept and receive—Statute of frauds.**—In Garfield *v.* Paris, 96 U. S. 557,

ACCESSION, ACCRETION AND RELICTION.

BY H. W. WESTER.

I. Definitions and Distinctions, 51.

II. Property Rights, 52.

A. Accretion and Reliction, 52.

1. Gradual Accretions, 52.

a. Statement of the Rule, 52.

b. Reason for the Rule, 53.

c. Nature of the Right, 53.

d. Application of the Rule, 53.

(1) Applicable Alike to Public and Private Rights, 53.

(2) As Applicable to the Formation of Islands, 53.

(3) Land Formed on Submerged Site of Previously Existing Land, 54.

(4) As Affected by Character of the Stream or Body of Water, 54.

(5) Accretions on Streets and Highways, 55.

(6) Accretions Formed by Artificial Agencies, 55.

2. Sudden Accretions, 55.

B. Avulsion, 55.

C. Accession, 56.

III. Determination of Property Rights, 56.

A. Ownership of Shore, 56.

1. Necessity for Establishing, 56.

2. As of What Time Ownership Must Be Established, 56.

B. Contiguity of Estate to the Water, 56.

C. Rule for Apportioning Accretions, 56.

D. What Law Governs, 57.

E. Evidence, 57.

F. Questions of Law and Fact, 57.

CROSS REFERENCES.

As to the rights of owners of land bordering on the water, see the titles LAKES AND PONDS; NAVIGABLE WATERS; WATERS AND WATERCOURSES. As to accretion or avulsion as affecting boundaries, see the title BOUNDARIES.

I. Definitions and Distinctions.

Alluvion.—Alluvion means an addition to riparian land, gradually and imperceptibly made, through causes either natural or artificial, by the water to which the land is contiguous.[1] It matters not whether the addition be on streams

563, 23 L. Ed. 821, it is said: "'Accept and receive' are the words of the statute in question; but the law is well settled, that an acceptance sufficient to satisfy the statute may be constructive, the rule being that the question is for the jury whether the circumstances proved, of acting or forbearing to act, do or do not amount to an acceptance within the statute." See, also, the title FRAUDS, STATUTE OF.

1. **Definitions of alluvion.**—County of St. Clair *v.* Lovingston, 23 Wall. 46, 23 L. Ed. 59; Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 191, 33 L. Ed. 877; Nebraska *v.* Iowa, 143 U. S. 359, 368, 36 L. Ed. 186.

"The Civil Code of Louisiana declares that the accretions which are formed successively and imperceptibly to any soil situated on the shores of any creek or run, are called alluvion." Saulet *v.* Shepherd, 4 Wall. 502, 18 L. Ed. 442.

"The Code Napoleon declares: 'Accumulations and increase of mud formed successively and imperceptibly on the soil bordering on a river or other stream is denominated "alluvion."'" County of

which do overflow their banks or those that do not. In each case it is alluvion.[2]

Reliction.—Reliction is the increase of the land surface caused by the waters gradually receding below the usual water marks.[3]

Avulsion.—Avulsion is that process by which the violence of a stream separates a considerable portion from one piece of land and joins it to another, but in such manner that it can still be identified.[4]

Accession.—Accession is the right to all which one's own property produces, whether that property be movable or immovable; and the right to that which is united to it by accession, either naturally or artificially.[5]

II. Property Rights.

A. Accretion and Reliction—1. GRADUAL ACCRETIONS—a. *Statement of the Rule.*—The rule is well settled that a person, whose land lying contiguous to a stream or body of water increases by alluvial formations or the gradual recession of the waters from the usual water marks, is entitled to such increase as far out as the middle thread of the stream,[6] and is independent of the law governing

St. Clair *v.* Lovingston, 23 Wall. 46, 66, 23 L. Ed. 59.

Blackstone defines alluvion as the washing up of land and earth so as in time to make terra firma. County of St. Clair *v.* Lovingston, 23 Wall. 46, 66, 23 L. Ed. 59.

"Bracton says, Book 11, c. 2: 'Alluvion is a latent increase, and that is said to be added by alluvion, whatever is so added by degrees, that it cannot be perceived at what moment of time it is added; for although you fix your eyesight upon it for a whole day, the infirmity of sight cannot appreciate such subtle increments, as may be seen in the case of a gourd, and such like.'" Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 192, 33 L. Ed. 877.

"In the Roman law, it was said in the Institutes of Gaius, Book II, § 70: 'Alluvion is an addition of soil to land by a river, so gradual that in short periods the change is imperceptible; or, to use the common expression, a latent addition.' Justinian says, Institutes, Book II, title 1, § 20: 'That is added by alluvion, which is added so gradually that no one can perceive how much is added at any one moment of time.'" Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 192, 33 L. Ed. 877.

Distinguished from reliction and avulsion.—Alluvion is different from reliction, and is the opposite of avulsion. County of St. Clair *v.* Lovingston, 23 Wall. 46, 68, 23 L. Ed. 59.

Test of what is gradual and imperceptible.—The test of what is gradual and imperceptible is that, though the witnesses may from time to time see that progress has been made, they could not perceive it while the process was going on. County of St. Clair *v.* Lovingston, 23 Wall. 46, 23 L. Ed. 59; Jefferis *v.* East Omaha Land Co., 34 U. S. 178, 191, 33 L. Ed. 877; Nebraska *v.* Iowa, 143 U. S. 359, 368, 36 L. Ed. 186; St. Louis *v.* Rutz, 138 U. S. 226, 251, 34 L. Ed. 941.

A bill stated that the land in question was formed by imperceptible degrees, and that the process, begun in 1853 and continued until 1870, resulting in the production by accretion of the tract of 40 acres and more, "went on so slowly that it could not be observed in its progress, but at intervals of not less than three or more months it could be discerned by the eye that additions greater or less had been made to the shore." The fact, as thus stated, is, that the land was formed by imperceptible degrees, within the meaning of the rule of law on the subject, and it is not capable of any construction which would result in the conclusion that the land was not formed by imperceptible degrees. Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 192, 33 L. Ed. 877.

2. As affected by nature of stream.—County of St. Clair *v.* Lovingston, 23 Wall. 46, 23 L. Ed. 59; Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 191, 33 L. Ed. 877.

3. Reliction.—County of St. Clair *v.* Lovingston, 23 Wall. 46, 66, 23 L. Ed. 59.

4. Avulsion.—Nebraska *v.* Iowa, 143 U. S. 359, 366, 36 L. Ed. 186; Missouri *v.* Nebraska, 196 U. S. 23, 35, 49 L. Ed. 372.

5. Accession.—Black's Law Dictionary, title "Accession," 2 Kent 360; 2 Bl. Comm. 404.

6. General rule as to property rights in accretion.—County of St. Clair *v.* Lovingston, 23 Wall. 46, 64, 23 L. Ed. 59; New Orleans *v.* United States, 10 Pet. 662, 9 L. Ed. 573; Handly *v.* Anthony, 5 Wheat. 374, 5 L. Ed. 113; Jones *v.* Johnston, 18 How. 150, 156, 15 L. Ed. 320; Jones *v.* Soulard, 24 How. 41, 16 L. Ed. 604; Banks *v.* Ogden, 2 Wall. 57, 67, 17 L. Ed. 821; Schools *v.* Risley, 10 Wall. 91, 110, 19 L. Ed. 850; Barney *v.* Keokuk, 94 U. S. 324, 24 L. Ed. 224; St. Louis *v.* Rutz, 138 U. S. 226, 245, 34 L. Ed. 941; Shively *v.* Bowlby, 152 U. S. 1, 35, 38 L. Ed. 331; Live Stock Co. *v.* Springer, 185 U. S. 47, 54, 46 L. Ed. 800.

Only to the middle of the stream.—St. Louis *v.* Rutz, 138 U. S. 226, 250,

the title to the soil covered by the water.[7]

b. *Reason for the Rule.*—By some jurists the rule has been vindicated on the principle of natural justice, that he who sustains the burden of losses and of repairs, imposed by the contiguity of waters, ought to receive whatever benefits they may bring by accretion;[8] by others, it is derived from the principle of public policy, that it is the interest of the community that all land should have an owner, and most convenient, that insensible additions to the shore should follow the title to the shore itself;[9] and by still others the maxim, de minimis non curat lex, is held to be applicable.[10]

c. *Nature of the Right.*—The riparian right alluvion is a vested right. It is an inherent and essential attribute of the original property. The title to the increment rests in the law of nature. It is the same with that of the owner of a tree to its fruits, and of the owner of flocks and herds to their natural increase. The right is a natural, not a civil one.[11]

d. *Application of the Rule*—(1) *Applicable Alike to Public and Private Rights.*—This rule is no less just, when applied to public than to private rights.[12]

(2) *As Applicable to the Formation of Islands.*—It is laid down by all the authorities, that, if an island or dry land forms upon that part of the bed of a

34 L. Ed. 941; Shively *v.* Bowlby, 152 U. S. 1, 35, 38 L. Ed. 331.

"As the law of Illinois confers upon the owner of land in that state which is bounded by, or fronts on, the Mississippi River, the title in fee to the bed of the river to the middle thereof, or so far as the boundary of the state extends, such riparian owner is entitled to all islands in the river which are formed on the bed of the river east of the middle of its width. That being so, it is impossible for the owner of an island which is situated on the west side of the middle of the river, and in the state of Missouri, to extend his ownership, by mere accretion, to land situated in the state of Illinois, the title in fee to which is vested by the law of Illinois in the riparian owner of the land in that state." St. Louis *v.* Rutz, 138 U. S. 226, 250, 34 L. Ed. 941.

Effect of act reserving school lands.—The act of June 13, 1812, reserving certain lands for the benefit of the public schools of St. Louis, does not reserve lands made by accretion to lots on the river which were inhabited, cultivated, and possessed by persons at the time of the cession of December, 1803, and till the already mentioned act of June 13, 1812. Schools *v.* Risley, 10 Wall. 91, 110, 19 L. Ed. 850. See the title SCHOOLS.

7. Ownership of underlying soil not considered.—Shively *v.* Bowlby, 152 U. S. 1, 35, 38 L. Ed. 331.

8. "Qui sentit onus sentire debet et commodum" lies at the foundation of the rule. County of St. Clair *v.* Lovingston, 23 Wall. 46, 69, 23 L. Ed. 59; New Orleans *v.* United States, 10 Pet. 662, 9 L. Ed. 573; Jones *v.* Soulard, 24 How. 41, 16 L. Ed. 604; Banks *v.* Ogden, 2 Wall. 57, 17 L. Ed. 821; Saulet *v.* Shepherd, 4 Wall. 502, 18 L. Ed. 442; Schools *v.* Risley, 10 Wall. 91, 110, 19 L. Ed. 850; Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 33 L. Ed. 877; Nebraska *v.* Iowa, 143 U. S. 359, 360, 36 L. Ed. 186; Missouri *v.* Nebraska, 196 U. S. 23, 35, 49 L. Ed. 372.

Mr. Justice Swayne, in County of St. Clair *v.* Lovingston, 23 Wall. 46, 23 L. Ed. 59, in delivering the opinion, spoke of the rule as resting in the law of nature. Shively *v.* Bowlby, 152 U. S. 1, 36, 38 L. Ed. 331.

9. Public policy.—Banks *v.* Ogden, 2 Wall. 57, 67, 17 L. Ed. 821; Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 33 L. Ed. 877.

10. De minimis non curat lex.—County of St. Clair *v.* Lovingston, 23 Wall. 46, 67, 23 L. Ed. 59; Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 192, 33 L. Ed. 877.

11. Nature of the right.—County of St. Clair *v.* Lovingston, 23 Wall. 46, 69, 23 L. Ed. 59.

12. Rule applicable to public as well as private rights.—New Orleans *v.* United States, 10 Pet. 662, 9 L. Ed. 573; Handly *v.* Anthony, 5 Wheat. 374, 5 L. Ed. 113; Jones *v.* Soulard, 24 How. 41, 16 L. Ed. 604; St. Louis *v.* Rutz, 138 U. S. 226, 251, 34 L. Ed. 941; Shively *v.* Bowlby, 152 U. S. 1, 35, 38 L. Ed. 331; Missouri *v.* Nebraska, 196 U. S. 23, 35, 49 L. Ed. 372.

Thus the rule was held applicable in New Orleans *v.* United States, 10 Pet. 662, 9 L. Ed. 573, in which case a conflict arose between the city of New Orleans and the federal government as to a strip of land lying along the Mississippi River, which strip of land had been used for the convenience of the public.

The eastern line of the city of St. Louis, as it was incorporated in 1809, is as follows: From the Sugar Loaf due east to the Mississippi; "from thence, by the Mississippi, to the place first mentioned." This last call made the city a riparian proprietor upon the Mississippi, and, as such, it was entitled to all accretions as far out as the middle thread of the stream. Jones *v.* Soulard, 24 How. 41, 16 L. Ed.

river which is owned in fee by the riparian proprietor, the same is the property of such riparian proprietor. He retains the title to the land previously owned by him with the new deposits thereon.[13]

(3) *Land Formed on Submerged Site of Previously Existing Land.*—When land is formed again on the place where the land had been washed away, it becomes the property of the original owner,[14] and this would be true although the land thus newly formed extends a short distance into the old bed of the river beyond the former shore line, such additional formation belongs to the original owner as a deposit on that part of the bed of the river which was owned by him in fee, and not to the state or to any third party. Otherwise, he would be cut off without his fault from the river front and from his riparian rights.[15]

(4) *As Affected by Character of the Stream or Body of Water.*—The rule is equally applicable to lands bounded by tide waters or by fresh waters;[16] by streams that do and by those that do not overflow their banks, where dykes and other defenses are, and where they are not, necessary to keep the water within its proper limits;[17] regardless of the rapidity of the current and the character of the soil through which it flows,[18] or the size of the stream.[19]

604, cited in Shively *v.* Bowlby, 152 U. S. 1, 35, 38 L. Ed. 331.

In several cases the rule has been applied in settling the disputed boundary between two states of the Union. See Missouri *v.* Nebraska, 196 U. S. 23, 49 L. Ed. 372; Handly *v.* Anthony, 5 Wheat. 374, 5 L. Ed. 113. See, generally, the title BOUNDARIES.

13. Islands.—St. Louis *v.* Rutz, 138 U. S. 226, 245, 34 L. Ed. 941. See the title ISLANDS.

In St. Louis *v.* Rutz, 138 U. S. 226, 251, 34 L. Ed. 941, the court said: "We must not be understood as implying, that if an island in the Mississippi River remains stable in position, while the main channel of the river changes from one side of the island to the other, the title to the island would change, because it might be at one time on one side and at another time on the other side of the boundary between two states. The right of accretion to an island in the river cannot be so extended lengthwise of the river as to exclude riparian proprietors above or below such island from access to the river, as such riparian proprietors. Mulry *v.* Norton, 100 N. Y. 424, 436, 437. It appears from the map, 'Exhibit B,' that the so-called Arsenal Island extended as far down the river as is shown on that map, which was made from surveys in 1873 and 1884; and if the plaintiff thereby has lost such newly-formed land and been deprived of access to the river in front of his surveys, then all the riparian proprietors down the river, as far as the bars have formed or may form hereafter in front of their land, must lose their titles and surrender them to the city of St. Louis, as a part of Arsenal Island. Such rapid changes in these alluvial formations cannot transfer title from one proprietor to another."

"Arsenal Island was the subject of the case of Carrick *v.* Lamar, 116 U. S. 423, 29 L. Ed. 677, and in the opinion in that case is described as 'a mere moving mass of alluvial deposits.' To such a movable island, traveling for more than a mile and from one state to another, the law of title by accretion can have no application, for its progress is not imperceptible, in a legal sense." St. Louis *v.* Rutz, 138 U. S. 226, 251, 34 L. Ed. 941.

14. Land formed on submerged site.—St. Louis *v.* Rutz, 138 U. S. 226, 246, 34 L. Ed. 941.

"Dry land which should again form on the site where Arsenal Island existed when it was surveyed in 1863 would be the property of the city of St. Louis." St. Louis *v.* Rutz, 138 U. S. 226, 249, 34 L. Ed. 941.

15. Newly-formed land extending into old river bed.—St. Louis *v.* Rutz, 138 U. S. 226, 246, 34 L. Ed. 941.

16. Equally applicable to tide or fresh waters.—Shively *v.* Bowlby, 152 U. S. 1, 35, 38 L. Ed. 331.

17. As affected by height of banks.—County of St. Clair *v.* Lovingston, 23 Wall. 46, 69, 23 L. Ed. 59.

18. As affected by rapidity of current and nature of soil.—Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 190, 33 L. Ed. 877; Nebraska *v.* Iowa, 143 U. S. 359, 367, 36 L. Ed. 186; Missouri *v.* Nebraska, 196 U. S. 23, 36, 49 L. Ed. 372.

Although the changes on the Missouri River are greater and more rapid than on the Mississippi, the difference does not constitute such a difference in principle as to render inapplicable to the Missouri River the general rule of law. Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 190, 33 L. Ed. 877; Nebraska *v.* Iowa, 143 U. S. 359, 367, 36 L. Ed. 186; Missouri *v.* Nebraska, 196 U. S. 23, 36, 49 L. Ed. 372.

"The very fact of the great changes in result, caused by imperceptible accretion, in the case of the Missouri River, makes even more imperative the application to that river of the law of accretion." Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 191, 33 L. Ed. 877.

19. As affected by the size of the stream.—Jefferis *v.* East Omaha Land Co., 134 U.

(5) *Accretions on Streets or Highways.*—Accretion by alluvion upon a street bounded on one side by a body of water will belong to him, in whom the fee of the half next the water is vested subject to the public easement.[20] A street or tow path or passway or other open space permanently established for public use between the river and the nearest row of lots or blocks in a town, when it was first laid out, or established, or founded, would prevent the owners of such lots or blocks from being riparian proprietors of the land between such lots or blocks and the river.[21] But this would not be true of a passageway or tow path kept up at the risk and charge of the proprietor of the lots, and following the changes of the river as it receded or encroached, and if the inclosure of the proprietor was advanced or set in with such recession or encroachment.[22]

(6) *Accretions Formed by Artificial Agencies.*—The fact that the accretion may have been caused wholly by obstructions placed in the river above, will have no effect on the ownership of the alluvion. The proximate cause was the deposits made by the water. The law looks no further. Whether the flow of the water was natural or affected by artificial means is immaterial.[23]

2. SUDDEN ACCRETIONS.—By the common law sudden accretions produced by unusual floods on navigable waters belong to the crown; but as the only waters recognized in England as navigable were tidewaters, the rule was often expressed as applicable to tidewaters only, although the reason of the rule would equally apply to navigable waters above the flow of the tide; that reason being, that the public authorities ought to have entire control of the great passageways of commerce and navigation, to be exercised for the public advantage and convenience.[24]

B. Avulsion.—When the violence of the stream separates a considerable part from one piece of land and joins it to another, but in such manner that it can still be identified, the property of the soil so removed naturally continues vested in its former owner.[25]

S. 178, 190, 33 L. Ed. 877; Nebraska *v.* Iowa, 143 U. S. 359, 367, 36 L. Ed. 186; Shively *v.* Bowlby, 152 U. S. 1, 35, 38 L. Ed. 331; Jones *v.* Soulard, 24 How. 41, 16 L. Ed. 604.

Applicable to the Mississippi.—Shively *v.* Bowlby, 152 U. S. 1, 35, 38 L. Ed. 331; Nebraska *v.* Iowa, 143 U. S. 359, 367, 36 L. Ed. 186; Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 190, 33 L. Ed. 877.

"In Jones *v.* Soulard, 24 How. 41, it was held, that a riparian proprietor on the Mississippi River at St. Louis was entitled, as such, to all accretions as far out as the middle thread of the stream; and that the rule, well established as to fresh water rivers generally, was not varied by the circumstance that the Mississippi at St. Louis is a great and public watercourse. The court said that from the days of Sir Matthew Hale all grants of land bounded by fresh water rivers, where the expressions designating the water line were general, conferred the proprietorship on the grantee to the middle thread of the stream, and entitled him to the accretions; that the land to which the accretion attached in that case was an irregular piece of 79 acres, and had nothing peculiar in it to form an exemption from the rule; that the rule applied to such a public watercourse as the Mississippi was at the city of St. Louis; and that the doctrine that, on rivers where the tide ebbs and flows, grants of land are bounded by ordinary highwater mark, had no application to the case, nor did the size of the river alter the rule." Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 190, 33 L. Ed. 877.

20. Accretion on streets.—Banks *v.* Ogden, 2 Wall. 57, 17 L. Ed. 821. See the title STREETS AND HIGHWAYS.

21. Street or passway permanently established.—Schools *v.* Risley, 10 Wall. 91, 110, 19 L. Ed. 850.

22. Temporary street or passway.—Schools *v.* Risley, 10 Wall. 91, 110, 19 L. Ed. 850.

23. Accretions formed by artificial agencies.—County of St. Clair *v.* Lovingston, 23 Wall. 46, 66, 23 L. Ed. 59. See, also, Watkins *v.* Holman, 16 Pet. 25, 10 L. Ed. 873.

24. Sudden accretions.—Barney *v.* Keokuk, 94 U. S. 324, 337, 24 L. Ed. 224.

25. Avulsion.—Nebraska *v.* Iowa, 143 U. S. 359, 361, 36 L. Ed. 186; Missouri *v.* Nebraska, 196 U. S. 23, 35, 49 L. Ed. 372; St. Louis *v.* Rutz, 138 U. S. 226, 245, 34 L. Ed. 941.

There can be no identification unless there is a sudden change and that is the very opposite of an imperceptible accretion. Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 194, 33 L. Ed. 877.

In 1877 the river above Omaha, which had pursued a course in the nature of an oxbow, suddenly cut through the neck of the bow and made for itself a new channel. This does not come within the law of accretion, but of that of avulsion. By

C. Accession.—Property rights in accessions will be treated under the specific titles in which the question may arise.[26]

III. Determination of Property Rights.

A. Ownership of Shore—1. Necessity for Establishing.—Before the proprietor can set up his claim to accretions and the like, he must first show that he owns the shore; and if he fail first to establish his ownership, judicial inquiry respecting his rights in or under the waters adjoining are abstractions and useless.[27]

2. As of What Time Ownership Must Be Established.—The right which the owner of the water lot has to the accretions in front of it depends on its condition at the date of the deed which conveyed him the legal title, and cannot be carried back by relation to the date of a title bond previously assigned to him, and under which he procured the deed.[28] Any past accretions belonged to the owner, and whoever sets up a title to them must show a deed of the same as in the case of any other description of land;[29] any alluvial accretions since the deed belonging to the proprietor as owner of the adjoining land.[30]

B. Contiguity of Estate to the Water.—The right to the alluvion depends upon the fact of the contiguity of the estate to the water.[31]

C. Rule for Apportioning Accretions.—The rule for apportioning the newly formed land along the water line is to measure the whole extent of the ancient bank or line of the river, and compute how many rods, yards, or feet each riparian proprietor owned on the river line; then, supposing the former line, for instance, to amount to 200 rods, to divide the newly formed bank or river line into 200 equal parts, and appropriate to each proprietor as many portions of this new river line as he owned rods on the old. When, to complete the division, lines are to be drawn from the points at which the proprietors respectively bounded on the old, to the points thus determined, as the points of division on the newly formed shore. The new lines thus formed, it is obvious, will be either parallel, or divergent, or convergent, according as the new shore line of the river equals, or exceeds, or falls short of the old.[32] This rule may require modification, perhaps, under particular circumstances. For instance, in applying the rule to the ancient margin of the river, to ascertain the extent of each proprietor's title on that margin, the general line ought to be taken, and not the actual length of the line on that margin, if it happens to be elongated by deep indentations or sharp pro-

this selection of a new channel the boundary was not changed, and it remained as it was prior to the avulsion, the centre line of the old channel; and that, unless the waters of the river returned to their former bed, became a fixed and unvarying boundary, no matter what might be the changes of the river in its new channel. Missouri *v.* Nebraska, 196 U. S. 23, 36, 49 L. Ed. 372.

Avulsion as affecting boundaries.—See the title BOUNDARIES.

26. Accession.—See the titles ANIMALS; BAILMENTS; CONFUSION OF GOODS; FIXTURES; SLAVES; WHARVES.

As to where the value of property wrongfully held is increased by labor, see the title TROVER AND CONVERSION.

As to reclamation of swamp and overflowed lands held by the public, see the titles LEVEES; NAVIGABLE WATERS; PUBLIC LANDS.

27. Necessity for establishing ownership.—Bates *v.* Illinois Central R. Co., 1 Black, 204, 208, 17 L. Ed. 158.

28. As of what time ownership must be established.—Johnston *v.* Jones, 1 Black, 209, 17 L. Ed. 117.

29. Jones *v.* Johnston, 18 How. 150, 156, 15 L. Ed. 320.

30. Jones *v.* Johnston, 18 How. 150, 156, 15 L. Ed. 320.

31. Contiguity of estate to the water.—Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 190, 33 L. Ed. 877; Saulet *v.* Shepherd, 4 Wall. 502, 508, 18 L. Ed. 442; Live Stock Co. *v.* Springer, 185 U. S. 47, 54, 46 L. Ed. 800; Johnston *v.* Jones, 1 Black 209, 223, 17 L. Ed. 117.

Thus where the accretion was made to a strip of land which bordered on the river, the accretion belongs to such strip and not to the larger parcel behind it, from which the strip, when sold, was separated. Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 190, 33 L. Ed. 877; Saulet *v.* Shepherd, 4 Wall. 502, 18 L. Ed. 442.

32. Rule for apportioning accretions.—Johnston *v.* Jones, 1 Black 209, 223, 17 L. Ed. 117; Jones *v.* Johnston, 18 How. 150, 15 L. Ed. 320.

jections. In such case, it should be reduced by an equitable and judicious estimate to the general available line of the land upon the river.[33]

D. What Law Governs.—The title to land acquired by accretion is a title acquired under the operation of the law of the state, which each state determines for itself.[34] Likewise the question as to whether the general rules relating to accretion by the gradual and imperceptible operation of natural causes attaches to land reclaimed by artificial means from the bed of a river, is a question which each state decides for itself.[35]

E. Evidence—Deeds.—Where a lot was conveyed as having a water front, and reconveyed to the original owner as having no such front, and afterwards conveyed by such original owner to a third party, deed from the first purchaser to such third party made after suit brought cannot be given in evidence to show the right of the plaintiff to a water front, and consequently a title in alluvium.[36]

Maps as Evidence.—The admissibility of a map as evidence would depend on a proper foundation being laid for it.[37]

Calculations Founded upon Unreliable Maps.—A calculation founded upon a map not itself original and reliable evidence, is clearly inadmissible.[38]

Character of Soil and Timber.—In determining the question as to whether land has been formed by accretion, the character of the soil and timber may be looked to.[39]

Evidence to Show Nonexistence of Contiguous Water.—It is competent to show that there was not, at the time of, nor since the survey of the land in question any body of water bordering on such land, and to contend that under such a state of facts, there could be no accretion by reliction.[40]

F. Questions of Law and Fact.—The inquiry as to whom accretions belong is a question of law.[41]

ACCESSORIES.—See the title ACCOMPLICES AND ACCESSORIES.

ACCIDENT—ACCIDENTALLY.—See the titles ACCIDENT INSURANCE; CARRIERS; MARINE INSURANCE. And see INEVITABLE ACCIDENT. Accidentally means happening by chance, unexpectedly taking place, not according to the usual course of things, or not as expected.[1]

ACCIDENT IN EQUITY.—See the title MISTAKE AND ACCIDENT.

33. Johnston *v.* Jones, 1 Black 209, 223, 17 L. Ed. 117.

34. What law governs.—Barney *v.* Keokuk, 94 U. S. 324, 24 L. Ed. 224; St. Louis *v.* Rutz, 138 U. S. 226, 250, 34 L. Ed. 941; Joy *v.* St. Louis, 201 U. S. 332, 343, 50 L. Ed. 776; St. Anthony Falls, etc., Co. *v.* Board of Water Commissioners, 168 U. S. 349, 359, 42 L. Ed. 947. See, generally, on this point, the titles CONFLICT OF LAWS; NAVIGABLE WATERS; WATERS AND WATERCOURSES.

35. Barney *v.* Keokuk, 94 U. S. 324, 337, 24 L. Ed. 224.

36. Deeds.—Johnston *v.* Jones, 1 Black 209, 17 L. Ed. 117.

As to documentary evidence, see, generally, the title DOCUMENTARY EVIDENCE.

37. Maps as evidence.—Johnston *v.* Jones, 1 Black 209, 225, 17 L. Ed. 117.

38. Calculations founded upon unreliable maps.—Johnston *v.* Jones, 1 Black 209, 225, 17 L. Ed. 117.

39. Character of soil and timber.—Islands formed by accretions are, in river phraseology, called made land, while those produced by the other process necessarily are of primitive formation. It is easy to distinguish them on account of the difference in their soil and timber. It has been found, by observation and experience, that primitive soil produces trees chiefly of the hardwood varieties, while the timber growing on land of secondary formation—the effect of accretions—is principally cottonwood. Missouri *v.* Kentucky, 11 Wall. 395, 408, 20 L. Ed. 116.

40. Evidence to show nonexistence of contiguous water.—Live Stock Co. *v.* Springer, 185 U. S. 47, 54, 46 L. Ed. 800.

41. County of St. Clair *v.* Lovingston, 23 Wall. 46, 62, 23 L. Ed. 59.

1. Accidently.—United States Mut. Accident Ass'n *v.* Barry, 131 U. S. 100, 121, 33 L. Ed. 60.

Accident.—In Viterbo *v.* Friedlander, 120 U. S. 707, 728, 30 L. Ed. 776, it is said: "It cannot be doubted, therefore, that the words 'unforeseen event, and **accident**, as used in the articles now under consideration have the meaning of 'fortuitous event' or 'irresistible force.'" The statute under construction was that of Louisiana providing for abatement of rent in case of loss by accident. See, generally, the title LANDLORD AND TENANT.

ACCIDENT INSURANCE.

BY T. B. BENSON.

I. **The Policy,** 58.
- A. Construction, 58.
- B. Accidents and Injuries Included, 58.
  1. Arising from External, Violent and Accidental Means, 58.
  2. Injuries Sustained in Traveling, 59.
- C. Accidents and Injuries Excluded, 59.
  1. Suicide, 59.
  2. Injuries Intentionally Inflicted, 60.
  3. Bodily Infirmities and Diseases, 60.
  4. Dueling, Fighting or Other Breach of Law, 60.
  5. Exposure to Unnecessary Danger, 60.

II. **Notice and Preliminary Proof of Accident and Injury,** 61.

III. **Proximate Cause,** 61.

IV. **Evidence,** 61.

V. **Presumptions and Burden of Proof,** 61.

CROSS REFERENCES.

See the titles ARBITRATION AND AWARD; BENEVOLENT AND BENEFICIAL ASSOCIATIONS; INSURANCE; LIFE INSURANCE; VERDICT.

I. The Policy.

A. Construction.—The contract must receive the construction which the language used fairly warrants.[1]

Construed by Court or Jury.—The language of the policy is to be construed by the court, so far as it involves matters of law, and by the jury aided by the court when it involves law and fact, and in neither view of it is the opinion of ordinary people in view of the state of things where the deceased resided, or their understanding of its language in view of the circumstances of the case, any sound criterion by which the judgment of the jury should be formed.[2]

B. Accidents and Injuries Included—1. ARISING FROM EXTERNAL, VIOLENT AND ACCIDENTAL MEANS—WHAT INJURIES ARE ACCIDENTAL.—The term "accidental" contained in the policy is used in its ordinary, popular sense, as meaning "happening by chance; unexpectedly taking place; not according to the usual course of things; or not as expected." If a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but if, in the act which precedes the injury, something unforeseen, unexpected, unusual, occurs which produces the injury, then the injury has resulted through accidental means.[3]

1. Ripley *v.* Railway Passengers' Assur. Co., 16 Wall. 336, 338, 21 L. Ed. 469.

2. Travelers' Ins. Co. *v.* Seaver, 19 Wall. 531, 543, 22 L. Ed. 155.

3. United States Mutual Accident Association *v.* Barry, 131 U. S. 100, 121, 33 L. Ed. 60.

Injury arising from jumping from platform.—In a suit on a policy stipulating to pay $5,000 to the insured's widow in case of his death, from sustaining "bodily injuries effected through external, violent and accidental means," the jury was at liberty to find that the injury causing death resulted from an accident, where, after two companions of the deceased had jumped from a platform and alighted safely, the deceased jumped and soon appeared ill, vomited and died in nine days. United States Mutual Accident Association *v.* Barry, 131 U. S. 100, 121, 33 L. Ed. 60.

Injury arising from lifting heavy burden.—"In Martin *v.* Travellers' Ins. Co., 1 Foster & Fin. 505, the policy was

2. Injuries Sustained in Traveling—Public and Private Conveyances Distinguished.—Public conveyances naturally suggests a vessel or vehicle employed in the general conveyance of passengers. Private conveyances suggests a vehicle belonging to a private individual.[4]

Traveling Does Not Include Walking.—Walking is not a means of traveling by either public or private conveyance.[5]

C. Accidents and Injuries Excluded—1. Suicide.—A state legislature may provide that suicide shall not be a defense.[6]

Suicide within Meaning of Policy.—If one whose life is insured intentionally kills himself when his reasoning faculties are so far impaired by insanity that he is unable to understand the moral character of his act, even if he does understand its physical nature, consequence, and effect, it is not a "suicide," or "self-destruction," or "dying by his own hand," within the meaning of those words in a clause excepting such risks out of the policy, and containing no further words expressly extending the exemption to such a case;[7] but such killing

against any bodily injury resulting from any accident or violence, 'provided that the injury should be occasioned by any external or material cause operating on the person of the insured.' In the course of his business he lifted a heavy burden and injured his spine. It was objected that he did not sustain bodily injury by reason of an accident. The plaintiff recovered." United States Mutual Accident Association *v.* Barry, 131 U. S. 100, 121, 33 L. Ed. 60.

Suicide while insane.—See post, "Suicide," I, C, 1.

The death of the assured not having been the effect of any cause specified in the proviso of the policy, and not coming within any warranty in the application, the question recurs whether it is within the general words of the leading sentence of the policy by which he is declared to be insured "against bodily injuries effected through external, accidental and violent means." This sentence does not, like the proviso, speak of what the injury is "caused by;" but it looks only to the "means" by which it is effected. No one doubts that hanging is a violent means of death. As it affects the body from without, it is external, just as suffocation by drowning has been held to be. And, according to the decisions as to suicide under policies of life insurance, it cannot, when done by an insane person, be held to be other than accidental. Accident Ins. Co. *v.* Crandal, 120 U. S. 527, 533, 30 L. Ed. 740.

4. Ripley *v.* Railway Passengers' Assur. Co., 16 Wall. 336, 338, 21 L. Ed. 469.

5. A person took out an accident policy of insurance on his life while "traveling by public or private conveyance." Having performed a part of his journey by steamer, which brought him to a certain village, he walked thence home about eight miles. Held, that while thus walking, he was not traveling by either public or private conveyance. Ripley *v.* Railway Passengers' Assur. Co., 16 Wall. 336, 21 L. Ed. 469.

6. Whitfield *v.* Ætna Life Ins. Co., 205 U. S. 489, 496, 51 L. Ed. 895. See the title INSURANCE.

7. Mutual Life Insurance Company *v.* Terry, 15 Wall. 580, 21 L. Ed. 236; Bigelow *v.* Berkshire Life Ins. Co., 93 U. S. 284, 23 L. Ed. 918; Charter Oak Life Ins. Co. *v.* Rodel, 95 U. S. 232, 24 L. Ed. 433; Manhattan Life Ins. Co. *v.* Broughton, 109 U. S. 121, 27 L. Ed. 878; Connecticut Mut. Life Ins. Co. *v.* Lathrop, 11 U. S. 612, 28 L. Ed. 536; Accident Ins. Co. *v.* Crandal, 120 U. S. 527, 30 L. Ed. 740; Connecticut Mut. Life Ins. Co. *v.* Akens, 150 U. S. 468, 473, 37 L. Ed. 1148.

In a policy of insurance covering "bodily injuries, effected through external, accidental and violent means," but providing that, "this insurance shall not extend to death or disability which may have been caused wholly or in part by bodily infirmities or disease, or by suicide, or self-inflicted injuries," hanging one's self while insane will not defeat a recovery. Accident Ins. Co. *v.* Crandal, 120 U. S. 527, 30 L. Ed. 740.

A provision, not containing the words "sane or insane," does not include a self-killing by an insane person, whether his unsoundness of mind is such as to prevent him from understanding the physical nature and consequences of his act, or only such as to prevent him while foreseeing and premeditating its physical consequences, from understanding its moral nature and aspect. Accident Ins. Co. *v.* Crandal, 120 U. S. 527, 531, 30 L. Ed. 740; Mutual Life Ins. Co. *v.* Terry, 15 Wall. 580, 21 L. Ed. 236; Bigelow *v.* Berkshire Life Ins. Co., 93 U. S. 284, 23 L. Ed. 918; Charter Oak Life Ins. Co. *v.* Rodel, 95 U. S. 232, 24 L. Ed. 433; Manhattan Life Ins. Co. *v.* Broughton, 109 U. S. 121, 27 L. Ed. 878.

Same rules apply to suicide and self-inflicted injuries.—"There can be no doubt that the assured did not die 'by suicide,' within the meaning of this policy; and the same reasons are conclusive against holding that he died by 'self-inflicted injuries.' If self-killing,

falls within a proviso against death or injury resulting from suicide, feloniously or otherwise, while sane or insane.[8]

2. Injuries Intentionally Inflicted.—There can be no recovery where the insured was murdered, if the policy contained a proviso against "intentional injuries, inflicted by the insured or any other person."[9]

Consent of Insured.—The injury need not be inflicted with the knowledge or consent of the insured.[10]

3. Bodily Infirmities and Diseases.—A clause which provides that the insurance shall not extend to "death or disability which may have been caused wholly or in part by bodily infirmities or disease," does not include a hanging one's self while insane.[11]

4. Dueling, Fighting or Other Breach of Law.—Engaging in violation of law by horse racing for money, is within the condition against "dueling, fighting or other breach of the law."[12]

5. Exposure to Unnecessary Danger.—A condition against assured's willfully "exposing himself to any unnecessary peril," embraces horse racing.[13]

'suicide,' 'dying by his own hand,' cannot be predicated of an insane person, no more can 'self-inflicted injuries,' for in either case it is not his act." Accident Ins. Co. *v.* Crandal, 120 U. S. 527, 532, 30 L. Ed. 740.

8. In an action upon a policy of insurance covering "bodily injuries, effected through external, violent and accidental means," with a proviso against recovery where the death or injury was the result of "suicide (felonious or otherwise, sane or insane)." No valid claim can be made under the policy, if the insured, either intentionally or when insane, inflicted upon himself the injuries which caused his death." Travelers' Ins. Co. *v.* McConkey, 127 U. S. 661, 668, 32 L. Ed. 308.

9. "The policy expressly provides that no claim shall be made under it where the death of the insured was caused by 'intentional injuries, inflicted by the insured or any other person.' If he was murdered, then his death was caused by intentional injuries inflicted by another person. Nevertheless the instructions to the jury were so worded as to convey the idea that if the insured was murdered, the plaintiff was entitled to recover; in other words, even if death was caused wholly by intentional injuries inflicted upon the insured by another person, the means used were 'accidental' as to him, and therefore the company was liable. This was error." Travelers' Ins. Co. *v.* McConkey, 127 U. S. 661, 667, 32 L. Ed. 308.

10. Travelers' Ins. Co. *v.* McConkey, 127 U. S. 661, 667, 32 L. Ed. 308.

11. "The words 'bodily infirmities or disease' do not include insanity. Although, as suggested by Mr. Justice Hunt in Mutual Life Ins. Co. *v.* Terry, 15 Wall. 580, 589, 21 L. Ed. 236, insanity or unsoundness of mind often, if not always, is accompanied by, or results from, disease of the body, still, in the common speech of mankind, mental are distinguished from bodily diseases. In the phrase 'bodily infirmities or disease,' the word 'bodily' grammatically applies to 'disease,' as well as to 'infirmities;' and it cannot but be so applied, without disregarding the fundamental rule of interpretation, that policies of insurance are to be construed most strongly against the insurers who frame them. The prefix of 'bodily' hardly affects the meaning of 'infirmities,' and it is difficult to conjecture any purpose in inserting it in this proviso, other than to exclude mental disease from the enumeration of the causes of death or disability to which the insurance does not extend." Accident Ins. Co. *v.* Crandal, 120 U. S. 527, 532, 30 L. Ed. 740.

12. Where two persons were driving sulkies in competition alongside of each other at a horse race for money—which sort of race was made illegal by statute—and on a collision ensuing, one jumped to the ground from his sulky, and was clear from the sulky, harness, and reins, on his feet and uninjured, and instantly spoke to his horse to stop, and then started forward to get hold of the reins, which were hanging across the axle tree; and when ahold of, or attempting to get hold of them, was killed by getting tangled in them, falling down and being dragged against a stone; held, on a suit upon a policy of insurance on the life of the person killed, which made it a condition of paying the sum assured that the contract should not extend to a case of death caused by "dueling, fighting, or other breach of the law on the part of the assured," that this death was within the condition. Travelers' Ins. Co. *v.* Seaver, 19 Wall. 531, 22 L. Ed. 155.

Provision is wise and prudent.—"The company in protecting themselves against accident or death caused by a violation of law, acted upon a wise and prudent estimate of the dangers to the person generally connected with such violations." Travelers' Ins. Co. *v.* Seaver, 19 Wall. 531, 541, 22 L. Ed. 155.

13. Travelers' Ins. Co. *v.* Seaver, 19 Wall. 531, 22 L. Ed. 155.

II. Notice and Preliminary Proof of Accident and Injury.

See the title INSURANCE.

III. Proximate Cause.

The law of insurance attributes an injury or loss to its proximate cause only.[14]

IV. Evidence.

In the construction of a provision in a policy excepting the insurer's liability, evidence of how people living in the same community with the insured understood such provisions is inadmissible.[15]

Direct and Positive Proof of Death.—The requirement, of direct and positive proof, does not make it necessary to establish the fact and attendant circumstances of death by persons who were actually present when the insured received the injuries which caused his death.[16]

14. Accident Ins. Co. *v.* Crandal, 120 U. S. 527, 532, 30 L. Ed. 740; Scheffer *v.* Washington City, etc., R. Co., 105 U. S. 249, 252, 26 L. Ed. 1070.

The court correctly instructed the jury that they must weigh and give due consideration to all the testimony, and that if the deceased received an internal injury which caused his death, that such injury was the proximate cause of death. United States Mutual Accident Association *v.* Barry, 131 U. S. 100, 120, 33 L. Ed. 60.

Violation of law proximate cause of injury.—Where two persons were driving sulkies in competition alongside of each other at a horse race for money—which sort of race was made illegal by statute—and on a collision ensuing, one jumped to the ground from his sulky, and was clear from the sulky, harness, and reins, on his feet and uninjured, and instantly spoke to his horse to stop, and then started forward to get hold of the reins, which were hanging across the axletree; and when ahold of, or attempting to get hold of them, was killed by getting tangled in them, falling down and being dragged against a stone; held, that the leap from the sulky and securing the reins, and the subsequent fall and injury, were so close and immediate in their relation to the racing, and all so manifestly part of one continuous transaction, that it could not be said that there was a new and controlling influence to which the disaster should be attributed. Travelers' Ins. Co. *v.* Seaver, 19 Wall. 531, 22 L. Ed. 155.

"Both parties appeal to the case of Louisiana Mut. Ins. Co. *v.* Tweed, 7 Wall. 44, 19 L. Ed. 65, where it is said that when a new force or cause of the injury intervenes between the original cause and the accident, the former is the proximate cause. But we do not think this new force or cause is sufficiently made out by this verdict. The leap from the sulky and securing the reins, and the subsequent fall and injury to Seaver are so close and immediate in their relation to his racing, and all so manifestly part of one continuous transaction, that we cannot, as this finding presents it, say there was a new and controlling influence to which the disaster should be attributed. If he had been landed safely from his sulky and, after being assured of his position, had, with full knowledge of what he was doing, gone to catch the animal, his death in that pursuit when the race was lost might have been too remote to bring the case within the exception. But as the finding presents it, we cannot say that the accident was not caused by the race which was itself a violation of the law, and which might still have gone on had he caught his mare in time." Travelers' Ins. Co. *v.* Seaver, 19 Wall. 531, 542, 22 L. Ed. 155.

15. Where the insured was killed in a horse race on a suit for insurance money on a policy containing a condition against willful exposure to unnecessary danger and peril, and where the language of the condition was the matter referred to by the court, it was error to tell the jury that they were to consider "how ordinary people in the part of the country where the insured reside, in view of the state of things then existing—the frequency of such races, and the way in which such matches are usually regulated—would naturally understand such language, whether as precluding such driving or not." Travelers' Ins. Co. *v.* Seaver, 19 Wall. 531, 22 L. Ed. 155.

"The jury should have been left to decide for themselves, under all the facts before them attending the death of the insured, whether it was caused by his willful exposure to an unnecessary danger or peril. Such light as the court as a matter of law could give them, on the subject of the willfulness of his conduct, or the presence or absence of any necessity or the character of the necessity which would justify him, might be proper, but this general reference to what ordinarily people in a particular locality might think about it, was clearly not so." Travelers' Ins. Co. *v.* Seaver, 19 Wall. 531, 544, 22 L. Ed. 155.

16. "The two principal facts to be es-

Declarations of Insured.—The declarations of an insured made contemporaneously or nearly so, with the event which it is alleged caused his death, from a part of the res gestæ and are admissible in evidence.[17]

V. Presumptions and Burden of Proof.

Presumption.—The jury should not presume, from the mere fact of death, that the insured was murdered.[18]

Burden of Proof.—The burden of proof is upon the plaintiff, to show, from all the evidence, that the death of the insured was caused by external violence and accidental means.[19]

ACCOMMODATION PAPER.—See the title BILLS, NOTES AND CHECKS.

tablished were external violence and accidental means, producing death. The first was established when it appeared that death ensued from a pistol shot through the heart of the insured. The evidence on that point was direct and positive; as much so, within the meaning of the policy, as if it had come from one who saw the pistol fired; and the proof, on this point, is none the less direct and positive, because supplemented or strengthened by evidence of a circumstantial character." Travelers' Ins. Co. *v.* McConkey, 127 U. S. 661, 666, 32 L. Ed. 308.

"The condition that direct and positive proof must be made of death having been caused by external, violent, and accidental means, did not deprive the plaintiff, when making such proof, of the benefit of the rules of law established for the guidance of courts and juries in the investigation and determination of facts." Travelers' Ins. Co. *v.* McConkey, 127 U. S. 661, 667, 32 L. Ed. 308.

17. Travelers' Ins. Co. *v.* Mosley, 8 Wall. 397, 19 L. Ed. 437. See the titles HEARSAY EVIDENCE; RES GESTÆ.

18. "The facts were all before the jury as to the movements of the insured on the evening of his death, and as to the condition of his body and clothes when he was found dead, at a late hour of the night, upon the floor of his office. While it was not to be presumed, as a matter of law, that the deceased took his own life, or that he was murdered, the jury were at liberty to draw such inferences in respect to the cause of death as, under the settled rules of evidence, the facts and circumstances justified." Travelers' Ins. Co. *v.* McConkey, 127 U. S. 661, 667, 32 L. Ed. 308.

19. Travelers' Ins. Co. *v.* McConkey, 127 U. S. 661, 668, 32 L. Ed. 308.

ACCOMPLICES AND ACCESSORIES.

BY H. W. WESTER.

I. Who Are Accomplices and Accessories, 63.
II. Aiders and Abettors, 63.
III. Indictment, 65.
IV. Instructions, 65.
V. Accomplices as Witnesses, 66.
A. Competency, 66.
B. Credibility, 67.
C. Equitable Right to Pardon, 68.
VI. Evidence, 69.

CROSS REFERENCES.

See the titles CONSPIRACY; CONSOLIDATION OF ACTIONS; CRIMINAL LAW; HOMICIDE; RES GESTÆ; SEPARATE TRIAL.

As to the admissions or confessions of one accomplice as evidence against the others, see the titles CONFESSIONS; DECLARATIONS AND ADMISSIONS.

I. Who Are Accomplices and Accessories.

One does not become an accomplice by not disclosing a homicide until some time afterward.[1] The purchaser, receiver, or concealer of stolen property is an accessory after the fact.[2]

II. Aiders and Abettors.

Liable as Principals.—It is a well-known and familiar principle of criminal jurisprudence, that he who commands, or procures a crime to be done, if it be done, is guilty of the crime, and the act is his act.[3] "This is so true, that even

1. Bird *v.* United States, 187 U. S. 118, 133, 47 L. Ed. 100.

2. Accessory after the fact.—Stockwell *v.* United States, 13 Wall. 531, 559, 20 L. Ed. 491, dissenting opinion of Field, J. See the title RECEIVING STOLEN GOODS.

3. Liable as principals.—United States *v.* Gooding, 12 Wheat. 460, 6 L. Ed. 693; Coffin *v.* United States, 162 U. S. 664, 669, 40 L. Ed. 1109.

Violation of slave trade act.—See the title SLAVES.

Upon an indictment under the slave trade act of the 20th of April, 1818, ch. 373, against the owner of the ship, it was not necessary that there should be any principal offender to whom the defendant might be aiding and abetting; these terms in the statute did not refer to the relation of principal and accessory in cases of felony; both the actor, and he who aids and abets the act, are considered as principals. "The terms 'aid' and 'abet,' used in this statute, are not used as technical phrases belonging to the common law, because the offense is not made a felony, and therefore, the words require no such interpretation. The statute punishes them as substantive offenses, and not as accessorial, and the words are, therefore, to be understood as in the common parlance, and import assistance, co-operation and encouragement." United States *v.* Gooding, 12 Wheat. 460, 476, 6 L. Ed. 693.

If done by others, under the command and direction of the owner of the ship, with his approbation and for his benefit, it is just as much, in contemplation of law, his own act, as if done by himself. To this extent, at least, the maxim may be safely applied, qui facit per alium, facit per se. And it cannot be material, whether it be done in his absence from, or his presence in, the scene. Especially, there can be no doubt, that the principle ought to be applied with increased force, where the owner resides at the same port or neighborhood, and superintends the course of the operations, even if he does not see them. United States *v.* Gooding, 12 Wheat. 460, 6 L. Ed. 693.

Embezzlement from national bank.—See, generally, the title BANKS AND BANKING.

To constitute an aider and abettor under § 5209, it is not necessary that the accused be an officer of the bank. Coffin

the agent may be innocent, when the procurer or principal may be convicted of guilt, as in the case of infants or idiots, employed to administer poison."[4] Even in the highest crimes, those who are present, aiding and commanding, or abetting, are deemed principals;[5] and if absent, those who aid and command, or abet in treason are deemed principals.[6] "In cases of misdemeanors, all those who are concerned in aiding and abetting, as well as in perpetrating the act, are principals."[7] Under such circumstances, there is no room for the question of actual constructive presence or absence; for whether present or absent, all are principals. They may be indicted and punished accordingly.[8]

Presence without Participation.—In some instances where an accomplice is present for the purpose of aiding and abetting in a murder, but refrains from so aiding and abetting because it turned out not to be necessary for the accomplishment of the common purpose, he is equally guilty as if he had actively participated by words or acts of encouragement.[9]

Criminal Intent.—The acts or words of encouragement and abetting must have been used by the accused with the intention of encouraging and abetting.[10]

Order of Superior.—The fact that the accused was acting under orders of one superior in authority would not excuse him if there were proof of guilty knowledge or participation on his part;[11] but if adequate proof to that effect is

v. United States, 162 U. S. 664, 669, 40 L. Ed. 1109. "It is evident that no matter how active the co-operation of third persons may have been in the wrongful act of a bank officer or agent, such third person is required to be charged as an aider and abettor in the offense and prosecuted as such. The primary object of the statute was to protect the bank from the acts of its own servants. As between officers and agents of the bank and third persons co-operating to defraud the bank, the statute contemplates that a bank officer shall be treated as a principal offender."

"It is clear that the statute has been violated if the one charged with aiding and abetting is shown to have actually aided and abetted the officer of the bank in misapplying its funds, no matter whom the accused may have ultimately intended to benefit by his misconduct, provided, of course, there existed the intent to defraud enumerated in the act of congress." Coffin *v.* United States, 162 U. S. 664, 667, 40 L. Ed. 1109.

"It is wholly immaterial that the principal offender should have had several intents, provided the principal and the aider and abettor were both actuated by the criminal intent specified in the statute." Coffin *v.* United States, 162 U. S. 664, 686, 40 L. Ed. 1109.

The mere consent of the defendants to the unlawful and criminal acts would not be sufficient to sustain a verdict of guilty. The consent or participation is required to be such as contributed to the execution of the unlawful and criminal acts charged in the indictment. Coffin *v.* United States, 162 U. S. 664, 682, 40 L. Ed. 1109.

4. Where agent is innocent.—United States *v.* Gooding, 12 Wheat. 460, 6 L. Ed. 693.

5. High crimes—Presence of accused.—United States *v.* Gooding, 12 Wheat. 460, 6 L. Ed. 693; Boyd *v.* United States, 142 U. S. 450, 35 L. Ed. 1076.

6. Treason—Accused absent.—United States *v.* Gooding, 12 Wheat. 460, 6 L. Ed. 693.

7. Misdemeanors.—United States *v.* Gooding, 12 Wheat. 460, 6 L. Ed. 693; United States *v.* Mills, 7 Pet. 138, 8 L. Ed. 636.

8. Question of actual or constructive presence immaterial.—United States *v.* Gooding, 12 Wheat. 460, 477, 6 L. Ed. 693.

9. Presence without participation.—Thus, if there had been evidence sufficient to show that there had been a previous conspiracy between R. and H. to waylay and kill C., H., if present at the time of the killing, would be guilty, even if it was found unnecessary for him to act. Hicks *v.* United States, 150 U. S. 442, 450, 37 L. Ed. 1137.

10. Criminal intent.—Hicks *v.* United States, 150 U. S. 442, 37 L. Ed. 1137.

An instruction is erroneous which omits to charge the jury that the acts or words of encouragement and abetting must have been used by the accused with the intention of encouraging and abetting, nor would such error be cured by the court afterwards saying: "If the deliberate and intentional use of words has the effect to encourage one man to kill another, he who uttered these words is presumed by the law to have intended that effect, and is responsible therefor." Hicks *v.* United States, 150 U. S. 442, 449, 37 L. Ed. 1137.

11. Order of superior—No defense.—Wilborg *v.* United States, 163 U. S. 632, 41 L. Ed. 289. See, generally, the titles

not shown the jury should find the defendant not guilty.[12]

Trial before Principal Offender.—"The trial or conviction of an actor is not indispensable to furnish a right to try the person who aids or abets the act; since each, in the eye of the law, is deemed guilty as a principal."[13]

III. Indictment.

Averment of Particular Acts.—It is not necessary that the particular act by which the aiding and abetting was consummated be specifically set out.[14]

"**If the party be only constructively a principal,** as an absent and distant coadjutor or leader, it may be necessary to aver the fact accordingly."[15]

Treason.—In prosecution for aiding and commanding, or abetting acts of treason, from considerations peculiar to the offense, it may be necessary to lay the overtacts precisely according to the facts, notwithstanding the accused be deemed principals.[16]

Embezzlement.—It is not necessary, in charging the defendant with aiding and abetting the cashier of a bank with the misapplication of its funds, to charge that the defendant then and there knew that such person was cashier. Where the acts charged against the cashier could only be committed by him by virtue of his official relation to the bank, the acts charged against the defendant likewise could only be committed by him in his official capacity, both being alleged to be officers of the same corporation. The knowledge that each had of the official relation of the other is necessarily implied in the coexistence of this official relation on the part of both towards the same corporation.[17] An indictment charging a violation of the statute relating to embezzlement from national banks is not defective in that in none of the counts is it asserted that the accused were officers of the bank or occupied any specific relation to the bank which made aiding and abetting possible.[18]

Robbing the Mails.—An indictment founded on the statute for advising, procuring and assisting a mail carrier to rob the mail, ought to set forth or aver that the said carrier did in fact commit the offense of robbing the mail, but it is not necessary that there be a distinct substantive averment of that fact.[19] The offense being secondary in its character it must sufficiently appear upon the indictment, that the offense alleged against the chief actor had been committed.[20]

IV. Instructions.

In the prosecution of accomplices and accessories, the general rules relative to

MASTER AND SERVANT; MILITARY LAW; PUBLIC OFFICERS.

Two men who were the mates of a vessel proceeded on a voyage assisting an unlawful military expedition or enterprise, under the captain's orders. This would not excuse them if there were proof of guilty knowledge or participation on their part when they left the port. Wiborg *v.* United States, 163 U. S. 632, 660, 41 L. Ed. 289.

12. Failure to show criminal intent.—Wiborg *v.* United States, 163 U. S. 632, 41 L. Ed. 289.

13. Trial before principal offender.—United States *v.* Gooding, 12 Wheat. 460, 476, 6 L. Ed. 693.

14. Averment of particular acts.—United States *v.* Gooding, 12 Wheat. 460, 6 L. Ed. 693; United States *v.* Simmons, 96 U. S. 360, 363, 24 L. Ed. 819; Coffin *v.* United States, 156 U. S. 432, 448, 39 L. Ed. 481, distinguishing Evans *v.* United States, 153 U. S. 584, 38 L. Ed. 831.

15. Where party is only a constructive principal.—United States *v.* Gooding, 12 Wheat. 460, 6 L. Ed. 693.

16. Treason.—United States *v.* Gooding, 12 Wheat. 460, 6 L. Ed. 693. See the title TREASON.

17. Embezzlement—Knowledge as to identity of cashier.—United States *v.* Northway, 120 U. S. 327, 333, 30 L. Ed. 664. See the title BANKS AND BANKING.

18. Embezzlement—Averment as to official position of accused.—Coffin *v.* United States, 162 U. S. 664, 40 L. Ed. 1109; Coffin *v.* United States, 156 U. S. 432, 39 L. Ed. 481, distinguishing United States *v.* Northway, 120 U. S. 327, 333, 30 L. Ed. 664.

19. Robbing the mails—Averment as to office of carrier.—United States *v.* Mills, 7 Pet. 138, 8 L. Ed. 636. See the title POSTAL LAWS.

20. Robbing the mails—Averment as to commitment of offense.—United States *v.* Mills, 7 Pet. 138, 8 L. Ed. 636.

instructions are applicable;[21] the instruction must be founded on evidence;[22] the defendant cannot complain of an instruction which it not prejudicial.[23]

V. Accomplices as Witnesses.

A. Competency.—"Accomplices in guilt, not previously convicted of an infamous crime, when separately tried are competent witnesses for or against each other."[24] Where two persons are jointly indicted for an offense committed against the United States and are tried separately, it is not competent for the person first tried to call the other as a witness in his behalf.[25] A different rule generally prevails where such witness is introduced by the prosecution.[26] "Such offenders everywhere are competent witnesses if they see fit voluntarily to appear

21. See the title INSTRUCTIONS.

22. Must be founded on evidence.—Bird *v.* United States, 187 U. S. 118, 132, 47 L. Ed. 100; Hicks *v.* United States, 150 U. S. 442, 450, 37 L. Ed. 1137.

23. Harmless error.—Dunbar *v.* United States, 156 U. S. 185, 200, 39 L. Ed. 390. "Of course the defendant cannot complain of an instruction that no conviction can be had on any count supported by only the uncorroborated testimony of an accomplice." Dunbar *v.* United States, 156 U. S. 185, 200, 39 L. Ed. 390. See the title APPEAL AND ERROR.

24. Accomplices separately tried.—Whiskey Cases, 99 U. S. 594, 25 L. Ed. 399.

25. Jointly indicted and separately tried.—United States *v.* Reid, 12 How. 361, 13 L. Ed. 1023.

Two persons were jointly indicted for a murder committed upon the high seas, and tried separately; the person first tried attempted to call the other as a witness in his behalf. The trial took place in Virginia, and the evidence would have been competent under a law of Virginia passed in 1849. But the 34th section of the Judiciary Act of 1789, declaring that the laws of the several states shall be regarded as rules of decision in trials at common law in the courts of the United States, meant only to include civil cases at common law, and not criminal offenses against the United States. The law by which the admissibility of testimony in criminal cases must be determined, is the law of the state, as it was when the courts of the United States were established by the Judiciary Act of 1789. United States *v.* Reid, 12 How. 361, 13 L. Ed. 1023.

26. United States *v.* Reid, 12 How. 361, 13 L. Ed. 1023.

In Benson *v.* United States, 146 U. S. 325, 36 L. Ed. 991, it was held, that when two parties were indicted jointly and tried separately, one might be called as a witness by the government against the other.

"Most of the authors on evidence evidently adopt the view that the testimony is admissible when offered by the state. Although but little authority is adduced to support their statements, and the doctrine is not very clearly or positively stated in some instances, still such a general concurrence of favorable expression has much weight upon the question. It goes far to show the common opinion and practice. Hawkins' P. C., book 2, c. 46, § 90; 1 Hale's P. C. 305; 2 Starkie's Ev. 11; Roscoe's Cr. Ev., 9th. Ed., 130, 140; 2 Russell's Crimes, 957. Mr. Wharton says: 'An accomplice is a competent witness for the prosecution, although his expectation of pardon depends upon the defendant's conviction, and although he is a codefendant, provided in the latter case his trial is severed from that of the defendant against whom he is offered.' Whart. Cr. Ev., 8th. Ed., § 439. Mr. Greenleaf states the same rule. He says: 'The usual course is, to leave out of the indictment those who are called as witnesses, but it makes no difference as to the admissibility of an accomplice, whether he is indicted or not, if he has not been put on his trial at the same time with his companions in guilt. 1 Greenl. Ev., § 379.'" Benson *v.* United States, 146 U. S. 325, 334, 36 L. Ed. 991.

In Benson *v.* United States, 146 U. S. 325, 334, 36 L. Ed. 991, the court said: "But it is said that this court has already practically decided this question in the case of United States *v.* Reid, 12 How. 361, 13 L. Ed. 1023. The precise question in that case was as to the right of the defendant to call his codefendant, and not that of the government to call the codefendant, and a distinction has been recognized between the two cases. It is true that the reasons given for the exclusion of the witness in one are largely the same as those given for his exclusion in the other, to wit, interest and being party to the record; but public policy is also urged in favor of the exclusion of one defendant as a witness for his codefendant, for each would try to swear the other out of the charge. And as the distinction prevailed, whether founded on satisfactory reasons or not, it is sufficient to justify us in holding that that case is not decisive of this. Further, the stress in that case was not on this question. The defendant was indicted and tried in the circuit court of the United States for the district of Virginia. A statute had been

and testify."[27] Offenders of the kind are not admitted to testify as of course, and sufficient authority exists for saying that in the practice of the English court it is usual that a motion to the court is made for the purpose, and that the court, in view of all the circumstances, will admit or disallow the evidence as will best promote the ends of public justice. Good reasons exist to suppose that the same course is pursued in the courts of some of the states, where the English practice seems to have been adopted without much modification.[28] But the course of proceeding in the courts of many of the states is quite different from that just described, the rule being that the court will not advise the attorney general how he shall conduct a criminal prosecution. Consequently, it is regarded as the province of the public prosecutor and not of the court to determine whether or not an accomplice, who is willing to criminate himself and his associates in guilt, shall be called and examined for the state.[29]

B. Credibility.—No conviction should be had on the uncorroborated testimony of an accomplice.[30]

C. Equitable Right to Pardon—General Statement.—"Where the case is

passed in that state, in terms permitting a codefendant when not jointly tried to testify in favor of the one on trial, and that statute was invoked as securing the competency of the witness, and the question which was discussed was whether the existing statute law of Virginia controlled, and it was held, that it did not, and that the question was to be determined by the common law as it stood in Virginia at the date of the Judiciary Act of 1789. It was assumed both in this court and in the circuit court, 3 Hughes 509, 539, 540, that by that law the codefendant was incompetent. It was not affirmed that such was the rule in the mother country or in the other states of the Union. We do not feel ourselves, therefore, precluded by that case from examining this question in the light of general authority and sound reason."

27. Voluntary appearance.—Whiskey Cases, 99 U. S. 594, 25 L. Ed. 399.

28. Manner of determining competency.—Whiskey Cases, 99 U. S. 594, 25 L. Ed. 399.

29. Whiskey Cases, 99 U. S. 594, 603, 25 L. Ed. 399.

"Of all others, the prosecutor is best qualified to determine that question, as he alone is supposed to know what other evidence can be adduced to prove the criminal charge. Applications of the kind are not always to be granted, and in order to acquire the information necessary to determine the question, the public prosecutor will grant the accomplice an interview, with the understanding that any communications he may make to the prosecutor will be strictly confidential. Interviews for the purpose mentioned are for mutual explanation, and do not absolutely commit either party; but if the accomplice is subsequently called and examined, he is equally entitled to a recommendation for executive clemency. Promise of pardon is never given in such an interview, nor any inducement held out beyond what the before-mentioned usage and practice of the courts allow." Whiskey Cases, 99 U. S. 594, 604, 25 L. Ed. 399.

30. Uncorroborated testimony.—Reagan *v.* United States, 157 U. S. 301, 311, 39 L. Ed. 709; Grimm *v.* United States, 156 U. S. 604, 39 L. Ed. 550.

On behalf of the defendant it is the duty of the court to caution the jury not to convict upon the uncorroborated testimony of an accomplice. Indeed, according to some authorities, it should peremptorily instruct that no verdict of guilty can be founded on such uncorroborated testimony, and this because the inducements to falsehood on the part of an accomplice are so great. Reagan *v.* United States, 157 U. S. 301, 311, 39 L. Ed. 709.

"An official, suspecting that the defendant was engaged in a business offensive to good morals, sought information directly from him, and the defendant, responding thereto, violated a law of the United States by using the mails to convey such information, and he cannot plead in defense that he would not have violated the law if inquiry had not been made of him by such government official. The authorities in support of this proposition are many and well considered. Among others reference may be made to cases of Bates *v.* United States, 10 Fed. Rep. 92, and the authorities collected in a note of Mr. Wharton, on page 97; United States *v.* Moore, 19 Fed. Rep. 39; United States *v.* Wight, 38 Fed. Rep. 106, in which the opinion was delivered by Mr. Justice Brown, then district judge, and concurred in by Mr. Justice Jackson, then circuit judge; United States *v.* Dorsey, 40 Fed. Rep. 752; Commonwealth *v.* Baker, 155 Mass. 287, in which the court held, that one who goes to a house alleged to be kept for illegal gaming, and engages in such gaming himself for the express purpose of appearing as a witness for the government against the proprietor, is not an accomplice, and the case is not subject to the rule that no

not within any statute, the general rule is that if an accomplice, when examined as a witness by the public prosecutor, discloses fully and fairly the guilt of himself and his associates, he will not be prosecuted for the offense disclosed;[31] but it is equally clear that he cannot by law plead such facts in bar of any indictment against him,[32] nor avail himself of it upon his trial,[33] for it is merely an equitable title to the mercy of the executive,[34] and can only come before the court by way of application to put off the trial in order to give the prisoner time to apply to the executive for the protection which immemorial usage concedes that he is entitled to at the hands of the executive.[35]

Origin of the Custom.—Beyond doubt, some of the elements of the usage had their origin in the ancient and obsolute practice called approvement.[36]

Abolition of Ancient Custom.—But great inconvenience arose from the practice of approvement, in consequence of which the present mode of proceeding was adopted in analogy to that law.[37]

Failure to Comply with Conditions.—Accomplices having refused to comply with the conditions annexed to his equitable right, refusing to testify, or

conviction should be had on the uncorroborated testimony of an accomplice.", Grimm *v.* United States, 156 U. S. 604, 39 L. Ed. 550.

31. **Immunity.**—Whiskey Cases, 99 U. S. 594, 25 L. Ed. 399. See, generally, the title PARDON.

32. **Plea of turning state's evidence as a defense.**—Ex parte Wells, 18 How. 307, 15 L. Ed. 421; Whiskey Cases, 99 U. S. 594, 25 L. Ed. 399.

33. **Immunity during trial.**—Ex parte Wells, 18 How. 307, 15 L. Ed. 421; Whiskey Cases, 99 U. S. 594, 25 L. Ed. 399.

34. **Merely an equitable right.**—Whiskey Cases, 99 U. S. 594, 25 L. Ed. 399.

35. **Application to postpone trial.**—Whiskey Cases, 99 U. S. 594, 25 L. Ed. 399; Ex parte Wells, 18 How. 307, 15 L. Ed. 421.

36. **Approvement.**—Whiskey Cases, 99 U. S. 594, 25 L. Ed. 399.

The doctrine of approvement may be briefly explained as follows: "When a person indicted of treason or felony was arraigned, he might confess the charge before the plea pleaded, and appeal, or accuse another as his accomplice of the same crime, in order to obtain his pardon. Such approvement was only allowed in capital offenses, and was equivalent to indictment, as the appellee was equally required to answer to the charge; and if proved guilty, the judgment of the law was against him, and the approver, so called, was entitled to his pardon ex debito justitiæ. On the other hand, if the appellee was acquitted, the judgment was that the approver should be condemned. 4 Bla. Com. 330." Whiskey Cases, 99 U. S. 594, 599, 25 L. Ed. 399.

37. **Approvement superseded.**—Whiskey Cases, 99 U. S. 594, 600, 25 L. Ed. 399.

"Centuries have elapsed since the judicial usage referred to was substituted for the ancient practice of approvement, and experience shows that throughout that whole period it has proved, both here and in the country where it had its origin, to be a proper and satisfactory protection to the accomplice in all cases where he acts in good faith, and testifies fairly and fully to the whole truth." Whiskey Cases, 99 U. S. 594, 25 L. Ed. 399.

Proceeding.—Prosecutors in such a case should explain to the accomplice that he is not obliged to criminate himself, and inform him just what he may reasonably expect in case he acts in good faith, and testifies fully and fairly as to his own acts in the case, and those of his associates. When he fulfills those conditions he is equitably entitled to a pardon, and the prosecutor, and the court if need be, when fully informed of the facts, will join in such a recommendation. Whiskey Cases, 99 U. S. 594, 604, 25 L. Ed. 399.

Duty of prosecutor.—Modifications of the practice doubtless exist in jurisdictions where the power of pardon does not exist prior to conviction; but every embarrassment of that sort may be removed by the prosecutor, as in the absence of any legislative prohibition he may nol. pros. the indictment if pending, or advise the prisoner to plead guilty, he, the prisoner, reserving the right to retract his plea and plead over to the merits if his application for pardon shall be unsuccessful. Whiskey Cases, 99 U. S. 594, 604, 25 L. Ed. 399.

Where power to pardon exists before conviction.—Where the power of pardon exists before conviction as well as after, no such difficulties can arise, as the prisoner, if an attempt is made to put him to trial in spite of his equitable right to pardon, may move that the trial be postponed, and may support his motion by his own affidavit, when the court may properly insist to be informed of all the circumstances. Power under such circumstances is vested in the court in a proper case to put off the trial as long as may be necessary, in order that the case of the prisoner may be presented to the executive for decision. Whiskey Cases, 99 U. S. 594, 604, 25 L. Ed. 399.

testifying falsely are to be tried and may be convicted upon their own confession.[38]

VI. Evidence.

In a prosecution for aiding and abetting the proof of the command or procurement, may be direct or indirect, positive or circumstantial; but this is matter for the consideration of the jury, and not of legal competency.[39]

ACCORD AND SATISFACTION.

CROSS REFERENCES.

See the titles ACCOUNTS AND ACCOUNTING; ARBITRATION AND AWARD; COMPROMISE; CONTRACTS; JUDGMENTS AND DECREES; LIMITATION OF ACTIONS AND ADVERSE POSSESSION; NOVATION; PAYMENT; RELEASE; RESCISSION, CANCELLATION AND REFORMATION; TENDER.

As to plea of accord and satisfaction to action on appeal bond, see the title APPEAL AND ERROR. As to satisfaction of judgments, see the title JUDGMENTS AND DECREES.

Definition.—An agreement between two persons, one of whom has a right of action against the other, that the latter should do or give, and the former accept, something in satisfaction of the right of action different from, and usually less than, what might be legally enforced; when the agreement is executed, and satisfaction has been made, it is called "accord and satisfaction."[1]

Setting Aside for Mistake.—An accord and satisfaction may be set aside if the parties were mutually mistaken.[2]

Plea of Accord and Satisfaction.—It has been held, that accord cannot be set up as a defense in the same plea with other defenses.[3]

ACCOUNT RENDER OR STATED.—See the title ACCOUNTS AND ACCOUNTING.

38. Failure to comply with conditions.—Whiskey Cases, 99 U. S. 594, 605, 25 L. Ed. 399.

39. Evidence.—United States *v.* Gooding, 12 Wheat. 460, 6 L. Ed. 693.

1. Black's Law Dict. 16.

The new agreement must be completely carried out before it amounts to an accord and satisfaction. Memphis *v.* Brown, 20 Wall. 289, 22 L. Ed. 264.

The discharge of a contract in a different thing from that for which the contract provides, necessarily is an accord and satisfaction. Sheehy *v.* Mandeville, 6 Cranch 250, 253, 263, 3 L. Ed. 215; Very *v.* Levy, 13 How. 345, 357, 14 L. Ed. 173; San Juan *v.* St. John's Gas Co., 195 U. S. 510, 521, 49 L. Ed. 299.

A note, given and received for and in discharge of an open account, operates as an accord and satisfaction as to the account. Sheehy *v.* Mandeville, 6 Cranch 250, 252, 3 L. Ed. 215.

The holder of treasury notes, payable three years after date, which were issued under the authority of an act of July 17, 1861 (12 Stat. 259), demanded payment in gold of the principal and interest due thereon. The secretary of the treasury refused payment in that medium, but offered it in legal tender notes. The holder, under protest, received the offered payment in full discharge of the notes, surrendered them to be canceled, and brought an action against the United States to recover the difference in the market value of gold and of legal tender notes at the date of such payment. Held, that by accepting the medium offered, and surrendering the treasury notes, the holder waived all claim, independently of the question whether or not that medium was a legal tender in payment of them. San Juan *v.* St. John's Gas Co., 195 U. S. 510, 521, 49 L. Ed. 299; Savage *v.* United States, 92 U. S. 382, 23 L. Ed. 660.

2. Horn *v.* Detroit Dry Dock Co., 150 U. S. 610, 37 L. Ed. 1199.

Pleading mistake.—"While an accord and satisfaction may be set aside, if it is shown that the parties to the transaction were mutually mistaken in regard to the material facts, such mistake must be set up by proper pleading. It is not available where it is neither averred in the bill, nor referred to in a plea in bar and a general replication thereto, which merely puts in issue the truth of the plea." Horn *v.* Detroit Dry Dock Co., 150 U. S. 610, 37 L. Ed. 1199. See the titles MISTAKE AND ACCIDENT; RESCISSION, CANCELLATION AND REFORMATION.

3. The plea of the state of Massa-

ACCOUNTS AND ACCOUNTING.

BY H. W. WESTER.

I. **Action of Account,** 70.
II. **Account Stated,** 71.
A. What Constitutes, 71.
B. Conclusiveness, 72.
C. Questions of Law and Fact, 72.
D. Impeachment—Grounds, 72.
III. **Jurisdiction,** 73.
IV. **Pleading and Practice,** 74.
V. **Evidence,** 74.

CROSS REFERENCES.

See the titles APPEAL AND ERROR; ARMY AND NAVY; ATTORNEY AND CLIENT; BANKS AND BANKING; CORPORATIONS; CREDITORS' SUITS; DOCUMENTARY EVIDENCE; JOINT TENANTS AND TENANTS IN COMMON; LACHES; LANDLORD AND TENANT; LIMITATION OF ACTIONS AND ADVERSE POSSESSION; MINES AND MINERALS; MUNICIPAL CORPORATIONS; OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; PAYMENT; POSTAL LAWS; PUBLIC LANDS; RESTRAINT OF TRADE; SCHOOLS; SET-OFF, RECOUPMENT AND COUNTERCLAIM; STOCK AND STOCKHOLDERS; TREES AND TIMBER; TRUSTS AND TRUSTEES.

As to the illegality of the transaction as a defense to an action on account, see the title ILLEGAL CONTRACTS. As to interest on account, see the title INTEREST. As to the mode by which a court of chancery ascertains the amount due, see the titles ISSUES TO JURY; REFERENCE. As to a promissory note given and received for and in discharge of an open account as constituting a bar to an action on the open account, see the title PAYMENT. As to accounts between partners, see the title PARTNERSHIP. As to accounting in patent right cases, see the title PATENTS. As to accounting between states, see the title STATE. As to accounting by trustees, see the title TRUSTS AND TRUSTEES. As to accounting by executors and administrators, see the title EXECUTORS AND ADMINISTRATORS. As to treasury statements, see the title UNITED STATES. As to department accounts, see the title UNITED STATES.

I. Action of Account.

The action of account is almost obsolete.[1]

chusetts, in a suit against her by the state of Rhode Island for the settlement of a boundary, after setting forth various proceedings which preceded and followed the execution of certain agreements with Rhode Island, conducing to show the obligatory and conclusive effect of those agreements upon both states, as an accord and compromise of a disputed right, proceeded to aver, that Massachusetts had occupied and exercised jurisdiction and sovereignty, according to the agreement, to the present time; and then set up as a defense, that the state of Massachusetts had occupied and exercised jurisdiction over the territory from that time up to the present; the defendants then pleaded the agreements of 1701 and 1718, and unmolested possession from that time, in bar to the whole bill of the complainant. The court held, that this plea was twofold: 1. An accord and compromise of a disputed right; 2. Prescription, or an unmolested possession from the time of the agreement. These two defenses are entirely distinct and separate, and depend upon different principles; here are two defenses in the same plea, contrary to the established rules of pleading; the accord and compromise, and the title by prescription united in this plea, render it multifarious; and it ought to be overruled on this account. Rhode Island *v.* Massachusetts, 14 Pet. 210, 10 L. Ed. 423. See the title MULTIFARIOUSNESS.

1. **Action of account almost obsolete.** —Ivinson *v.* Hutton, 98 U. S. 79, 25 L.

II. Account Stated.

A. What Constitutes.—An account rendered becomes an account stated, unless objected to within a reasonable time.[2] And where a party to a stated account, who is under a duty, from the usages of business or otherwise, to examine it within a reasonable time after having an opportunity to do so, and give timely notice of his objections thereto, neglects altogether to make such examination himself, or to have it made, in good faith, by another for him; by reason of which negligence, the other party, relying upon the account as having been acquiesced in or approved, has failed to take steps for his protection which he could and would have taken had such notice been given the former may be estopped by his conduct from questioning its conclusiveness.[3] Or if certain items in an account under such circumstances are objected to within a reasonable time, and others not, the latter are to be regarded as covered by such an admission.[4] The mere rendering an account, however, does not make it a stated account; but if the other party receives it, admits the correctness of the items, claims the balance, or offers to pay it, as it may be in his favor or against him, then it becomes a stated account.[5] A statement which is only partial, made up from imperfect sources, the correctness of which is disputed by the defendant, does not constitute such an account stated as to conclude the defendant.[6]

Demand Founded on Executed Contract.—A demand cannot be regarded as an open account where there is a contract which is the foundation of the claim, and which, though not fulfilled according to its letter, either as to the time or place of delivery, yet with the qualifications which the law under such circumstances imposes, determines the respective liabilities of the parties.[7]

Bank Book.—As to whether a bank book, balanced and returned constitutes an account stated, see the title BANKS AND BANKING.

An Account Closed, by the cessation of dealings between the parties, is not an account stated.[8]

Submission.—In order to constitute an account stated between individuals,

Ed. 66; James *v.* Browne, 1 Dall. 339, 1 L. Ed. 165.

"The action of account has, we know, been almost disused in England for a century past; but this is owing to the greater facility of obtaining settlements in the court of chancery, by a reference to the masters; and there are many cases in the books which point out the expediency and propriety of the interference of that court." James *v.* Browne, 1 Dall. 339, 340, 1 L. Ed. 165.

2. Account rendered.—Wiggins *v.* Burkham, 10 Wall. 129, 19 L. Ed. 884; Freeland *v.* Heron, 7 Cranch 147, 3 L. Ed. 297; Standard Oil Co. *v.* Van Etten, 107 U. S. 325, 27 L. Ed. 319.

3. Failure to object.—Leather Manufacturers' Bank *v.* Morgan, 117 U. S. 96, 107, 29 L. Ed. 811.

"The principle which lies at the foundation of evidence of this kind is, that the silence of the party to whom the account is sent warrants the inference of an admission of its correctness. This inference is more or less strong according to the circumstances of the case. It may be repelled by showing facts which are inconsistent with it, as that the party was absent from home, suffering from illness, or expected shortly to see the other party, and intended, and preferred, to make his objections in person. Other circumstances of a like character may be readily imagined. As regards merchants residing in different countries, Judge Story says: 'Several opportunities of writing must have occurred.'" Wiggins *v.* Burkham, 10 Wall. 129, 131, 19 L. Ed. 884.

Reasonable time—Foreign merchants.—An account current, sent by a foreign merchant to a merchant in this country, and not objected to for two years, is deemed an account stated. Freeland *v.* Heron, 7 Cranch 147, 3 L. Ed. 297.

Reasonable time—Merchants at home.—Between merchants at home, an account presented, and remaining unobjected to, after the lapse of several posts, is treated, under ordinary circumstances, as being, by acquiescence, a stated account. Wiggins *v.* Burkham, 10 Wall. 129, 19 L. Ed. 884.

4. Wiggins *v.* Burkham, 10 Wall. 129, 19 L. Ed. 884.

5. Toland *v.* Sprague, 12 Pet. 300, 9 L. Ed. 1093.

6. Sturm *v.* Boker, 150 U. S. 312, 37 L. Ed. 1093.

7. Demand founded on executed contract.—New Orleans, etc., R. Co. *v.* Lindsay, 4 Wall. 650, 18 L. Ed. 328.

8. Account closed.—Mandeville *v.* Wilson, 5 Cranch 15, 3 L. Ed. 23.

the statement of the account must be adopted by one party and submitted as correct to the other.[9]

B. Conclusiveness.—Where an account is settled by parties themselves, and where there is no unfairness, and where all the facts are equally well known to both sides, their adjustment is final and conclusive.[10] So that if an account stated be pleaded in bar to a bill in equity, such plea will be sustained, except so far as the complainant can show it to be erroneous.[11] But a settled account is only prima facie evidence of its correctness, at law or in equity; it may be impeached by proof of fraud, or omission or mistake; and if it be confined to particular items of account, concludes nothing as to other items not stated in it.[12]

C. Questions of Law and Fact.—What is to be regarded as a reasonable time for the objection to an account rendered, when the facts are clear, is a matter of law.[13] Where the proofs are conflicting, it is a mixed one of law and fact; and in such cases the court should instruct the jury upon the several hypotheses of fact insisted on by the parties.[14]

D. Impeachment—Grounds.—An account rendered which has become an account stated, is open to correction for mistake.[15]

Release.—If the accounts between the parties are impeached, and a release has been obtained, executed by one of the parties, in a case depending before a court of chancery, the release will not prevent the court from looking into the settlements; and the release in such a case is entitled to no greater force in a court of equity, than the settlement of the account on which it was given.[16]

9. Submission.—Nutt *v.* United States, 125 U. S. 650, 655, 31 L. Ed. 821.

10. Final and conclusive.—Hager *v.* Thompson, 1 Black 80, 17 L. Ed. 41; Chappedelaine *v.* Dechenaux, 4 Cranch 306, 2 L. Ed. 629; Goodwin *v.* Fox, 129 U. S. 601, 632, 32 L. Ed. 805; Cooper *v.* Coates, 21 Wall. 105, 111, 22 L. Ed. 481; Leather Manufacturers' Bank *v.* Morgan, 117 U. S. 96, 107, 29 L. Ed. 811; Roberts *v.* Benjamin, 124 U. S. 64, 73, 31 L. Ed. 334.

11. Bar to bill in equity.—Chappedelaine *v.* Dechenaux, 4 Cranch 306, 2 L. Ed. 629.

12. Account settled only prima facie evidence.—Perkins *v.* Hart, 11 Wheat. 237, 6 L. Ed. 463, distinguished in Hager *v.* Thompson, 1 Black 80, 93, 17 L. Ed. 41; Standard Oil Co. *v.* Van Etten, 107 U. S. 325, 334, 27 L. Ed. 319. See post, "Impeachment," II, D.

If palpable errors be shown, errors which cannot be misunderstood, the settlement must so far be considered as made upon absolute mistake or imposition, and ought not to be obligatory on the injured party or his representatives, because such items cannot be supposed to have received his assent. Chappedelaine *v.* Dechenaux, 4 Cranch 306, 2 L. Ed. 629.

Fraud.—Perkins *v.* Hart, 11 Wheat. 237, 6 L. Ed. 463; Hager *v.* Thompson, 1 Black 80, 17 L. Ed. 41. See the title FRAUD AND DECEIT.

13. Reasonable time—Question of law.—Standard Oil Co. *v.* Van Etten, 107 U. S. 325, 334, 27 L. Ed. 319; Wiggins *v.* Burkham, 10 Wall. 129, 19 L. Ed. 884.

Where the items of an account stated were not disputed, but were admitted, and payment of the same demanded, it was not taking the question of fact, whether the account was a stated account, from the jury, for the court to instruct the jury, that the account was a stated account. Toland *v.* Sprague, 12 Pet. 300, 9 L. Ed. 1093.

14. Mixed questions.—Wiggins *v.* Burkham, 10 Wall. 129, 19 L. Ed. 884.

15. Mistake.—Perkins *v.* Hart, 11 Wheat. 237, 256, 6 L. Ed. 463; Wiggins *v.* Burkham, 10 Wall. 129, 132, 19 L. Ed. 884; Leather Manufacturers' Bank *v.* Morgan, 117 U. S. 96, 107, 29 L. Ed. 811; Standard Oil Co. *v.* Van Etten, 107 U. S. 325, 331, 27 L. Ed. 319; Nixdorff *v.* Smith, 16 Pet. 132, 10 L. Ed. 913; Chappedelaine *v.* Dechenaux, 4 Cranch 306, 2 L. Ed. 629; Hager *v.* Thompson, 1 Black 80, 17 L. Ed. 41. See the titles MISTAKE AND ACCIDENT; RESCISSION, CANCELLATION AND REFORMATION.

16. Release.—Kelsey *v.* Hobby, 16 Pet. 269, 10 L. Ed. 961. See the title RELEASE.

If a release is executed, and a settlement is made, of a particular item in an account for which suit has been brought, and in which the party has been arrested, the settlement having been confined to the claim for the damages for which the suit was brought, the mere circumstance of the defendant being detained by the process issued to recover the amount claimed, would be no objection to the validity of the agreement and release. But if, while under detention, for want of special bail, a lease was obtained of other matters than those embraced in the suit, and much more important in amount, and which had been insisted on for years, in the suit previously instituted, then in the

Admissibility of Evidence.—Whatever naturally and logically tends to establish a mistake is competent evidence.[17]

Weight and Sufficiency of Evidence.—After long delay, and after long apparent acquiescence in the correctness of the settlement, the evidence ought to be very clear that a mistake was in fact made, in order to justify unravelling what was done.[18]

Presumptions and Burden of Proof.—The practice of opening accounts, which the parties who could best understand them have themselves adjusted or by their silence acquiesced in, is not encouraged, and the whole labor of proof lies upon the party objecting to the account, and errors, which he does not plainly establish, cannot be supposed to exist.[19]

III. Jurisdiction.

A court of chancery has jurisdiction in matters of account,[20] and it cannot be doubted, that this jurisdiction is often beneficially exercised; but a court of equity may not take cognizance of every action, for goods, wares and merchandise sold and delivered, or of money advanced where partial payments have been made, or of every contract, express or implied, consisting of various items, on which different sums of money have become due and different payments have been made. Although the line may not be drawn with absolute precision, yet it may be safely affirmed, that a court of chancery cannot draw to itself every transaction between individuals in which an account between parties is to be adjusted. In all cases in which an action of account would be the proper remedy at law,[21] and in all cases where a trustee is a party,[22] the jurisdiction of a court of equity is undoubted; it is the appropriate tribunal. But in transactions not of this peculiar character, great complexity ought to exist in the accounts,[23] or some

course of proceeding; neither the circumstances under which the release was taken, and the account connected with it settled, nor the contents of the papers, entitle them to any consideration in a court of equity. Kelsey *v.* Hobby, 16 Pet. 269, 10 L. Ed. 961.

17. Admissibility of evidence.—Standard Oil Co. *v.* Van Etten, 107 U. S. 325, 331, 27 L. Ed. 319.

18. Weight and sufficiency of evidence.—Willett *v.* Fister, 18 Wall. 91, 96, 21 L. Ed. 804; Bispham *v.* Price, 15 How. 162, 176, 14 L. Ed. 644; Chappedelaine *v.* Dechenaux, 4 Cranch 306, 2 L. Ed. 629.

No practice could be more dangerous than that of opening accounts which the parties themselves have adjusted, on suggestion supported by doubtful or by only probable testimony. Chappedelaine *v.* Dechenaux, 4 Cranch 306, 2 L. Ed. 629.

19. Evidence—Burden of proof.—Bispham *v.* Price, 15 How. 162, 176, 14 L. Ed. 644; Freeland *v.* Heron, 7 Cranch 147, 3 L. Ed. 297.

The whole labor of proof lies upon the party objecting to the account, and errors which he does not plainly establish cannot be supposed to exist. Chappedelaine *v.* Dechenaux, 4 Cranch 306, 2 L. Ed. 629.

"When the account is admitted in evidence as a stated one, the burden of showing its incorrectness is thrown upon the other party. He may prove fraud, omission, or mistake, and in these respects he is in nowise concluded by the admission implied from his silence after it was rendered." Wiggins *v.* Burkham, 10 Wall. 129, 132, 19 L. Ed. 884; Perkins *v.* Hart, 11 Wheat. 237, 256, 6 L. Ed. 463.

20. Equity jurisdiction.—Fowle *v.* Lawrason, 5 Pet. 495, 8 L. Ed. 204; Ivinson *v.* Hutton, 98 U. S. 79, 25 L. Ed. 66; Tyler *v.* Savage, 143 U. S. 79, 95, 36 L. Ed. 82; Root *v.* Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. Ed. 975; Western Union Tel. Co. *v.* Western, etc., R. Co., 91 U. S. 283, 291, 23 L. Ed. 350; Claggett *v.* Kilbourne, 1 Black 346, 17 L. Ed. 213; Pendleton *v.* Wambersie, 4 Cranch 73, 2 L. Ed. 554; Grant *v.* Poillon, 20 How. 162, 169, 15 L. Ed. 871; Ward *v.* Thompson, 22 How. 330, 333, 16 L. Ed. 249.

"'There cannot be any real doubt that the remedy in equity, in cases of account, is generally more complete and adequate than it is or can be at law.' 1 Story's Eq. Jur., § 450." Kilbourn *v.* Sunderland, 130 U. S. 505, 515, 32 L. Ed. 1005; United States *v.* Old Settlers, 148 U. S. 427, 465, 37 L. Ed. 509.

21. Concurrent jurisdiction.—Fowle *v.* Lawrason, 5 Pet. 495, 8 L. Ed. 204; Stearns *v.* Page, 7 How. 819, 828, 12 L. Ed. 928.

22. Trustee a party.—See the title TRUSTS AND TRUSTEES.

23. Complicated accounts.—Fowle *v.* Lawrason, 5 Pet. 495, 8 L. Ed. 204; Kirby *v.* Lake Shore, etc., R. Co., 120 U. S. 130, 30 L. Ed. 569; Dubourg De St. Colombe

difficulty at law should interpose,[24] some discovery should be required,[25] in order to induce a court of chancery to exercise jurisdiction. When to these considerations is added the charge against the defendants of actual concealed fraud, the right of the plaintiff to invoke the jurisdiction of equity cannot well be doubted.[26]

IV. Pleading and Practice.

Prayer for General Relief.—Where the bill states a case proper for an account, one may be ordered under the prayer for general relief.[27]

When a decree, by its terms, limits the accounting to the date of service of process in the suit, an accounting will not be granted where the property for which the account was asked was received, if received at all, after such service.[28]

A motion made on the foot of a decree against a defendant to compel an account will be denied where the original decree, which charged all those defendants against whom proofs existed, did not charge the one sought to be charged in the motion, and where the proofs on the motion were no other than the proofs at the original hearing.[29]

V. Evidence.

"Where an allowance is asked which is clearly excessive and exorbitant, it is for the party claiming to be entitled to establish just what is the amount he is properly entitled to, and it is not made the duty of the court or its officers to arbitrarily guess at the amount."[30]

ACCRETION.—See the title Accession, Accretion and Reliction, ante, p. 51.

ACCRUE.—See note 1.

v. United States, 7 Pet. 625, 8 L. Ed. 807; Kilbourn *v.* Sunderland, 130 U. S. 505, 515, 32 L. Ed. 1005; Parkersburg *v.* Brown, 106 U. S. 487, 27 L. Ed. 238.

24. Inadequate remedy at law.—Fowle *v.* Lawrason, 5 Pet. 495, 8 L. Ed. 204; French *v.* Hay, 22 Wall. 231, 22 L. Ed. 799; Root *v.* Lake Shore, etc., R. Co., 105 U. S. 189, 26 L. Ed. 975.

Thus after an arbitrament and award, an action was instituted at law upon the award, and the court being of opinion the award was void for informality, judgment was given for the defendant; a bill was then filed by the plaintiff, on the equity side of the circuit court for the county of Alexandria, to establish the settlement of complicated accounts between the parties, which was made by the arbitrators; and if that could not be done, for a settlement of them under the authority of a court of chancery. This is not a case proper for the jurisdiction of a court of chancery. Fowle *v.* Lawrason, 5 Pet. 495, 8 L. Ed. 204.

25. Discovery.—Fowle *v.* Lawrason, 5 Pet. 495, 8 L. Ed. 204; French *v.* Hay, 22 Wall. 231, 22 L. Ed. 799. See the title DISCOVERY.

In 1859 A. lent to B., who was largely interested in an embarrassed railroad, $5,000 to buy certain judgments against the road, and B. having bought, in 1859 and the early part of 1860, judgments to the amount of $31,000, assigned the whole of them to A., absolutely. Subsequently, that is to say in August, 1860, A. made a transfer (so called) of them to B., "upon B.'s payment of $5,000, with interest from this date;" and gave to B. a power of attorney of the same date, authorizing him "for me and in my name" to dispose of them as he might see proper. Held, that a bill making such an allegation and such a claim was demurrable; the bill not being one of discovery, and the complainant having complete remedy at law. French *v.* Hay, 22 Wall. 231, 22 L. Ed. 799.

26. Fraud.—Kirby *v.* Lake Shore, etc., R. Co., 120 U. S. 130, 134, 30 L. Ed. 569.

27. Prayer for general relief.—Watts *v.* Waddle, 6 Pet. 389, 8 L. Ed. 437; Stevens *v.* Gladding, 17 How. 447, 455, 15 L. Ed. 155, citing English *v.* Foxall, 2 Pet. 595, 612, 7 L. Ed. 531; Walden *v.* Bodley, 14 Pet. 156, 10 L. Ed. 398; Hobson *v.* McArthur, 16 Pet. 182, 195, 10 L. Ed. 930; Tayloe *v.* Merchants' Fire Ins. Co., 9 How. 390, 405, 13 L. Ed. 187.

28. Texas *v.* White, 10 Wall. 127, 19 L. Ed. 971.

29. Texas *v.* White, 10 Wall. 127, 19 L. Ed. 971.

30. Evidence.—Spalding *v.* Mason, 161 U. S. 375, 394, 40 L. Ed. 738.

1. Accrue.—A statute of limitations provided that the people of the state could not sue any person for any real property by reason of the right or title of the people to the same unless such right or title should have **accrued** within ten

ACCUMULATIONS.—See the title PERPETUITIES.

ACCUSATION.—See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

ACID.—See note 1.

ACKNOWLEDGE.—See the titles ACKNOWLEDGMENTS; LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

years before any action should be commenced. It was held, that the terms "shall have **accrued**" were used in the sense of shall have existed within the period designated. Weber *v.* State Harbor Commissioners, 18 Wall. 57, 68, 21 L. Ed. 798. See, also, the title LIMITATION OF ACTIONS.

In Rice *v.* United States, 122 U. S. 611, 617, 30 L. Ed. 793, it is said: "A claim first **accrues,** within the meaning of the statute, when a suit may first be brought upon it, and from that day the six years' limitation begins to run."

In Amy *v.* Dubupue, 98 U. S. 470, 476, 25 L. Ed. 228, it is said: "Such a construction of the statute would defeat its manifest purpose, which was to prevent the institution of actions founded upon written contracts after the expiration of ten years, without suit from the time 'their causes **accrue;**' that is, from the time the right to sue for a breach attaches."

Accrued.—In United States *v.* Morris, 10 Wheat. 246, 300, 6 L. Ed. 314, it is said: "The words are, 'shall prefer his petition to the judge of the district, in which such fine, penalty, forfeiture or disability shall have **accrued.**' That this word **accrued** meant something more than the term incurred, used in the previous part of the section, is obvious, from this consideration, that an offense might be committed in one district, and the offender prosecuted in another; but it never was imagined, that the suit for remission, could be going on in the district where the penalty was incurred, in one sense of the term, and the prosecution in another. The term **accrued,** therefore, has been universally held to be here used with relation to the seizure, information or suit for the penalty."

1. Acid.—In Lutz *v.* Magone, 153 U. S. 105, 108, 38 L. Ed. 651, it is said: "An **acid** is described by Webster primarily as 'a sour substance,' and chemically as 'one of a class of compounds, generally, but not always, distinguished by their sour taste, solubility in water, and reddening of vegetable blue or violet colors.'" See, generally, the title REVENUE LAWS.

ACKNOWLEDGMENTS.

BY JAMES F. MINOR.

I. **Definitions and Distinctions,** 77.

II. **Necessity for Acknowledgment,** 77.
- A. In General, 77.
  - 1. Of Deed, 77.
  - 2. Of Power of Attorney, 77.
  - 3. Of Instrument Executed by Married Woman, 78.
- B. For Recordation, 79.
- C. For Admission in Evidence, 80.

III. **Act of Taking and Certifying Acknowledgment, Whether Judicial or Ministerial,** 80.

IV. **Requisites Essential to Valid Acknowledgment,** 81.
- A. Complete Instrument, 81.
- B. By Whom Taken, 81.
  - 1. When Taken in the State, 81.
    - a. In General, 81.
    - b. Officer Whose Authority Has Been Revoked, 81.
    - c. Clerks of Court, 81.
    - d. Mayor, Justice or Judge, 82.
  - 2. When Taken in Another State, 82.
- C. Mode of Making, 83.
  - 1. By Married Woman, 83.
  - 2. By Corporation, 84.
  - 3. In Representative Capacity, 84.

V. **Certificate of Acknowledgment,** 84.
- A. Purpose and Necessity, 84.
- B. Requisites Essential to Valid Certificate, 84.
  - 1. Designation of Officer's Official Authority, 84.
  - 2. Proof of Officer's Authority, 85.
  - 3. Venue, 86.
  - 4. Contents of Body of Certificate, 86.
    - a. In General, 86.
    - b. Identification of Grantor as Person Acknowledging, 87.
    - c. Instruments Executed by Husband and Wife, 88.
      - (1) In General, 88.
      - (2) Certificate of Separate Examination and Acknowledgment, 89.
      - (3) Explanation of Contents to Wife, 90.

VI. **Effect, Correction, or Reformation of Defective Certificate of Acknowledgment,** 90.
- A. Effect of Invalid Acknowledgment, 90.
- B. Reformation by Officer or Court, 90.
- C. By Legislative Enactment, 91.
  - 1. Constitutionality, 91.
  - 2. Construction, 91.

VII. **Conclusiveness of Acknowledgment,** 93.
- A. Presumption in Favor of Validity, 93.
- B. Conclusiveness of Certificate, 93.
- C. Presumption as to Venue, 94.

D. Evidence, 94.
1. Competency, 94.
2. Weight and Sufficiency, 94.

VIII. Fees, 95.

CROSS REFERENCES.

See the titles AFFIDAVITS; CHATTEL MORTGAGES AND CONDITIONAL SALES; DEEDS; MORTGAGES AND DEEDS OF TRUST; NOTARY PUBLIC; RECORDING ACTS.

I. Definitions and Distinctions.

The acknowledgment, and the proof authorizing the admission of a deed to record, are provisions which the law makes for the security of creditors and purchasers.[1] But the acknowledgment of a deed is not the making thereof.[2]

II. Necessity for Acknowledgment.

A. In General—1. OF DEED.—The acknowledgment of a deed is not the making thereof. The instrument is a deed before acknowledgment, although the latter formality may be necessary to make it operative.[3] The general rule is that an acknowledgment is not essential to the validity of a deed as between the parties.[4]

2. OF POWER OF ATTORNEY.—Semble, that a power of attorney to convey lands must be duly acknowledged like a deed, if that is required to be acknowledged.[5]

1. Provisions for security of creditors and purchasers.—Sicard *v.* Davis, 6 Pet. 124, 8 L. Ed. 342.

2. Acknowledgment not execution.—Wood *v.* Owings, 1 Cranch 239, 2 L. Ed. 94.

3. For what purpose necessary.—Wood *v.* Owings, 1 Cranch 239, 2 L. Ed. 94; Sicard *v.* Davis, 6 Pet. 124, 8 L. Ed. 342.

4. Not essential to validity between parties.—Mackall *v.* Casilear, 137 U. S. 556, 564, 34 L. Ed. 776; Elwood *v.* Flannigan, 104 U. S. 562, 566, 26 L. Ed. 842; Hepburn *v.* Dubois, 12 Pet. 345, 9 L. Ed. 1111; Stebbins *v.* Duncan, 108 U. S. 32, 44, 27 L. Ed. 641.

The acknowledgment and the proof which may authorize the admission of a deed to record and the recording thereof, are provisions which the law makes for the security of creditors and purchasers; they are essential to the validity of the deed, as to persons of that description, not as to the grantor; his estate passes out of him and vests in the grantee, so far as respects himself, as entirely, if the deed be in writing, sealed and delivered, as if it be also acknowledged, or settled and proved by three subscribing witnesses and recorded in the proper court. In a suit between them, such a deed is completely executed, and would be conclusive although never admitted to record, nor attested by any subscribing witness; proof of sealing and delivering would alone be required; and the acknowledgment of the fact by the party, would be sufficient proof of it. Sicard *v.* Davis, 6 Pet. 124, 8 L. Ed. 342. See post, "Purpose and Necessity," V, A. See, generally, the titles DEEDS; RECORDING ACTS.

By the statutes of Illinois in force in 1835, a deed signed and sealed by the party making the same was sufficient for the conveyance of any land in that state, without acknowledgment. Rev. Laws, 1833, p. 129, §1. Elwood *v.* Flannigan, 104 U. S. 562, 566, 26 L. Ed. 842; Stebbins *v.* Duncan, 108 U. S. 32, 44, 27 L. Ed. 641.

In District of Columbia.—Quære, whether in the District of Columbia a deed is operative, even as between the parties, notwithstanding delivery, unless it be acknowledged and recorded. Mackall *v.* Casilear, 137 U. S. 556, 564, 34 L. Ed. 776.

In Tennessee.—In Tennessee, the fee in lands does not pass unless the conveyance is proved, or duly acknowledged and registered. McEwen *v.* Bulkley, 24 How. 242, 16 L. Ed. 672.

5. Power of attorney must be acknowledged.—Clark *v.* Graham, 6 Wheat. 577, 5 L. Ed. 334. See post, "Of Instrument Executed by Married Woman," II, A, 3. See, generally, the titles POWERS; PRINCIPAL AND AGENT.

In Texas, in 1832, a letter power of attorney, being neither acknowledged, witnessed, certified to, nor written on sealed paper, nor proved before a notary, and no summons even served on the donor to appear before an official for the purpose of rendering it an authentic or judicial act, was nevertheless valid, the want of the formalities referred to merely affecting the mode of authenticating the instrument. If it is passed before a notary

3. Of Instrument Executed by Married Woman.—The deed of a feme covert, conveying her interest in lands which she owns in fee, did not formerly pass her interest, by force of its execution and delivery, as in the common case of a deed by a person under no legal incapacity; in such cases, an acknowledgment gives no additional effect between the parties to the deed; it operates only as to third persons, under the provisions of recording and kindred laws. The law presumed a feme covert to act under the coercion of her husband, unless before a court of record, a judge, or some commissioner, in England, by a separate acknowledgment, out of the presence of her husband, or, in these states, before some court, or judicial officer authorized to take and certify such acknowledgment, the contrary appeared.[6]

public and witnesses, and is certified as a testimonio, it is called an authentic instrument and proves itself. If not thus authenticated, it must be proved to have been executed by the party to be charged with it. Williams *v.* Conger, 125 U. S. 397, 421, 31 L. Ed. 778.

By married woman.—See post, "Of Instrument Executed by Married Woman," II. A, 3.

6. Formalities required and effect of noncompliance.—Hepburn *v.* Dubois, 12 Pet. 345, 9 L. Ed. 1111; Holladay *v.* Daily, 19 Wall. 606, 609, 22 L. Ed. 187; Drury *v.* Foster, 2 Wall. 24, 17 L. Ed. 780; Mexia *v.* Oliver, 148 U. S. 664, 673, 37 L. Ed. 602. Elliott *v.* Peirsol, 1 Pet. 328, 7 L. Ed. 164; Hitz *v.* Jenks, 123 U. S. 297, 303, 31 L. Ed. 156.

"In most of the states a married woman cannot, in the absence of statutory authority, execute, either alone or in connection with her husband, a valid power of attorney to convey her interest in real property. She can pass her interest only by uniting personally in a conveyance with her husband, and acknowledging, upon a separate examination apart from him, before a public officer, that she executes the conveyance freely, without any fear of him, or compulsion from him. The private examination is required to protect her from the coercion or undue influence of her husband, and her acknowledgment is therefore considered as an essential preliminary to the validity of any transfer by her. The private examination is in its nature personal; it is a matter in which she cannot be represented by another. A privy acknowledgment by attorney, as observed by Bishop, would seem to involve a contradiction, and certainly would in a great degree defeat the object which her personal examination was intended to secure." Holladay *v.* Daily, 19 Wall. 606, 609, 22 L. Ed. 187.

It took the place of alienation by means of fine in a court of record in England, though differing in some of its effects, owing to the diversity in the nature of the two proceedings. Hitz *v.* Jenks, 123 U. S. 297, 301, 31 L. Ed. 156, per Gray, J. See, also, Elliott *v.* Peirsol, 1 Pet. 328, 7 L. Ed. 164.

The object of a statute, requiring the separate examination of the wife to be taken by a judicial officer or notary public, to be certified by him in a particular form, and to be recorded in the registry of deeds, was twofold—not only to protect the wife by making it the duty of such an officer to ascertain and to certify that she has not executed the deed by compulsion of her husband or in ignorance of its contents; but also to facilitate the conveyance of the estates of married women, and to secure and perpetuate evidence, upon which innocent grantees as well as subsequent purchasers may rely, that the requirements of the statute, necessary to give validity to the deed, had been complied with. Hitz *v.* Jenks, 123 U. S. 297, 303, 31 L. Ed. 156. See post, "By Married Woman," IV, C, 1; "Certificate of Separate Examination and Acknowledgment," V, B, 4, c, (2).

It is a fatal objection to a power of attorney by a husband and wife, that there was no separate examination of the wife nor any acknowledgment by her, but only proof by oath of a subscribing witness. Its subsequent due acknowledgment after privy examination, did not cure defect as to acts done thereunder before. Dubois *v.* Hepburn, 10 Pet. 1, 20, 9 L. Ed. 325.

Exception to rule.—It appearing in evidence in Lloyd *v.* Taylor, 1 Dall. 17, 1 L. Ed. 18, that it had been the constant usage of the province, formerly, for femes covert to convey their estates in this manner, without an acknowledgment or separate examination; and that there were a great number of valuable estates held under such titles, which it would be dangerous to impeach, at this time of day, the court gave a charge to the jury in favor of the defendants, founded on the maxim "communis error facit jus," that such deed without acknowledgment or separate examination was good.

In Texas.—By the laws of Texas the interest of a married woman in her separate estate cannot be divested, except by the conveyance of herself and husband, and after her privy examination before the proper officer. Hollingsworth *v.* Flint, 101 U. S. 591, 596, 25 L. Ed. 1028.

A deed or power of attorney, signed by the wife alone, is not such an instrument as the statute makes effective to pass her

B. For Recordation.—Acknowledgment is one mode of authenticating a writing for recordation, proof by witnesses being the other, and one or the other

estate. The decisions under similar statutes have been uniform in holding the separate conveyance of the wife invalid, notwithstanding it may have been clearly shown that she acted with her husband's assent. The statute does not attempt to provide for either conveyances or powers of attorney from the wife to the husband, and it would be a departure from the policy of the law, wholly unauthorized by anything in the Texas statute, to allow the husband, by means simply of a general power of attorney from the wife, to dispose of her separate estate at his will. Mexia *v.* Oliver, 148 U. S. 664, 673, 37 L. Ed. 602.

In Illinois, previous to March 27, 1869, an acknowledgment by a married woman before a qualified officer was essential to the valid execution of her conveyance of real property. But on that date an act was passed, the first section of which removed the necessity. Ill. Sess. Laws of 1869, 359. Knight *v.* Paxton, 124 U. S. 552, 555, 31 L. Ed. 518.

After the passage of this act the execution of a conveyance of real property by a married woman joining with her husband was sufficiently authenticated by her signature. It would seem that her acknowledgment of its execution before an officer authorized to take acknowledgments was only required to render it admissible as evidence without further proof, or to release her homestead right in the property. For its validity as a transfer of the grantor's interest, except as to the homestead rights therein, the acknowledgment was unnecessary. Knight *v.* Paxton, 124 U. S. 552, 556, 31 L. Ed. 518.

In Minnesota.—"By the laws of Minnesota, an acknowledgment of the execution of a deed before the proper officers, privately and apart from her husband, by a feme covert, is an essential prerequisite to the conveyance of her real estate or any interest therein. And she is disabled from executing or acknowledging a deed by procuration, as she cannot make a power of attorney. These disabilities exist by statute and the common law for her protection, in consideration of her dependent condition, and to guard her against undue influence and restraint." Drury *v.* Foster, 2 Wall. 24, 33, 17 L. Ed. 780.

A paper, executed, under seal, for the husband's benefit, by husband and wife, acknowledged in separate form by the wife, and meant to be a mortgage of her separate lands, but with blanks left for the insertion of the mortgagee's name and the sum borrowed, and to be filled up by the husband, is no deed as respects the wife, when afterwards filled up by the husband and given to a lender of money, though one bona fide and without knowledge of the mode of execution. The mortgagee, on cross bill to a bill of foreclosure, was directed to cancel her name. Drury *v.* Foster, 2 Wall. 24, 17 L. Ed. 780.

"To permit an estoppel to operate against her would be a virtual repeal of the statute that extends to her this protection, and also a denial of the disability of the common law that forbids the conveyance of her real estate by procuration. It would introduce into the law an entirely new system of conveyances of the real property of feme coverts." Drury *v.* Foster, 2 Wall. 24, 34, 17 L. Ed. 780.

In Virginia and Ohio.—By the law of Virginia the acknowledgment and the recording of conveyances by husband and wife of lands in that commonwealth, in the mode prescribed by her laws, was formerly essential to pass the estate of the wife in such lands. Sewall *v.* Haymaker, 127 U. S. 719, 728, 32 L. Ed. 299.

Until the husband acknowledged it, and thereby, in the only way prescribed by statute, gave his assent to her conveying away her interest, the deed was ineffectual for any purpose. While it may not have been necessary that they should acknowledge the deed at the same time, or upon the same occasion, or before the same officer, the statute of Virginia, upon any fair interpretation of its words, and having regard to the policy which induced its enactment, must be held to have required that the acknowledgment of the husband should occur in the lifetime of the wife, while she was capable of asking his consent to the conveyance of her lands. But that assent was of no avail after the death of the wife before the husband had, by acknowledgment of the deed, signified his willingness to have her convey. Sewall *v.* Haymaker, 127 U. S. 719, 728, 32 L. Ed. 299. But see now Va. Code (1904), Ch. 111.

In Sewall *v.* Haymaker, 127 U. S. 719, 730, 32 L. Ed. 299, it was said: "Upon examining the statutes of Ohio—the controlling provisions of which have been referred to—and, also, the decisions of the supreme court of that state to which our attention has been called, we find nothing to justify us in holding that a deed for land, acknowledged by the wife, but not acknowledged by the husband in the lifetime of the wife, will pass her estate in the lands conveyed. In Ludlow *v.* O'Neil, 29 O. St. 181, it was held—using the language of the syllabus—that 'under the statute of February 22, 1831, it is not indispensable to the validity of a deed executed by husband and wife that they should acknowledge it before the same officer or at the same time and

is necessary to record an instrument so as to be valid against creditors and subsequent purchasers.[7]

C. For Admission in Evidence.—As a general rule a deed, to be admissible in evidence without further proof, must have been duly acknowledged by the grantor before the proper officer; when so certified to, it is admissible.[8]

III. Act of Taking and Certifying Acknowledgment, whether Judicial or Ministerial.

The privy examination of a married woman and the taking of her acknowledgment to a deed, are judicial or quasi judicial acts.[9]

place, or that their acknowledgments should be certified by a single certificate.' Yet, 'the acknowledgment of the wife is not binding upon her until the deed is executed and acknowledged by the husband.' 'The husband,' the court said, 'can render the wife every needed protection by himself refusing to sign and acknowledge the deed. If she acknowledge it before the husband, it is presented to him with the wife's signature and acknowledgment, and he has only to refuse to acknowledge.' We are of opinion that equally under the Ohio and Virginia statutes, a deed by the husband and wife conveying the latter's land is inoperative to pass her title unless the husband—she having duly acknowledged the deed—should, in her lifetime, and by an acknowledgment in the form prescribed by law, signify his assent to such conveyance."

7. Mode of authentication.—See, generally, the title RECORDING ACTS. So held of a chattel mortgage. Hodgson *v.* Butts, 3 Cranch 140, 2 L. Ed. 391; Sicard *v.* Davis, 6 Pet. 124, 8 L. Ed. 342; So with a deed. Blackell *v.* Patton, 7 Cranch 471, 3 L. Ed. 408; Findlay *v.* Hinde, 1 Pet. 241, 7 L. Ed. 128.

The acknowledgment, and the proof which may authorize the admission of a deed to record and the recording thereof, are provisions which the law makes for the security of creditors and purchasers; they are essential to the validity of the deed as to such, not as to the grantor. Sicard *v.* Davis, 6 Pet. 124, 8 L. Ed. 342.

In Illinois.—Although a deed was defectively acknowledged for record, but was admitted to record nevertheless, and the signature to the acknowledgment of the deed, by one of the justices of the peace before whom the acknowledgment was taken, and his signature to the jurat of an oath of identity indorsed on the deed, subscribed and sworn to before him by grantor, were proven by competent testimony, the record was effectual, under Illinois law, to affect subsequent purchasers with notice. Stebbins *v.* Duncan, 108 U. S. 32, 45, 27 L. Ed. 641.

Although, in Illinois in 1835 (Rev. Laws, 1833, p. 129, § 1), an acknowledgment was unnecessary to make a deed valid to convey land, to entitle it to record, however, an acknowledgment was required before one of certain designated officers. Elwood *v.* Flannigan, 104 U. S. 562, 566, 26 L. Ed. 842.

In Massachusetts, a deed conveying an estate of freehold in land must be acknowledged before the proper magistrate, so as to be recorded. United States *v.* Crosby, 7 Cranch 115, 3 L. Ed. 287.

8. Acknowledgment necessary.—Knight *v.* Paxton, 124 U. S. 552, 556, 31 L. Ed. 518; Hollingsworth *v.* Flint, 101 U. S. 591, 25 L. Ed. 1028; Houghton *v.* Jones, 1 Wall. 702, 17 L. Ed. 503.

In California.—By the law of California, deeds conveying real property may be read in evidence in any action when verified by certificates of acknowledgment, or proof of their execution by the grantors before a notary public. Houghton *v.* Jones, 1 Wall. 702, 17 L. Ed. 503.

In Illinois, after the act of March 27, 1869, the acknowledgment of a married woman of her execution of a deed for land before the officer authorized to take acknowledgments, was still required to render it admissible as evidence without further proof. Knight *v.* Paxton, 124 U. S. 552, 556, 31 L. Ed. 518.

In Texas.—Where a deed executed by a man and wife, in a conveyance of her property, in Texas, was not acknowledged until long after it was executed, it was inadmissible in evidence to support the title of a plaintiff in a suit begun before such acknowledgment. It could not pass the wife's title until such acknowledgment after privy examination before the proper officer. Hollingsworth *v.* Flint, 101 U. S. 591, 25 L. Ed. 1028.

9. Judicial or quasi judicial act.—Hitz *v.* Jenks, 123 U. S. 297, 303, 31 L. Ed. 156; Drury *v.* Foster, 2 Wall. 24, 34, 17 L. Ed. 780.

"The duty of examining the wife privily and apart from her husband, of explaining the deed to her fully, and of ascertaining that she executed it of her own free will, without coercion or undue influence of his, is a duty imposed by law upon the officer, involving the exercise of judgment and discretion, and thus a judicial or quasi judicial act. The magistrate is required to ascertain a particular state of facts, and, having ascertained it, to certify it for record, for the benefit of the parties to the deed, and of all others who may thereafter acquire rights under

IV. Requisites Essential to Valid Acknowledgment.

A. Complete Instrument.—A deed must be complete, without blanks to be filled in, before it can be validly acknowledged.[10]

B. By Whom Taken—1. When Taken in the State—a. *In General.*—The grantee cannot take the acknowledgment of a conveyance to himself.[11] By § 441, Revised statutes of the District of Columbia, acknowledgments of deeds may be made before any judge of a court of record and of law, or any chancellor of a state, or a judge of a court of the United States or a justice of the peace, or a notary public, or a commissioner of the circuit court of the district.[12] And in Dakota it was enacted by the legislature, in 1873, that proof or acknowledgment of an instrument might be made, within or without the territory and within the United States, before any public officer having an official seal, including notaries public.[13]

b. *Officer Whose Authority Has Been Revoked.*—The acknowledgment of a mortgage taken by an officer whose authority had been revoked by the Declaration of Independence, was held valid to authorize its recordation against a judgment creditor and purchaser with notice of the mortgage.[14]

c. *Clerks of Court.*—Certain old statutes of Kentucky were construed, in an early case, to give clerks of court authority to take the acknowledgments and privy examinations of married women, in all cases of deeds by them and their husbands.[15]

it. And the statute expressly provides that upon the recording of the certificate 'the deed shall be as effectual in law as if she had been an unmarried woman.'" Hitz *v.* Jenks, 123 U. S. 297, 303, 31 L. Ed. 156.

See, however, Elliott *v.* Peirsol, 1 Pet. 328, 341, 7 L. Ed. 164, where it is held, that an officer (clerk in this case), in certifying the acknowledgment, acts ministerially, and not judicially, in the matter. This was the acknowledgment and privy examination of a married woman also. See, post, "Conclusiveness of Certificate," VII, B.

10. Complete instrument essential.—Drury *v.* Foster, 2 Wall. 24, 34, 17 L. Ed. 780.

There can be no acknowledgment of a deed within the requisitions of the statute until the blanks were filled and the instrument complete. Till then there was no deed to be acknowledged. The acts of the feme covert and of the officers in acknowledging a blank mortgage were nullities, and the form of acknowledgment annexed as much waste paper as the blank mortgage itself, at the time of signing. Drury *v.* Foster, 2 Wall. 24, 34, 17 L. Ed. 780.

11. Grantee incompetent.—Mackall *v.* Casilear, 137 U. S. 556, 564, 34 L. Ed. 776; Phelps *v.* Harris, 101 U. S. 370, 375, 25 L. Ed. 855.

The fact that a grantee cannot take the acknowledgment of a conveyance to himself is immaterial in this case. The execution of this deed to grantee was expressly averred by complainant and its delivery conceded, but he alleged that it was given to secure notes for the purpose of borrowing money for himself and his father, and that this was not done. There is no prayer for specific relief in relation to it, nor are the averments such as would entitle complainant to resort to the prayer for general relief, to set it aside, by reason of the want of acknowledgment, if that were a proper ground; and, if void upon its face, as now contended, the interference of a court of equity would seem to be unnecessary. Mackall *v.* Casilear, 137 U. S. 556, 564, 34 L. Ed. 776.

12. In District of Columbia.—Hitz *v.* Jenks, 123 U. S. 297, 300, 31 L. Ed. 156.

13. In Dakota.—Smith *v.* Gale, 144 U. S. 509, 522, 36 L. Ed. 521.

14. Effect of revocation of officer's authority.—Parker *v.* Wood, 1 Dall. 436, 1 L. Ed. 212.

15. Clerks of court generally.—Elliott *v.* Peirsol, 1 Pet. 328, 339, 7 L. Ed. 164.

Clerks of court in Kentucky.—The first section of the Kentucky statute of 1796 (1 Litt. Laws, p. 569), authorizes clerks of the county courts, general court, and court of appeals, to take, in their offices, the acknowledgment or proof of the execution of deeds, and to record them, upon acknowledgments, or proofs so taken by themselves; but did not authorize them to take the acknowledgment and privy examination of feme covert. But by a subsequent statute, clerks are authorized to take, in their offices, the "acknowledgment of all deeds, according to law." And the act of 1810 (4 Litt. Ky. Laws, 165), which authorizes the clerk of one county to take and certify the acknowledgment of a deed, to be recorded by the clerk of another county, where the land lies, etc., declares, that "if the due acknowledgment, or privy ex-

d. *Mayor, Justice or Judge.*—The mayor of a city has been held in Virginia a proper officer to take the acknowledgment of a feme covert to a deed.[16] And in Pennsylvania, Kentucky and Illinois, the same has been held of a justice of the peace.[17] And in Pennsylvania also of a justice of the supreme court.[18]

2. *When Taken in Another State.*—Provision is made in an act of the legislature of Illinois for the record of all deeds to lands in that state which had been executed without the state and within the United States, and have been acknowledged or proved in conformity to the laws of the state where executed.[19] And this seems to be the general rule where due proof of such acknowledgment is made, as required by statute, if any such statute exists.[20]

amination of the wife, etc., shall have been taken, etc., by the clerk receiving the acknowledgment of the deed, etc., and that being duly certified with the deed, and recorded, shall transfer such wife's estate, etc.," as fully as if the examination had been made by the court, or the clerk in whose office the deed shall be recorded. It is by construction of these last-recited laws, that the clerks are held, in Kentucky, to be authorized to take the acknowledgments and privy examination of femes covert, in all cases of deeds made by them and their husbands. Elliott *v.* Peirsol, 1 Pet. 328, 339, 7 L. Ed. 164.

16. Mayor or justice in Virginia.—Inasmuch as, in affirmative statutes, such parts of the prior as may be incorporated into the subsequent statute, as consistent with it, must be considered in force, and if a subsequent statute be not repugnant in all its provisions to a prior one, yet if the later statute clearly intended to prescribe the only rules which should govern, it repeals the prior one; under the application of these rules, the law of Virginia, passed in 1776, authorizing the mayor of a city to take the acknowledgment of a feme covert to a deed, was not repealed by the act of 1785, or that of 1796. Daviess *v.* Fairbairn, 3 How. 636, 11 L. Ed. 760.

17. Justice of the peace.—McKeen *v.* Delancy, 5 Cranch 22, 3 L. Ed. 25; Elliott *v.* Peirsol, 1 Pet. 328, 339, 7 L. Ed. 164; Elwood *v.* Flannigan, 104 U. S. 562, 566, 26 L. Ed. 842.

Justice of the peace in Kentucky.—"The fourth section of the Kentucky statute of 1796 (see 1 Litt. Laws, p. 569) provides for the privy examination and acknowledgment of femes covert in open court; and where they cannot conveniently attend, authorizes a commission to issue to two justices, to take and certify the acknowledgment and privy examination; and declares, that 'in either case, the said writing, acknowledged by the husband, and proved by witnesses to be his act, and recorded together with such privy examination and acknowledgment, etc., shall not only be sufficient to convey or release any right of dower, etc., but be as effectual for every other purpose, as if she were an unmarried woman.'" Elliott *v.* Peirsol, 1 Pet. 328, 339, 7 L. Ed. 164.

Justice of the peace in Illinois.—A justice of the peace was one of the officers designated in Illinois, in 1835, to take acknowledgments. Elwood *v.* Flannigan, 104 U. S. 562, 566, 26 L. Ed. 842.

18. Justice of the supreme court in Pennsylvania.—Under the act of Pennsylvania of 1715, which requires a deed to be acknowledged before a justice of the peace of the county where the lands lie, it had been the long-established practice, before the year of 1775, to acknowledge deeds before a justice of the supreme court of the province of Pennsylvania; and although the act of 1715 does not authorize such a practice, yet, as it has prevailed, it is to be considered as a correct exposition of the statute. McKeen *v.* Delancy, 5 Cranch 22, 3 L. Ed. 25. See, also, Davey *v.* Turner, 1 Dall. 11, 1 L. Ed. 15.

"Were this act of 1715 now, for the first time, to be construed, the opinion of this court would certainly be, that the deed was not regularly proved. A justice of the supreme court would not be deemed a justice of the county, and the decision would be, that the deed was not properly proved, and therefore, not legally recorded. But, in construing the statutes of a state on which land titles depend, infinite mischief would ensue, should this court observe a different rule from that which has been long established in the state; and in this case, the court cannot doubt, that the courts of Pennsylvania consider a justice of the supreme court as within the description of the act." McKeen *v.* Delancy, 5 Cranch 22, 30, 3 L. Ed. 25.

19. When taken in another state according to its laws.—Secrist *v.* Green, 3 Wall. 744, 18 L. Ed. 153; Little *v.* Herndon, 10 Wall. 26, 19 L. Ed. 878.

20. General rule.—Smith *v.* Gale, 144 U. S. 509, 521, 36 L. Ed. 521; Secrist *v.* Green, 3 Wall. 744, 750, 18 L. Ed. 153; Elwood *v.* Flannigan, 104 U. S. 562, 26 L. Ed. 842; Carpenter *v.* Dexter, 8 Wall. 513, 19 L. Ed. 426; Little *v.* Herndon, 10 Wall. 26, 19 L. Ed. 878; McEwen *v.* Buckley, 24 How. 242, 247, 16 L. Ed. 672. As to proof of authority, see post, "Proof of Officer's Authority," V, C.

A deed for lands in Illinois, executed in Virginia and acknowledged in conformity with its laws at the time of execution,

C. Mode of Making—1. By Married Woman.—A deed for a wife's maiden lands, executed by herself and husband, acknowledged by both before a justice of the common pleas court, the acknowledgment setting out that the wife, being examined secretly and apart from her husband, did declare that she executed the deed with her full, free and voluntary consent, the acknowledgment and examination being indorsed by the justice on the deed, was held in 1764, under the practice and usage of the province of Pennsylvania, as good and valid, though not according to the common law of England.[21]

may be lawfully recorded in Illinois, and read in evidence without further proof of execution. Little *v.* Herndon, 10 Wall. 26, 19 L. Ed. 878.

The only officers authorized by the laws of Illinois, in 1818, to take acknowledgments or proof, without the state, of deeds of land in the state, were "mayors, chief magistrates, or officers of the cities, towns, or places," where the deeds were executed. But this want of authority of the justice of the peace was remedied by a statute passed on the 23d of February, 1847. Carpenter *v.* Dexter, 8 Wall. 513, 525, 19 L. Ed. 426.

Justice of the peace under Illinois laws.—A justice of the peace was not authorized, by the laws of Illinois, in 1818, to take the acknowledgment or proof, without the state, of deeds of land situated within the state; but this want of authority was remedied by a statute passed on the 22d of February, 1847. Carpenter *v.* Dexter, 8 Wall. 513, 19 L. Ed. 426.

Master in chancery under Illinois laws.—An acknowledgment, on the day of its date, before a master of chancery, in New York, of a deed executed March 3d, 1818—probate being made by a subscribing witness personally known to the master, of the identity of the party professing to grant with the party presenting himself to acknowledge, and the record of acknowledgment certifying that the grantor "consented that the deed might be recorded where necessary"—was a sufficient acknowledgment of the deed, by the laws of New York regulating the subject, at the date when the deed was made. Secrist *v.* Green, 3 Wall. 744, 18 L. Ed. 153.

Having been so, and conveying land in Illinois, such deed was entitled to be recorded in Illinois, the laws of that state allowing deeds for lands in the state, executed out of it but within the United States, to be recorded when acknowledged or proved in conformity with the law of the state where executed; and when so recorded, it was properly read without other proof of execution. Secrist *v.* Green, 3 Wall. 744, 18 L. Ed. 153.

Grantee incompetent.—Mackall *v.* Casilear, 137 U. S. 556, 564, 34 L. Ed. 776; Phelps *v.* Harris, 101 U. S. 370, 375, 25 L. Ed. 855. See ante, "In General," IV, B, 1, a.

Clerk of court under Tennessee laws.—By the laws of Tennessee anterior to 1856, a deed for lands lying in Tennessee could not be acknowledged or proven in another state before the clerk of a court. In 1856, a law was passed allowing this to be done. This statute was prospective. McEwen *v.* Bulkley, 24 How. 242, 16 L. Ed. 672.

And where a deed was acknowledged in 1839, before the clerk of a court in another state, a copy of it from the record was improperly allowed to be read in evidence to the jury. McEwen *v.* Bulkley, 24 How. 242, 16 L. Ed. 672.

The circumstance that the law of 1856 was called an amendment of the prior law does not change this view of the subject. McEwen *v.* Bulkley, 24 How. 242, 16 L. Ed. 672.

Clerk of United States district court under Virginia laws.—In the case of a deed made by a grantor nonresident of Virginia, it is sufficient to allow a proper record of it under the Virginia statute of December 8th, 1792, that there be a certificate of the clerk of a district court of the United States that the grantor personally appeared in court and acknowledged the instrument to be his free act and deed; this being accompanied by a certificate of even date, by the judge of the same court, that the clerk was then the officer that he professed to be. Shutte *v.* Thompson, 15 Wall. 151, 21 L. Ed. 123.

21. Execution by married woman.—Davey *v.* Turner, 1 Dall. 11, 1 L. Ed. 15; Lloyd *v.* Taylor, 1 Dall. 17, 1 L. Ed. 18. See ante, "Of Instrument Executed by Married Woman," II, A, 3; post, "Instruments Executed by Husband and Wife," V, B, 4, c.

"In the case of Davey *v.* Turner, 1 Dall. 11, 1 L. Ed. 15, tried in this court, September, 1764 (ante, p. 11), it was ruled, that an acknowledgment of the deed, on a private examination before a justice of peace, was sufficient, under a long usage, to sanctify her deed, though not strictly agreeable to law." Lloyd *v.* Taylor, 1 Dall. 17, 1 L. Ed. 18.

It seems that, where the wife had declared that she executed the deed with her free consent, it must be taken that the magistrate taking her acknowledgment did his duty in making her acquainted with the contents, there being no statutory provision on the subject, only a common usage. Davey *v.* Turner, 1 Dall. 11, 1 L. Ed. 15.

"**By the laws of Maryland,** to enable a married woman to execute a valid deed

2. By Corporation.—Where there is no statutory provision as to the execution or acknowledgment of deeds by a corporation, in such cases, its officer affixing its seal is the party executing the deed, within the meaning of the statutes requiring deeds to be acknowledged by the grantor.[22]

3. In Representative Capacity.—A deed executed and acknowledged by a guardian for his ward, and acknowledged by him "to be his act and deed, as guardian aforesaid, and thereby the act and deed of" the ward, is a good execution and acknowledgment.[23]

V. Certificate of Acknowledgment.

A. Purpose and Necessity.—The privy examination and acknowledgment of a deed, by a feme covert, so as to pass her estate, cannot be legally proved by parol testimony.[24]

B. Requisites Essential to Valid Certificate.—1. Designation of Officer's Official Authority.—The statement by an officer in his certificate, of his official character, which authorizes the holder thereof to take acknowledgments, necessarily includes a statement of his official authority.[25]

for realty, the separate examination and other solemnities, required by law, are indispensable." Rhea *v.* Rhenner, 1 Pet. 105, 7 L. Ed. 72.

Separate acknowledgment. — Separate acknowledgment was formerly provided for in probably all the statutes of the various states relating to the subject of the conveyance by married women of any interest they may have in real estate. It has been said to be the most important and essential element in the method employed to transfer such estates. Williams *v.* Paine, 169 U. S. 55, 64, 42 L. Ed. 658; Holladay *v.* Daily, 19 Wall. 606, 609, 22 L. Ed. 187. See ante, "Of Instrument Executed by Married Woman," II, A, 3; post, "Instruments Executed by Husband and Wife," V, B, 4, c.

By § 450, Rev. Stat., of District of Columbia, the officer taking the acknowledgment of a married woman to a deed for land or interest therein, merely relinquishing her dower or as a party with her husband, is required to examine her privily and apart from the husband, and to explain the deed to her fully. Hitz *v.* Jenks, 123 U. S. 297, 31 L. Ed. 156.

22. By corporation in Tennessee.—This is the case in Tennessee. Kelly *v.* Calhoun, 95 U. S. 710, 24 L. Ed. 544. See the title CORPORATIONS.

23. Acknowledgment in representative capacity.—Van Ness *v.* United States Bank, 13 Pet. 17, 10 L. Ed. 38.

"It is argued, that it should have been signed 'Marcia Burnes, by her guardian, W. M. Duncanson,' and in like manner acknowledged 'as her act and deed.' This is a case, where no question arises as to the manner of executing an authority given by private persons, as to which the case of the Lessee of Clarke *v.* Courtney, 5 Pet. 319, 350, 8 L. Ed. 140, may justly apply. But this is the case where an authority is to be exercised under the decree of a court of chancery, and, therefore, where a liberal construction may and ought to prevail. These two forms of signature and acknowledgment mean precisely the same thing; and as this deed substantially conforms, in the manner of its execution, to the directions contained in the decree, we consider it to be valid and effectual to convey the property therein mentioned." Van Ness *v.* United States Bank, 13 Pet. 17, 20, 10 L. Ed. 38.

A deed acknowledged by an attorney in fact for a party thereto, where the acknowledgment states that it was acknowledged subsequently to its execution and under a power dated prior to the date of the actual power, though both were subsequent to the deed, is not well acknowledged. Dubois *v.* Hepburn, 10 Pet. 1, 20, 9 L. Ed. 325.

24. Purpose and necessity of certificate.—Elliott *v.* Peirsol, 1 Pet. 328, 338, 7 L. Ed. 164.

What the law requires to be done, and appear on record, can only be done, and made to appear by the record itself, or an exemplification of it; it is perfectly immaterial, whether there be an acknowledgment or privy examination in form, or not, if there be no record made of the privy examination; for, by the express provisions of the law, it is not the fact of privy examination only, but the recording of the fact, which make the deed effectual to pass the estate of a feme covert. Elliott *v.* Peirsol, 1 Pet. 328, 7 L. Ed. 164. See ante, "Necessity for Acknowledgment," II; post, "Evidence," VII, D.

25. Designation of official character sufficient.—Elwood *v.* Flannigan, 104 U. S. 562, 568, 26 L. Ed. 842.

A deed was signed and sealed by the grantor, and was attested by two witnesses, having indorsed upon it a certificate of acknowledgment signed by Titus B. Willard, which set forth that he was one of the justices of the peace of Berrien County, and that Ash-kum, who was named in the deed as grantor, came be-

2. Proof of Officer's Authority.—Unless the statute of a state requires evidence of official character to accompany the official act which it authorizes, none is necessary. And where one state recognizes acts done in pursuance of the laws of another state, its courts will take judicial cognizance of those laws, so far as it may be necessary to determine the validity of the acts alleged to be in conformity with them.[26] But the requirements of the laws of the state where the cer-

fore him and acknowledged its execution. It is true the certificate does not state that the officer was one who by law could take the acknowledgment of deeds, but it does state what the office was, and as the statute makes it the official duty of one holding such an office to take the acknowledgment of deeds, the statement of his official character necessarily included a statement of his official authority. Elwood *v.* Flannigan, 104 U. S. 562, 568, 26 L. Ed. 842.

But not essential.—The acts of the assembly of Maryland, prescribing the mode in which deeds should be acknowledged for the conveyance of real property, were adopted by congress, in the act assuming jurisdiction in the District of Columbia, together with the other laws of Maryland then in force. The acts of the assembly of Maryland relating to the acknowledgment of deeds, do not require that justices of the peace, or other officers who have authority to take acknowledgments, shall describe in their certificates their official character; whenever it is established by proof, that the acknowledgment was made before persons authorized to take it, it must be presumed to have been taken by them in their official capacity. Van Ness *v.* United States Bank, 13 Pet. 17, 10 L. Ed. 38.

26. Necessity of proof of officer's authority.—Carpenter *v.* Dexter, 8 Wall. 513, 19 L. Ed. 426; Elwood *v.* Flannigan, 104 U. S. 562, 26 L. Ed. 842; Secrist *v.* Green, 3 Wall. 744, 750, 18 L. Ed. 153. See ante, "When Taken in Another State," IV, B, 2.

Thus, where a statute of Illinois provided that deeds of land within the state, which had been, or might thereafter, be executed without the state and within the United States, and which had been, or might be acknowledged or proved, in conformity with the laws of the state where executed, were admissible to record in the counties of Illinois, in which the property was situated; and a deed executed in New York was acknowledged before a judge of a court of record of that state—an officer authorized by the laws of New York to take the acknowledgment and proof of deeds; and the certificate of this judge was not accompanied by any evidence of his official character, or that his certificate was in conformity with the laws of that state; held, that no such certificate of conformity was necessary for the reasons given above. Carpenter *v.* Dexter, 8 Wall. 513, 19 L. Ed. 426.

By the statutes of Illinois in force when the deed in question was executed, a deed signed and sealed by the party making the same was sufficient for the conveyance of any lands in that state. Rev. Laws, 1833, p. 129, § 1. To entitle such a deed to record, however, an acknowledgment was required before one of certain designated officers, among which were justices of the peace. If the justice resided out of the state, it was required that there be added to the deed a certificate of the proper clerk, "setting forth that the person before whom such * * * acknowledgment was made was a justice of the peace at the time of making the same." Id., p. 138, § 1. Later statutes made a deed executed in another state entitled to record when executed and acknowledged or proved according to law there, and the same certified to by the clerk of a court of record there. Elwood *v.* Flannigan, 104 U. S. 562, 566, 26 L. Ed. 842.

Although the deed was not acknowledged in conformity to Illinois laws, and so as to be entitled to record when it was recorded in Illinois, yet, under the later statutes, upon loss of the original a certified copy from the Illinois records of the deed and certificate of acknowledgment, when accompanied by the necessary certificates of due execution and authority subsequently made by the proper officers, is competent evidence in Illinois. The laws of Illinois, therefore, requiring the certificate of a clerk in certain cases as to the official character of a justice of the peace, are unimportant. If in Michigan such a certificate was not necessary to complete the execution of the deed, none was required in Illinois. Certainly a deed may be said to be fully executed when all has been done that is necessary to entitle it to record, and for that purpose in Michigan the evidence of an acknowledgment was complete when the officer before whom it was taken signed a certificate to that effect indorsed on the deed. No provision was made for any authentication of his official character. His certificate, made as it must necessarily be, under the obligations of his official oath, was deemed sufficient. Elwood *v.* Flannigan, 104 U. S. 562, 568, 26 L. Ed. 842.

It being objected that there was no proof that the officer taking the acknowledgment was at the time in fact a justice of the peace, the laws of Michigan required no other evidence of that fact to entitle a deed to record than the certificate of the officer himself. That was given in this case, and in addition it was shown that he was acting as a justice of

tificate is to be used, must be complied with.[27]

3. Venue.—It will be presumed, that a commissioner of deeds, in New York, whose authority to act is limited only to his county, exercised his office within the territorial limits for which he was appointed, although the only venue given to his certificate of acknowledgment be "state of New York." If such were not the presumption, the defect in this particular held to be supplied in this case by reference to the deed and the previous certificate of acknowledgment by the same person; in the first of which the grantor designated the county in which he had affixed his hand and seal to the instrument, and in the second of which the county is given in its venue.[28]

4. Contents of Body of Certificate—a. *In General.*— The certificate of acknowledgment ought not to be left in uncertainty. It is ex parte proof of the deed; and it ought to appear, with all reasonable certainty, that the requisites of the law had been complied with.[29] In aid of the certificate of acknowledgment, or proof of a deed, reference may be had to the instrument itself, or to any part

the peace at the time. This made it unnecessary to consider whether the certificate of the secretary of state, of the fact of his appointment, was competent evidence. The law did not require a copy of his commission, or proof of his having taken the official oath. It was sufficient that he was acting under color of right. That fact was clearly shown. Elwood *v.* Flannigan, 104 U. S. 562, 569, 26 L. Ed. 842.

Master in chancery.—Where it was insisted that there should have been some proof of the official character of the master in chancery certifying an acknowledgment, where neither the legislatures of New York or Illinois, the states concerned, saw fit to require any such proof, therefore none was necessary in Illinois. Secrist *v.* Green, 3 Wall. 744, 750, 18 L. Ed. 153.

27. Statutory requirements must be observed.—Smith *v.* Gale, 144 U. S. 509, 521, 36 L. Ed. 521. See ante, "When Taken in Another State," IV, B, 2; "Construction," VI, C, 2.

Instruments executed in Minnesota were acknowledged before a notary public of Ramsey county in that state, who certified to the same under his official seal, and to this acknowledgment was appended a certificate of the secretary of state of Minnesota, to the effect that the notary taking the acknowledgment had been duly appointed and qualified, etc.; that full faith and credit were due to his official acts; and that his signature was genuine, and the instrument executed and acknowledged in accordance with the laws of the state. Indorsed upon these instruments was the certificate of the register of deeds of Minnehaha county, Dakota, that they had been filed for record in August, 1871. Objection was made to the admission of these conveyances upon the ground that, having been executed without the state, the certificate of the officer taking the acknowledgment ought to have been "accompanied by a certificate under the name and official seal of the clerk, register, recorder or prothonotary of the county in which such officer resides * * * specifying that such officer was at the time of taking the proof or acknowledgment duly authorized," etc., as required by § 528 of the Civil Code (Dakota) of 1865-66. Under this statute, the certificate of the secretary of state was insufficient and immaterial. Smith *v.* Gale, 144 U. S. 509, 521, 36 L. Ed. 521.

But this want of a proper additional certificate was cured by the curative act of 1872-3 (Laws, pp. 63, 64), § 5. Smith *v.* Gale, 144 U. S. 509, 521, 36 L. Ed. 521. See post, "Construction," VI, C, 2.

In Virginia.—In Shutte *v.* Thompson, 15 Wall. 151, 21 L. Ed. 123, a deed was held sufficiently proved for record in Virginia where acknowledged outside Virginia, when the certificate of the United States district clerk was accompanied by a certificate of even date, by the judge of the same court, that the clerk was then the officer he professed to be.

28. Presumption as to venue.—Carpenter *v.* Dexter, 8 Wall. 513, 19 L. Ed. 426.

29. Certainty required.—Hinde *v.* Longworth, 11 Wheat. 199, 207, 6 L. Ed. 454.

In Tennessee.—The formula prescribed by the laws of Tennessee for the acknowledgment of deeds is: "Personally appeared before me * * * the within named bargainor, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained." If the acknowledgment be taken without the state, by one of the officers designated in § 2043, Tenn. Code, the same formula must be followed. Kelly *v.* Calhoun, 95 U. S. 710, 712, 24 L. Ed. 544.

The certificate of probate of a deed in Tennessee did not say that the witness swore that the grantor acknowledged it on the day of its date. But as the certificate said that the grantor acknowledged it for the purposes therein contained, the probate is covered by an act passed in 1846. Lea *v.* Polk County Copper Co., 21 How. 493, 16 L. Ed. 203.

of it.[30] Semble, that, where the officer in effect only certified that he was told by an interpreter that an Indian woman made the acknowledgment, no power having been given him to swear an interpreter for such a purpose, the acknowledgment was invalid.[31]

b. *Identification of Grantor as Person Acknowledging.*—A statutory requirement that the certificate shall state or show that the person acknowledging the instrument was personally known or proven to be the person executing same, is one of substance, but a substantial compliance therewith is sufficient.[32] If the officer taking the acknowledgment was satisfied of such identity, and so certified,

30. Reference to instrument.—Carpenter *v.* Dexter, 8 Wall. 513, 19 L. Ed. 426.

Presumption in favor of validity, see post, "Presumption in Favor of Validity," VII. A.

31. Certificate on information of interpreter insufficient.—Elwood *v.* Flannigan, 104 U. S. 562, 569, 26 L. Ed. 842.

32. Substantial compliance with statute sufficient.—Schley *v.* Pullman Car Co., 120 U. S. 575, 585, 30 L. Ed. 789; Kelly *v.* Calhoun, 95 U. S. 710, 712, 24 L. Ed. 544; Carpenter *v.* Dexter, 8 Wall. 513, 19 L. Ed. 426; Elwood *v.* Flannigan, 104 U. S. 562, 568, 26 L. Ed. 842.

"It was said in Lindley *v.* Smith, 46 Ill. 523, 527, that the requirement that the certificate should show that the person acknowledging it was personally known to the officer to be the person whose name is subscribed to the deed, or was proved to be such, by a credible witness, was one of substance and salutary in its operation, and was not dispensed with by the act of 1853; and that 'it is the acknowledgment of the feme covert which is the operative act to pass her title.'" Schley *v.* Pullman Car Co., 120 U. S. 575, 585, 30 L. Ed. 789.

Where the officer's certificate states that "personally came Christina Lynn and William Lynn, her husband, known to me to be the persons who executed the foregoing instrument, and acknowledged the same to be their free act and deed," this is, in substance, a statement that they came before the officer and were personally known to him to be the real persons who in fact subscribed and acknowledged the deed. Schley *v.* Pullman Car Co., 120 U. S. 575, 585, 30 L. Ed. 789.

The formula prescribed by the laws of Tennessee for the acknowledgment of deeds is "Personally appeared before me * * * the within named bargainor, with whom I am personally acquainted, and who acknowledged that he executed the within instrument for the purposes therein contained." Held, that a certificate of an officer taking the acknowledgment of the grantor in a deed of trust, in which the officer certifies that said grantor is "personally known" to him, is a compliance with the statute. Kelly *v.* Calhoun, 95 U. S. 710, 24 L. Ed. 544.

In this formula, both the phrases 'personally appeared' and 'with whom I am personally acquainted' are found. It has been held, by the supreme court of the state, that the latter means more than the former, and that personal knowledge is indispensable. But it has been also held, that a substantial compliance with the statute is all that is required. And such is the rule laid down by this court. Kelly *v.* Calhoun, 95 U. S. 710, 712, 24 L. Ed. 544; Carpenter *v.* Dexter, 8 Wall. 513, 19 L. Ed. 426.

To be "personally acquainted with" and to "know personally" are, in such a certificate, equivalent phrases. Kelly *v.* Calhoun, 95 U. S. 710, 24 L. Ed. 544.

Implication of knowledge from facts certified.—It being objected that the certificate of a Michigan officer did not state that the person acknowledging was personally known to the officer, there is nothing in the Michigan statute which requires any such statement, though there is in Illinois. It is enough in Michigan if the officer certifies to the fact of an acknowledgment by the proper party. That has been done in this case. The statement is that Ash-kum, an Indian chief, came before the officer and made the necessary acknowledgment. This implies that the grantor was in some way known to the officer, and that the acknowledgment was in fact made. The making of the certificate was an official act, done under the sanction of an official oath, and is presumptively true. The laws of Michigan did not require the officer to state in his certificate the evidence by which the identity of the person was established in his mind. It was enough that he certified to the fact. Elwood *v.* Flannigan, 104 U. S. 562, 568, 26 L. Ed. 842.

"The fact that the grantor was in this case an Indian is unimportant. The duty of the officer was precisely the same in respect to him as it was to other men. The officer must, in his case as in others, be satisfied of the identity of the person, as well as of the fact of an acknowledgment. That being done, it was his duty to make the certificate." Elwood *v.* Flannigan, 104 U. S. 562, 569, 26 L. Ed. 842.

"When the officer, being a subscribing witness himself with Wooster, certifies that 'Wooster, one of the subscribing witnesses,' came before him and was known to him, he does, in fact, certify that he knew Wooster to be a subscribing witness as plainly as if he had added

the evidence by which he reached that conclusion cannot be inquired into.[33]

c. *Instruments Executed by Husband and Wife*—(1) *In General.*—The certificate must show, with all reasonable certainty, that the requisites of law have been complied with. It is ex parte proof of the deed and should not be left in uncertainty.[34]

those words. There is here a compliance, in substance if not in form, with the statute, and that is all which is required." Carpenter *v.* Dexter, 8 Wall. 513, 529, 19 L. Ed. 426.

Omission supplied by reference to attestation clause.—Thus, where a law of Illinois, in force in 1847, provided that no officer should take the acknowledgment of any person, unless such person should be personally known to him to be the real person who executed the deed, and in whose name such acknowledgment was proposed to be made, or should be proved to be such by a credible witness, and that such personal knowledge or proof should be stated in the certificate; and the certificate of the officer following immediately after the attestation clause of the deed, stated that the "above named grantor, who has signed, sealed, and delivered the above instrument in writing, personally appeared" before the officer, and acknowledged the same to be his free act and deed, but omitted to state that the person making the acknowledgment was personally known to the officer to be the person who executed the deed; held, that the omission was supplied by reference to the attestation clause, which declared that the instrument was "signed, sealed, and delivered," in presence of the subscribing witnesses, of whom the officer taking the acknowledgment was one. Carpenter *v.* Dexter, 8 Wall. 513, 19 L. Ed. 426.

"The law of Illinois in force in 1818 did not require the officer taking the acknowledgment of a deed to certify, from his personal knowledge, to the identity of the party making the acknowledgment with the grantor. It did not require the acknowledgment to be certified in any particular form, except in case of a married woman. A certificate, without declaring such identity, or even personal knowledge of the parties making the acknowledgment, was held, by the supreme court of that state, to be as full and exact as was contemplated by the law of 1819, a law which was identical in terms, so far as it relates to the point under consideration, with the law in force in 1818, except that the word 'territory' was changed to that of 'state.'" Carpenter *v.* Dexter, 8 Wall. 513, 526, 19 L. Ed. 426.

33. Source of knowledge not inquired into.—Culbertson *v.* Whitbeck Co., 127 U. S. 326, 330, 32 L. Ed. 134; Elwood *v.* Flannigan, 104 U. S. 562, 568, 26 L. Ed. 842.

If the grantor was not known to the officer taking the acknowledgment, the New York law required (in 1818) that the deed should be proved by satisfactory evidence, and that the substance of the evidence, with the names of the witnesses, should be incorporated in the certificate of acknowledgment. All this was done in the case of this deed. Secrist *v.* Green, 3 Wall. 744, 750, 18 L. Ed. 153.

Where the acknowledgment was taken in the state of New Jersey, before R., a master in chancery and notary public, who says in his certificate that the parties, naming them, personally appeared before him, "who, I am satisfied, are the grantors in the within deed of conveyance," and this language is the defect complained of by defendant, this is sufficient evidence that the parties who appeared before him were the grantors in the deed. If he was satisfied of that fact the court cannot now inquire into the evidence by which he reached that conclusion. But any difficulty on this subject is removed by the certificate of the clerk of the county in that state, that said R. was a master in chancery and a notary public in and for said county, and "that the annexed instrument (meaning the deed) is executed and the proof of acknowledgment thereto taken in accordance with the laws of said state of New Jersey." This official statement that the acknowledgment was made according to the laws of the state is, we think, sufficient to make it valid, because the law of Michigan provides (Howell's Statutes, § 5660), where such acknowledgments are taken out of the state, that the clerk certifying to the official character of the office shall also state "that the deed is executed and acknowledged according to the laws of such state." Culbertson *v.* Witbeck Co., 127 U. S. 326, 330, 32 L. Ed. 134.

34. Compliance with requisites of law necessary.—Hinde *v.* Longworth, 11 Wheat. 199, 207, 6 L. Ed. 454.

Where the certificate of acknowledgment of a deed of land in Ohio, is as follows: "Hamilton ss: Personally, before me, Thomas Gibson, one of the justices of the court of common pleas for said county, the above named Thomas Doyle, and —— Doyle, his wife, who being examined separate and apart, acknowledged the foregoing deed to be her hand and seal, free act and deed, for the uses and purposes mentioned;" quære, whether this can be taken for the acknowledgment of Thomas Doyle. He alone signed the deed. His wife is not named as a party

(2) *Certificate of Separate Examination and Acknowledgment.*—Where a statute requires a private examination of the wife, to ascertain that she acts freely, and not by compulsion of her husband, but prescribes no precise form of words to be used in the certificate, it is sufficient if the words of the acknowledgment have the same meaning, and are in substance the same, with those used in the statute, the state court not having held the contrary.[35] But it is essential that the fact of such privy examination, when required by statute, should be certified to. It cannot be shown by parol evidence.[36]

in any manner, except in the conclusion. Hinde *v.* Longworth, 11 Wheat. 199, 207, 6 L. Ed. 454.

The certificate is insufficient, unless it contains enough to show, with all reasonable certainty, that, in point of fact, Thomas Doyle did appear before the officer and acknowledge the deed, and this, it seems, it does not show. It does not even state expressly, that Thomas Doyle appeared before the officer; but if that is to be inferred, the purpose for which he appeared is not stated, so that nothing can be inferred from the mere fact of appearance. It does not set forth that he, in point of fact, did acknowledge the deed, or did any one act that might by possibility be construed into an acknowledgment. The certificate does state that the wife did acknowledge the deed, which, if true, necessarily implies, that she appeared before the magistrate, although that fact is not stated. The form of the certificate is adapted to the acknowledgment of the wife. Hinde *v.* Longworth, 11 Wheat. 199, 207, 6 L. Ed. 454.

In Illinois.—Within the meaning of the act of 1847, and according to the tendency of the decisions of the supreme court of the state of Illinois, the wife joins with her husband in the execution of a conveyance of her estate of inheritance where her name alone appears in the granting clause, but the deed is signed by both herself and husband, is acknowledged by both, and is certified as required by law. Such conveyance, so signed, acknowledged, and certified, of the wife's land, seems to be as effectual, under the local law, to invest the grantee with the title and interest of both husband and wife as if his name had also appeared in the granting clause. Schley *v.* Pullman Car Co., 120 U. S. 575, 583, 30 L. Ed. 789.

35. Substantial compliance with statute sufficient.—Dundas *v.* Hitchcock, 12 How. 257, 13 L. Ed. 978; Deery *v.* Cray, 5 Wall. 795, 18 L. Ed. 653.

Where one of the objections to the acknowledgment of the wife is, that she acknowledges to have signed and sealed "the said indenture of mortgage," and not that part of it called the "relinquishment of dower," this objection is hypercritical. "Haret in litera." It is founded on the untenable assumption, that the several covenants signed by the husband and wife do not constitute one assurance or deed of mortgage. The same criticism would annul the acknowledgment of the husband, which is, "that he executed the foregoing indenture," whereas the deed signed by him is a deed poll and not an indenture. Surely no court would declare his acknowledgment invalid for this slight misnomer. It would, certainly, be no great latitude of construction, even if they were separate and distinct instruments, to refer the acknowledgment of the wife to that one which contains her own grant or release, and which she has signed and sealed. Dundas *v.* Hitchcock, 12 How. 257, 268, 13 L. Ed. 978.

A certificate by the proper officers, that a feme covert being "privately examined, apart from and out of the hearing of her husband," acknowledged, etc., was a sufficient compliance with the Maryland statute of 1807, which required the examination to be "out of the presence" of the husband. The expressions are equivalent. Deery *v.* Cray, 5 Wall. 795, 18 L. Ed. 653.

36. Fact must be certified to.—Miller *v.* Texas, etc., R. Co., 132 U. S. 662, 690, 33 L. Ed. 487; Elliott *v.* Peirsol, 1 Pet. 328, 340, 7 L. Ed. 164; Hitz *v.* Jenks, 123 U. S. 297, 303, 31 L. Ed. 156.

Where a deed was acknowledged before a notary public, and a certificate of said acknowledgment was made in due form, with one exception, that it contains no statement that the wife was privily examined by the officer apart from her husband, this is necessary in order to validate a convevance of the wife's separate property in Texas, and its absence cannot be supplied by showing that she was actually privily examined. See, to the same effect, Elliott *v.* Peirsol, 1 Pet. 328, 340, 7 L. Ed. 164; Hitz *v.* Jenks, 123 U. S. 297, 303, 31 L. Ed. 156. This seems to be a fatal defect. Miller *v.* Texas, etc., R. Co., 132 U. S. 662, 690, 33 L. Ed. 487. See, ante, "Of Instrument Executed by Married Woman," II, A, 3.

District of Columbia, Virginia and Kentucky.—By § 451, Rev. Stat., District of Columbia, "if upon such privy examination and explanation, she (a married woman) shall acknowledge the deed to be her act and deed, and shall declare that she had willingly signed, sealed and delivered the same, and that she wished not to retract it, the officer shall certify such examination, acknowledgment and declaration by a certificate annexed to the deed, and under his hand and seal, to the

(3) *Explanation of Contents to Wife.*—A deed was held insufficient under the law of Pennsylvania, to pass the title, where the notary's certificate did not state that he had made known its contents to the wife.[37]

VI. Effect, Correction, or Reformation of Defective Certificate of Acknowledgment.

A. Effect of Invalid Acknowledgment.—It has never been supposed that a notary, who takes an acknowledgment of a deed, could be counted as a witness to the deed without a separate signature. But where the certificate of a vice consul to the acknowledgment of a will before him by testator, was a wholly unofficial act, there is no objection to disregarding the words "Vice Consul of the United States," and treating it as an acknowledgment of the execution before a competent witness. The acknowledgment of a will is really a feature of the attestation.[38]

B. Reformation by Officer or Court.—The failure of the certificate of a clerk to state the essential privy examination of a feme, cannot be cured by subsequent proceedings of the court or clerk, upon evidence of the fact. The clerk's authority was exhausted in its exercise, and he has no authority subsequently to alter the records of the acknowledgment after it is made.[39]

following effect," that is to say, beginning in the usual form of a certificate or acknowledgment, and adding that, "being by me examined privily and apart from her husband, and having the deed aforesaid fully explained to her, she acknowledged the same to be her act and deed, and declared that she had willingly signed, sealed and delivered the same, and that she wished not to retract it." Hitz *v.* Jenks, 123 U. S. 297, 301, 31 L. Ed. 156.

"It has been decided by this court, in a case arising under a similar statute of Virginia, that if the certificate, as recorded, is silent as to these facts (separate examination and acknowledgment), the want cannot be supplied by parol evidence that the wife was duly examined; and this for the reason stated by Mr. Justice Trimble, in delivering judgment, as follows: 'What the law requires to be done, and appear of record, can only be done and made to appear by the record itself, or an exemplification of the record. It is perfectly immaterial whether there be an acknowledgment or privy examination in fact or not, if there be no record made of the privy examination; for by the express provisions of the law, it is not the fact of privy examination merely, but the recording of the fact, which makes the deed effectual to pass the estate of a feme covert.' Elliott *v.* Peirsol, 1 Pet. 328, 340, 7 L. Ed. 164." Hitz *v.* Jenks, 123 U. S. 297, 304, 31 L. Ed. 156.

By the Virginia statute of 1748, "when any deed has been acknowledged by a feme covert, and no record made of her privy examination, such deed is not binding upon the feme and her heirs;" this law was adopted by Kentucky, at her separation from Virginia; and is understood never to have been repealed. Elliott *v.* Peirsol, 1 Pet. 328, 339, 7 L. Ed. 164.

37. Explanation to wife must be certified to.—Bayne *v.* Wiggins, 139 U. S. 210, 212, 35 L. Ed. 144. See, generally, the title HUSBAND AND WIFE.

38. Invalid acknowledgment as to attestation.—Keely *v.* Moore, 196 U. S. 38, 45, 49 L. Ed. 376. See, generally, the title WILLS.

Irregular but sufficient acknowledgment.—Where a mortgage was executed by a husband, his own name only being used in the body of the instrument, but it was signed by his wife also, who relinquished her right of dower, and made her acknowledgment in an after part of the instrument; and there is sufficient evidence, from an inspection of the whole instrument, to believe that the intention of the parties was to consider the whole paper as forming one assurance, the wife will be barred of her dower, as far as the mortgage is concerned. Dundas *v.* Hitchcock, 12 How. 257, 13 L. Ed. 978. See Stebbins *v.* Duncan, 108 U. S. 32, 45, 27 L. Ed. 641. See, ante, "For Recordation," II. B.

39. Officer cannot alter record.—Elliott *v.* Peirsol, 1 Pet. 328, 340, 7 L. Ed. 164.

A deed from baron and feme, of lands in the state of Kentucky, executed to a third person, by which the land of the feme was intended to be conveyed, for the purpose of a recoveyance to the husband, and thus to vest in him the estate of the wife, was indorsed by the clerk of Woodford county court, "acknowledged by James Elliott, and Sarah G. Elliott, September 11th, 1816," and was certified as follows: "Attest—J. McKenney, jun., Clerk. Woodford County, ss: September 11th, 1813. This deed from James Elliott and Sarah G. Elliott, his wife, to Benjamine Elliott, was this day produced before me, and acknowledged by said James and Sarah to be their act and deed, and the

C. By Legislative Enactment—1. CONSTITUTIONALITY.—The authority of the supreme court of the United States to examine into the constitutionality of a statute of a state curing defective acknowledgments, is confined to the question, whether it violates the federal constitution.[40]

2. CONSTRUCTION.—Statutes curing defective acknowledgments are to be so construed as to effectuate their purpose; that is, to create a conclusive presumption of proper acknowledgment of instruments within their purview, when reasonably construed.[41] But the courts are bound by the clearly expressed language

same is duly recorded. John McKenney, jun, C. C. C." Held, that subsequent proceedings of the court of Woodford county, by which the defect of the certificate of the clerk to state the privy examination of the feme (which, by the law of Kentucky, is necessary to make a conveyance of the estate of a feme covert legal), were intended to be cured, upon evidence that the privy examination was made by the clerk, will not supply the defect, or give validity to the deed. Elliott *v.* Peirsol, 1 Pet. 328, 340, 7 L. Ed. 164.

An officer (clerk in this case) in certifying the acknowledgment, acts ministerially, and not judicially, in the matter. Until his certificate of the acknowledgment was recorded, it was, in its nature, but an act in pais, and alterable at the pleasure of the officer. But the authority of the clerk to make and record a certificate of the acknowledgment of the deed, was functus officio, as soon as the record was made. By the exertion of his authority, the authority itself became exhausted. The act had become matter of record, fixed, permanent and unalterable; and the remaining powers and duty of the clerk were only to keep and preserve the record safely. Elliott *v.* Peirsol, 1 Pet. 328, 341, 7 L. Ed. 164.

40. Jurisdiction of supreme court.—Watson *v.* Mercer, 8 Pet. 88, 8 L. Ed. 876. See the title CONSTITUTIONAL LAW.

In 1785, M. and wife executed a deed conveying certain lands of the wife to T., who immediately reconveyed them to M.; the object of the conveyance was to vest the lands of the wife in the husband. The deed of M. and wife to T. was not acknowledged according to the forms established by the law of Pennsylvania of February 20th, 1770, to pass the estates of femes covert; and after the death of the wife of M., the land was recovered in an ejectment from the heirs of M., in a suit instituted against him by the heirs of the wife of M. In 1826, after the recovery of the ejectment, the legislature of Pennsylvania passed an act, the object of which was to cure all defective acknowledgments of this sort, and to give them the same efficacy as if they had been originally taken in the proper form. The plaintiffs in the ejectment claimed title to the premises, under James Mercer, the husband; and the defendants, as heirs-at-law of his wife, who died without issue; this ejectment was brought after the passage of the act of 1826. The authority of this court to examine the constitutionality of the act of 1826 extends no further than to ascertain whether it violates the constitution of the United States; the question, whether it violates the constitution of Pennsylvania, is upon the present writ of error, not before the court. Watson *v.* Mercer, 8 Pet. 88, 8 L. Ed. 876.

Reason and necessity.—The great evils likely to arise from a strict construction applied to the bona fide conveyances of the early period of the settlement of this country, an age careless of form, have compelled legislatures to quiet titles by confirmatory acts, in order to prevent the most gross injustice. Webb *v.* Weatherhead, 17 How. 577, 578, 15 L. Ed. 35.

Constitutionality of Pennsylvania act.—"The act of 1826 does not violate the obligation of any contract, either in its terms or its principles; it does not even affect to touch any title acquired by a patent or any other grant; it supposes the titles of the femes covert to be good, however acquired; and even provides that deeds of conveyance made by them shall not be void, because there is a defective acknowledgment of the deeds, by which they have sought to transfer their title. So far, then, as it has any legal operation, it goes to confirm and not to impair the contract of the femes covert; it gives the very effect to their acts and contracts which they intended to give; and which, from mistake or accident, has not been effected. The cases of Calder *v.* Bull, 3 Dall. 386, 1 L. Ed. 648; Fletcher *v.* Peck, 5 Cranch 87, 138, 3 L. Ed. 162; Ogden *v.* Saunders, 12 Wheat. 213, 266, 6 L. Ed. 606; and Satterlee *v.* Matthewson, 2 Pet. 380, 7 L. Ed. 458, fully recognize this doctrine." Watson *v.* Mercer, 8 Pet. 88, 8 L. Ed. 876.

41. Conclusive presumption of regularity created.—Webb *v.* Weatherhead, 17 How. 577, 15 L. Ed. 35; Smith *v.* Gale, 144 U. S. 509, 522, 36 L. Ed. 521; Scott *v.* Reid, 10 Pet. 524, 527, 9 L. Ed. 519.

Construction of Tennessee acts.—In 1839, the legislature of Tennessee passed a law containing the following provision, namely: "That whenever a deed has been registered twenty years, or more, the same shall be presumed to be upon lawful authority, and the probate shall be good and effectual, though the certificate on

of the statutes, and cannot extend them. Where they make a distinction, reasonable or unreasonable, the courts must observe it.[42]

which the same has been registered, has not been transferred to the register's books, and no matter what has been the form of the certificate of probate or acknowledgment." A deed to "the legatees and devises of the late Anthony Bledsoe," which was certified by the register of Maury county, Tennessee, to have been recorded there in January, 1809, was, under the authority of this statute, properly admitted in evidence, although informalities existed with respect to its being proved, and with respect to the acknowledgment of a feme covert. Webb *v.* Weatherhead, 17 How. 577, 15 L. Ed. 35.

As a legal presumption it is conclusive that the deed was properly acknowledged, although the contrary may appear on the face of the papers. Webb *v.* Weatherhead, 17 How. 577, 578, 15 L. Ed. 35.

Informalities and errors in the acknowledgments of feme coverts, are those which the carelessness and ignorance of conveyancers were most liable to make, and which most required such curative legislation. Webb *v.* Weatherhead, 17 How. 577, 578, 15 L. Ed. 35. See, generally, the title RECORDING ACTS.

Construction of Dakota act.—Where an act of Dakota (Laws of Dakota Territory, 1872-3, pp. 63, 64), passed after the acknowledgment of the instruments in question, provided how they should be taken in future, and provided by § 5 that "All records of instruments heretofore made in any of the counties of the territory, the acknowledgment and certificate of which instruments are taken and certified by the officers, and in the manner herein provided, shall, from and after the taking effect of this act, have the same force and effect as though such certificates of acknowledgment were accompanied by the additional certificates heretofore required by law," this curative act did away with the necessity of any certificate additional to that of the notary public, provided that the latter certified to the acknowledgment under his hand and seal. Smith *v.* Gale, 144 U. S. 509, 522, 36 L. Ed. 521.

"The certificates upon the original instruments were attested by an official seal. It seems, however, that in putting these instruments upon record in the register's office in the county of Minnehaha, the scrivener omitted to make a similitude on the record of the notarial seal, or a scroll or symbol to indicate it, and the defendant introduced the record books in which these instruments had been recorded to show this fact. It was claimed at this point that the deeds did not prove themselves, as they had not been duly recorded. By § 493 of the Dakota Code of Civil Procedure it is enacted that 'every instrument in writing, which is acknowledged or proved, and duly recorded, is admissible in evidence without further proof.' These instruments, however, under the curative act of 1873, were perfect upon their face, the certificate of the secretary of state being mere surplusage, and that of the notary being accompanied by his official seal. Now, while § 5 of this act makes the records of instruments heretofore made, evidence, notwithstanding the want of a certificate of authorization, it ought not to be held that the original instrument, which is perfect upon its face, is made inadmissible by the fact that the record of such instrument has omitted the official seal of the notary." Smith *v.* Gale, 144 U. S. 509, 523, 36 L. Ed. 521. See, ante, "Proof of Officer's Authority," V, B, 2.

42. Distinctions must be observed.—Scott *v.* Reid, 10 Pet. 524, 527, 9 L. Ed. 519.

The third section of the Tennessee act of the 23d of November, 1809, which provides, "that all deeds for the absolute conveyance of any real estate within this state, to which the Indian title was not extinguished, at the time of the execution of such deed, and at the time of the registration of the same, as hereinafter mentioned, which deed shall have been proved by one or more of the subscribing witnesses thereto, in any court of record, or before any judge of the superior courts in the state, or shall have been so proved before any court of record or any judge of a court, or mayor of a city, out of this state, and shall have been registered in any county in this state, within the time required for the probate and registration of deeds; such probate and registration shall be sufficient to entitle such deed or deeds to be read in evidence, in any court within this state; and shall also be sufficient to entitle such deed or deeds to registration in the county or counties where said land may lie, when the Indian title is extinguished thereto," does not apply to deeds of this character proved by acknowledgment, so as to make them competent evidence. Scott *v.* Reid, 10 Pet. 524, 525, 9 L. Ed. 519. See Blackwell *v.* Patton, 7 Cranch 471, 3 L. Ed. 408.

It does not appear why the benefits of this statute were given to those who held under deeds proved by the subscribing witnesses, and withheld from those whose deeds were proved by the acknowledgment of the grantor. In most cases, if not in all, proof by acknowledgment would be deemed more satisfactory than by witnesses; but the legislature having made a distinction between the cases; whether it was intended or not, reasonable or unreasonable; the courts **are**

VII. Conclusiveness of Acknowledgment.

A. Presumption in Favor of Validity.—It is the policy of the law to uphold certificates when substance is found, and not to suffer conveyances, or the proof of them, to be defeated by technical or unsubstantial objections.[43]

B. Conclusiveness of Certificate.—Where a perfect deed has been signed and acknowledged before the proper officer, an inquiry into the examination of the feme covert, embracing the requisites of the statute, as constituting the acknowledgment, with a view to contradict the writing, is inadmissible. Acts of the officer for this purpose are judicial and conclusive.[44]

C. Presumption as to Venue.—See, ante, "Venue," V, B, 3.

bound by the clearly-expressed language of the act. Scott *v.* Reid, 10 Pet. 524, 527, 9 L. Ed. 519.

In the latter part of the second section of the Tennessee act of 1821 it is provided, that "in all cases where a deed of conveyance of land has been acknowledged before a judge of the late superior courts of law and equity, or before any court of record in this state, and since registered in any register's office in this state; or where the privy examination of a feme covert, through whom the title is derived, has been taken before any court of record and certified, and such deed registered in the proper county; such deed, or an authenticated copy thereof, may be read in evidence, and shall be deemed sufficient to pass the title; provided, that no person claiming by a conveyance under the same title, shall be affected thereby. These provisions embrace two descriptions of cases. The first one, is, where a deed has been acknowledged before a judge and registered in any register's office in the state; and the other, where the privy examination of a feme covert, through whom the title is derived, has been taken before a court of record and registered in the proper county. But in neither of these cases, shall the title be held good against a person claiming under the same title. Scott *v.* Reid, 10 Pet. 524, 527, 9 L. Ed. 519.

This section does not so clearly express the intention of the legislature as it might have done, but it is susceptible of the construction that the deed required to be registered in the proper county is the deed that conveys the title of the feme covert. To extend this requirement, by construction, to the first deed named, would make the provision contradictory, if not absurd. Scott *v.* Reid, 10 Pet. 524, 528, 9 L. Ed. 519.

43. Policy of law to uphold validity.—Carpenter *v.* Dexter, 8 Wall. 513, 526, 19 L. Ed. 426; Davey *v.* Turner, 1 Dall. 11, 1 L. Ed. 15; Lloyd *v.* Taylor, 1 Dall. 17, 1 L. Ed. 18; Ross *v.* McLung, 6 Pet. 283, 287, 8 L. Ed. 400.

And for that purpose resort will be had to the instrument to which it is attached. Carpenter *v.* Dexter, 8 Wall. 513, 528, 19 L. Ed. 426.

44. Certificate sole and conclusive evidence.—Drury *v.* Foster, 2 Wall. 24, 34, 17 L. Ed. 780; Young *v.* Duvall, 109 U. S. 573, 27 L. Ed. 1036; Hitz *v.* Jenks, 123 U. S. 297, 304, 31 L. Ed. 156. See Ross *v.* McLung, 6 Pet. 283, 287, 8 L. Ed. 400.

"That the magistrate's certificate, when made in the form required by the statute, and duly recorded, is conclusive evidence that he has performed his duty, has not been directly adjudged by this court; but the course of its decisions has tended to this conclusion. In Drury *v.* Foster, Mr. Justice Nelson, in delivering judgment, observed: 'There is authority for saying, that where a perfect deed has been signed and acknowledged before the proper officer, an inquiry into the examination of the feme covert, embracing the requisites of the statute, as constituting the acknowledgment, with a view to contradict the writing, is inadmissible; that the acts of the officer for this purpose are judicial and conclusive.' 2 Wall. 24, 34, 17 L. Ed. 780. And in Young *v.* Duvall, the court said that if the officer's certificate 'can be contradicted, to the injury of those who in good faith have acted upon it, the proof to that end must be such as will clearly and fully show the certificate to be false or fraudulent. The mischiefs that would ensue from a different rule could not well be overstated. The cases of hardship upon married women that might occur under the operation of such a rule are of less consequence than the general insecurity of titles to real estate, which would inevitably follow from one less rigorous.' 109 U. S. 573, 577, 27 L. Ed. 1036." Hitz *v.* Jenks, 123 U. S. 297, 304, 31 L. Ed. 156.

The reasonable, if not the necessary, conclusion is that, except in cases of fraud, the certificate, made and recorded as the statute requires, is the sole and conclusive evidence of the separate examination and acknowledgment of the wife. Hitz *v.* Jenks, 123 U. S. 297, 303, 31 L. Ed. 156. See post, "Competency," VII, D.

In Rhea *v.* Rhenner, 1 Pet. 105, 7 L. Ed. 72, and in Hepburn *v.* Dubois, 12 Pet. 345, 9 L. Ed. 1111, the requisite certificate was either wanting or defective upon its face. Hitz *v.* Jenks, 123 U. S. 297, 305, 31 L. Ed. 156. See ante, "Of Instrument Executed by Married Woman," II, A, 3; "By Married Woman," IV, C, 1.

Weight in evidence.—"The solemn probate of a deed by a witness, upon oath, before a magistrate, for the pur-

D. Evidence.—See, ante, "Purpose and Necessity," V, A; "Conclusiveness of Certificate," VII, B.

1. Competency.—Extrinsic evidence, in the absence of fraud or duress, is incompetent to impeach the notary's certificate as to the manner in which he performed his duty.[45]

2. Weight and Sufficiency.—Even upon the assumption that the certificate is only prima facie evidence of the facts stated in it, the proof must be of a clear, complete, and satisfactory character in order to impeach the official statements of the officer who certified the acknowledgment of the deed in question.[46]

VIII. Fees.

The taking of an acknowledgment in a criminal cause by the accused and his

pose of having it recorded, and the certificate of the magistrate of its due probate, upon such testimony, are certainly entitled to more weight as evidence, than the mere unexplained proof of the handwriting of a witness, after his death. The one affords only a presumption of the due execution of the deed, from the mere fact that the signature of the witness is to the attestation clause; the other is a deliberate affirmation by the witness, upon oath, before a competent tribunal, of the material facts to prove the execution." Crane *v.* Morris, 6 Pet. 598, 615, 8 L. Ed. 514. See post, "Evidence," VII, D.

45. Extrinsic evidence incompetent.—Hitz *v.* Jenks, 123 U. S. 297, 304, 31 L. Ed. 156.

Where the recorded certificate of the notary public who took the acknowledgment was in the form given in the statute, the other evidence on the subject was the testimony of the appellant and of the notary. The appellant, being called as a witness in her own behalf, admitted her signature, but did not recollect that she ever executed or acknowledged the deed in question, and denied that it was ever explained to her. The notary, being called as a witness by the appellees, testified that in taking her acknowledgment he asked her if she had read over the deed and understood its contents, and if she willingly signed, sealed and delivered it, without any compulsion on the part of her husband, and wished not to retract it, to all which she answered in the affirmative; that he did not otherwise explain the deed to her, and did not read it himself; and that he did not think it necessary to explain a deed if the party was already acquainted with its contents. The appellant's signature being admitted, and there being no proof of fraud or duress in taking or procuring her acknowledgment, the extrinsic evidence was, for the reasons and upon the authorities before stated, incompetent to impeach the notary's certificate as to the manner in which he had performed his duty. Hitz *v.* Jenks, 123 U. S. 297, 305, 31 L. Ed. 156.

In the case of a deed actually executed by a married woman of full age and sound mind, a certificate of her separate examination and acknowledgment, in the form prescribed by the statute, and duly recorded with the deed, cannot afterwards, except for fraud, be controlled or avoided by extrinsic evidence of the manner in which the examination was conducted by the magistrate. Hitz *v.* Jenks, 123 U. S. 297, 304, 31 L. Ed. 156.

46. Proof must be full.—Young *v.* Duvall, 109 U. S. 573, 577, 27 L. Ed. 1036; Hitz *v.* Jenks, 123 U. S. 297, 304, 31 L. Ed. 156; Insurance Co. *v.* Nelson, 103 U. S. 544, 548, 26 L. Ed. 436; Hammond *v.* Hopkins, 143 U. S. 224, 271, 36 L. Ed. 134.

Where it was in proof that Mrs. Y. signed the note and the deed, having an opportunity to read the papers before signing them; she was before an officer competent under the law to take her acknowledgment, and he came into her presence for the purpose of receiving it; he so came at the request of the husband, who expected, by means of the executed deed of trust, to secure a loan of the amount specified in the note; and she knew, or could readily have ascertained while in the presence of the officer, as well to what property the deed referred as the object of its execution, but there is, however, a conflict in evidence as to whether she willingly signed, sealed, and delivered the deed, or had its contents fully or at all explained to her by the officer, or was examined privily and apart from her husband; the certificate of the officer must of necessity, arising out of considerations of public policy, under the circumstances disclosed in this case, be regarded as an ascertainment, in the mode prescribed by law, of the facts essential to his authority to make it; and if, under such circumstances, it can be contradicted, to the injury of those who in good faith have acted upon it—upon which question no opinion expressed—the proof to that end must be of such a character as will clearly and fully show the certificate to be false or fraudulent. Young *v.* Duvall, 109 U. S. 573, 576, 27 L. Ed. 1036; Insurance Co. *v.* Nelson, 103 U. S. 544, 547, 26 L. Ed. 436.

In the absence of evidence of fraud or collusion on the part of officers certifying to an acknowledgment of a husband and wife, since deceased, their certificate ought to prevail to establish the fact, against the qualified denial by the wife

sureties is a single act, for which only one fee can be charged. If, for any reason, it was necessary to take them separately, that fact should have been made to appear. The burden of proof was upon the plaintiff suing for such fees.[47]

ACQUAINTED.—See the title ACKNOWLEDGMENTS, ante, p. 75.

ACQUIESCENCE.—See note 1.

ACQUIT.—As to plea of autrefois acquit, see the title AUTREFOIS, ACQUIT AND CONVICT.

ACROSS.—"To the word across, unless it is qualified by some prefix as diagonally or obliquely, there is attached, in ordinary use, but one meaning, and that is a direction opposite to length."[2]

ACT.—See, generally, the title STATUTES. An act is defined as "an exertion of energy or force, mental or physical; anything that is done or performed; a doing or deed; an operation or performance."[3]

ACTION ON THE CASE.—See the title TRESPASS.

of any knowledge of the deed, and the statement of the husband that he had signed his wife's name and that the deed had never been acknowledged. Hammond *v.* Hopkins, 143 U. S. 224, 271, 36 L. Ed. 134.

When a deed or mortgage, regular in appearance, and bearing the genuine signature and duly certified acknowledgment of the grantor or mortgagor is attacked, the evidence to impeach it should be clear and convincing. The acknowledgment of a deed can only be impeached for fraud, and the evidence of fraud must be clear and convincing. In this case, the testimony of the wife touching the manner in which her signature to the mortgage was obtained is so incredible, that her account of the way in which her acknowledgment was taken is entitled to little weight. Insurance Co. *v.* Nelson, 103 U. S. 544, 26 L. Ed. 436. See ante, "Conclusiveness of Certificate," VII. B.

47. Taking acknowledgment in criminal case a single act.—United States *v.* Hall, 147 U. S. 691, 37 L. Ed. 333; United States *v.* Taylor, 147 U. S. 695, 37 L. Ed. 335; United States *v.* Ewing, 140 U. S. 142, 146, 35 L. Ed. 388; United States *v.* Barber, 140 U. S. 164, 35 L. Ed. 396. See U. S. Rev. Stat., § 828.

1. Acquiescence.—In Pence *v.* Langdon, 99 U. S. 578, 581, 25 L. Ed. 420, it is said: "**Acquiescence** and waiver are always questions of fact. There can be neither without knowledge. The terms import this foundation for such action. One cannot waive or **acquiesce** in a wrong while ignorant that it has been committed." See, also, the titles LACHES; WAIVER.

2. Hannibal, etc., R. Co. *v.* Missouri River Packet Co., 125 U. S. 260, 271, 31 L. Ed. 731.

3. Act.—Wilson *v.* Nelson, 183 U. S. 191, 212, 46 L. Ed. 147.

In Wilson *v.* Nelson, 183 U. S. 191, 212, 46 L. Ed. 147, it is said: "Black's Law Dictionary describes 'an **act**' as follows: 'In a more technical sense, it means something done voluntarily by a person, and of such a nature that certain legal consequences attach to it. Thus, a grantor acknowledges a conveyance to be his **act** and deed, the terms being synonymous.' Independently of dictionary definitions, it may be safely said that, in common usage and understanding, the word **act** signifies something done voluntarily, or, in other words, the result of an exercise of the will."

Act done.—In Alexander *v.* Bryan, 110 U. S. 414, 418, 28 L. Ed. 195, it is said: "It is settled law in Alabama, that, until there is a judicial ascertainment of the default of the principal, the liability of the surety is not fixed, within the statute; that the bar in favor of the surety must be computed from the time of such ascertainment of such default; that the words **act** done, in the statute mean such judicial ascertainment; and that it is that only which creates a cause of action against the surety, and authorizes a suit against him on his bond. Fretwell *v.* McLemore, 52 Ala. 124, 136." See, generally, the title SURETYSHIP.

Judicial and legislative act.—In Sinking Fund Cases, 99 U. S. 700, 761, 25 L. Ed. 496, it is said: "The distinction between a judicial and a legislative act is well defined. The one determines what the law is, and what the rights of parties are, with reference to transactions already had; the other prescribes what the law shall be in future cases arising under it. Wherever an act undertakes to determine a question of right or obligation, or of property, as the foundation upon which it proceeds, such **act** is to that extent a judicial one, and not the proper exercise of legislative functions."

Acting.—In United States *v.* Fuller, 160 U. S. 593, 597, 40 L. Ed. 549, it is said: "While the words '**acting** master's mates,' sometimes employed prior to the Revised Statutes, might indicate, by the use of the word '**acting,**' a person temporarily appointed to the duties of a master's mate, officers who are recognized by law, and whose pay is fixed by a permanent statute, cannot be said to be temporarily appointed."

ACTIONS.

BY FRANK STUART.

I. Definitions, Distinctions and General Consideration, 98.
A. "Action," 98.
1. General Definition, 98.
2. As Applicable in Particular Instances, 98.
B. "Case," 98.
C. "Suit," 99.
D. "Cause," 100.
E. "Cause of Action," 100.
F. "Civil Cause," 100.
G. "Case" and "Cause" Compared, 100.
H. "Case" and "Suit" Compared, 100.
I. "Action," "Suit" and "Cause" Compared, 101.
J. Controversy, 101.
K. "Original Suit" and "Cause," 101.
L. Kinds of Actions Generally, 101.
M. Penal or Remedial Actions, 101.
N. Petition of Right, 101.
O. Distinction between Admiralty and Common-Law Process, 102.
P. Proceedings In Rem and Personam, 102.
Q. Local and Transitory Actions, 102.
R. Joint and Several Actions, 102.
S. Cases at Common Law and Cases in Equity, 102.
T. Actions Ex Delicto and Ex Contractu, 102.
U. Remedy, 103.
V. "Common-Law Remedy," 104.
W. Friendly Suits, 104.
X. Forms and Modes of Procedure, 104.
Y. Hypothecary Action, 104.

II. Right of Action, 104.
A. Object, 104.
B. Right to Bring Suit Distinguished from Right to Prosecute Particular Bill, 104.
C. Test, 104.
D. Necessity for Actual Controversy, 104.
E. As Dependent on Defense, 104.
F. What Law Governs, 105.
G. No Right or Wrong without a Remedy, 105.
H. Liability without Fault, 105.
I. Damnum Absque Injuria, 105.
J. Trivial Causes, 106.
K. Motive, 106.
L. Actions for Use of Another, 106.
M. Impairment or Modification of Remedy, 106.

III. Statutory Remedies, 106.
A. New Liability or Right Created without Remedy, 106.
B. New Statutory Remedy or Penalties and Forfeitures for Existing Common-Law Right, 106.
C. Statute Creating New Right or Offense and Prescribing a Specific Remedy or Punishment, 107.

D. Enforcement of Statutory Remedies, 109.
E. Form of Action for Breach, 110.
F. Failure to Pursue Statutory Remedies, 110.

IV. Merger, 110.

V. Commencement, Prosecution and Termination of Actions, 110.
A. Commencement, 110.
1. Demand, 110.
2. What Law Governs, 110.
3. What Constitutes, 110.
4. Necessity for Process and Appearances, 111.
5. Necessity for Appearance and Return to Summons, 111.
6. Premature Suits, 111.
7. Evidence of Commencement, 111.
B. Prosecution, 111.
C. Termination, 111.

VI. Joinder and Splitting Causes of Action, 111.
A. Joinder of Causes of Action, 111.
B. Splitting Causes of Action, 112.

VII. Equitable Defenses, 114.

CROSS REFERENCES.

See the titles ABATEMENT, REVIVAL AND SURVIVAL, vol. 1, p. 1; AGREED CASE; APPEAL AND ERROR; APPEARANCES; ASSUMPSIT; BONDS; CONSPIRACY; CONSOLIDATION OF ACTIONS; CONSTITUTIONAL LAW; CONTINUANCES; COSTS; COURTS; COVENANT, ACTION OF; CREDITORS' SUITS; DEATH BY WRONGFUL ACT; DEBT, THE ACTION OF; DEMAND; DEMURRERS; DETINUE; DISCOVERY; DISMISSAL, DISCONTINUANCE AND NONSUIT; EJECTMENT; ELECTION OF REMEDIES; EQUITY; FALSE IMPRISONMENT; FICTITIOUS SUIT; FORCIBLE ENTRY AND DETAINER; FRIENDLY SUITS; HABEAS CORPUS; ILLEGAL CONTRACTS; INJUNCTIONS; JUDGMENTS AND DECREES; JURISDICTION; LABOR; LIBEL AND SLANDER; LIMITATION OF ACTIONS AND ADVERSE POSSESSION; LIS PENDENS; MALICIOUS PROSECUTION; MERGER; MOTIONS; MULTIFARIOUSNESS; ORDINANCES; PARTIES; PENALTIES AND FORFEITURES; PLEADING; PREMATURE ACTIONS; QUO WARRANTO; REMOVAL OF CAUSES; REPLEVIN; REVENUE LAWS; SEPARATE TRIALS; STATUTES; SUMMARY PROCEEDINGS; SUMMONS AND PROCESS; SUPERSEDEAS AND STAY OF PROCEEDINGS; SUPPLEMENTARY PROCEEDINGS; TORTS; TRESPASS; TROVER AND CONVERSION; VENUE.

As to joinder and splitting of causes on appeal, see the title APPEAL AND ERROR. As to deciding moot questions on appeal, see the title APPEAL AND ERROR. As to necessity for actual controversy to give jurisdiction on appeal, see the title APPEAL AND ERROR. As to the right to waive a tort and sue on contract, see the titles ASSUMPSIT; ELECTION OF REMEDIES. As to effect of repeal of statute on jurisdiction, see the title COURTS; JURISDICTION; STATUTES. As to pleading and practice, mode and forms of procedure, etc., in federal courts, see the titles COURTS; EQUITY; PLEADING. As to the effect of a technical mistake of an attorney as destroying a right of action, see the title MISTAKE AND ACCIDENT. As to adoption of state court practice by federal courts, see the title COURTS. As to joinder in indictments, see the titles CRIMINAL LAW; INDICTMENTS, INFORMATIONS AND PRESENTMENTS. As to preservations of distinction in federal courts between law and equity, see the title EQUITY. As to actions by and against District of Columbia, see the title DISTRICT OF COLUMBIA. As to right of actions on illegal or immoral contract, see the title ILLEGAL CONTRACTS. As to actions on judgments and decrees, see the title JUDGMENTS AND DECREES. As to joint judgments, see the title JUDGMENTS AND DECREES. As to actions to recover penalties, see the titles ORDINANCES; PENALTIES AND FOR-

FEITURES; STATUTES. As to suit in name of one person for benefit of another, see the title PARTIES. As to nonjoinder and misjoinder of parties, see the titles DEMURRERS; PARTIES. As to actions by or against states or United States, see the titles STATES; UNITED STATES. As to interference with contractual relations as constituting a right of action, see the titles CONTRACTS; MASTER AND SERVANT. As to particular forms of actions, see the particular titles, as ASSUMPSIT; DEBT, THE ACTION OF; etc. As to actions by and against particular parties, see the particular titles.

I. Definitions, Distinctions and General Consideration.

A. "Action"—1. GENERAL DEFINITION.—"An action is an ordinary proceeding in a court of justice by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or the punishment of a public offense."[1]

2. AS APPLICABLE IN PARTICULAR INSTANCES.—*As Applicable to Copyright a Law.*—The word "action" used in the copyright law providing that no person shall maintain an action for the infringement of his copyright unless he shall give notice thereof by inserting the prescribed words in the several copies of every edition published, means either an action at law or in equity.[2]

As Applicable to Criminal Proceedings.—The word "actions" may include both civil and criminal proceedings.[3]

As Applicable to Removal of Cause Act.—As to what constitutes an action within the removal of cause act, see the title REMOVAL OF CAUSES.

As Applicable to Admiralty.—As to the nature of proceedings in admiralty, see the title ADMIRALTY.

As Applicable to Mandamus.—See the title MANDAMUS.

Scire Facias.—Scire facias is generally classified as in substance a new action.[4]

Writ of Error.—See the title APPEAL AND ERROR.

B. "Case."—Case means a proceeding in court, a suit, or action.[5] A case in law or equity is a term well understood, and of limited signification. It is a controversy between parties which has taken shape for judicial decision.[6] In

1. **Definition of action.**—Code of Civil Procedure of Kansas, Dassler's Comp. Laws, § 3525; Code, § 4. Ames *v.* Kansas, 111 U. S. 449, 460, 28 L. Ed. 482.

"Lord Coke defined 'action' to be 'a legal demand of one's right.'" Bradford *v.* Southern R. Co., 195 U. S. 243, 248, 49 L. Ed. 178.

Derivation.—The term action is derived from the Latin ago, to urge and drive. Ex parte Milligan, 4 Wall. 2, 112, 18 L. Ed. 281.

Necessity for prosecution to judgment.—See the title INSURANCE.

2. **"Action" as applicable to copyright law.**—Thompson *v.* Hubbard, 131 U. S. 123, 150, 33 L. Ed. 76. See the title COPYRIGHT.

3. **Criminal proceedings.**—Caha *v.* United States, 152 U. S. 211, 214, 38 L. Ed. 415. See the title CRIMINAL LAW.

4. **Scire facias.**—Browne *v.* Chavez, 181 U. S. 68, 71, 45 L. Ed. 752; Davis *v.* Packard, 7 Pet. 276, 8 L. Ed. 684.

Various English cases have held that scire facias on a judgment was not a mere continuation of a former suit but created a new right. Browne *v.* Chavez, 181 U. S. 68, 71, 45 L. Ed. 752.

A scire facias upon a judgment, is, to some purposes, only a continuance of the former suit. Davis *v.* Packard, 7 Pet. 276, 8 L. Ed. 684. See the titles JUDGMENTS AND DECREES; SCIRE FACIAS.

While it is true that a scire facias for the purpose of obtaining execution is ordinarily a judicial writ to continue the effect of the former judgment, yet it is in the nature of an action because the defendant may plead to it. Browne *v.* Chavez, 181 U. S. 68, 71, 45 L. Ed. 752.

As to the nature of a writ of scire facias upon a recognizance to answer for an offense, see the title SCIRE FACIAS.

5. **Definitions of "case."**—See, also, CASE. Blyew *v.* United States, 13 Wall. 581, 595, 20 L. Ed. 638.

6. Surrender of Criminals, 5 Wheat. Appendix 1, 16; Florida *v.* Georgia, 17 How. 478, 515, 15 L. Ed. 181.

Story defines a case as a suit in law or equity instituted according to the regular course of judicial proceedings. Kendall *v.* United States, 12 Pet. 524, 632, 9 L. Ed. 1181.

A case is the right to assert rights in

other words, whenever the claim or contention of a party takes such a form that the judicial power is capable of acting upon it, then it has become a case or controversy,[7] and consists of the right of one party, as well as of the other.[8]

C. "Suit."—The term "suit" is a very comprehensive one, and is understood to apply to any proceeding in a court of justice, in which an individual pursues that remedy in a court of justice which the law affords him.[9]

the form prescribed by law. Osborn *v.* Bank, 9 Wheat. 738, 6 L. Ed. 204.

Case is derived from cado. Ex parte Milligan, 4 Wall. 2, 112, 18 L. Ed. 281.

As to what constitutes a case within removal of cause act, see the title REMOVAL OF CAUSES.

Cases affecting ambassadors or other public officials or consuls, see the title AMBASSADORS AND CONSULS.

7. Smith *v.* Adams, 130 U. S. 167, 173, 174, 32 L. Ed. 895; Osborn *v.* Bank, 9 Wheat. 738, 819, 6 L. Ed. 204; Pacific Steam Whaling Co. *v.* United States, 187 U. S. 447, 451, 47 L. Ed. 253; Kendall *v.* United States, 12 Pet. 524, 645, 9 L. Ed. 1181; Interstate Commerce Comm. *v.* Brimson, 154 U. S. 447, 475, 38 L. Ed. 1047; Cohens *v.* Virginia, 6 Wheat. 264, 405, 5 L. Ed. 257; La Abra Silver Mining Co. *v.* United States, 175 U. S. 423, 455, 44 L. Ed. 223.

"To come within the description of a case in law and equity, a question must assume a legal form for forensic litigation and judicial decision. There must be parties come into court who can be reached by its process and bound by its power, whose rights admit of ultimate decision by a tribunal to which they are bound to submit." Florida *v.* Georgia, 17 How. 478, 515, 15 L. Ed. 181, citing Surrender of Criminals, 5 Wheat. Appendix 1, 17.

8. New Orleans, etc., R. Co. *v.* Mississippi, 102 U. S. 135, 141, 26 L. Ed. 99; Story on the Constitution, § 1647; Tennessee *v.* Davis, 100 U. S. 257, 263, 25 L. Ed. 650; Cohens *v.* Virginia, 6 Wheat. 264, 379, 5 L. Ed. 257.

9. **Definition of "suit."**—See, also, SUIT. Weston *v.* Charleston, 2 Pet. 449, 7 L. Ed. 481; Kendall *v.* United States (Dissenting opinion of Barbour, J.), 12 Pet. 524, 645, 9 L. Ed. 1181; Holmes *v.* Jennison, 14 Pet. 540, 586, 10 L. Ed. 579; Ex parte Milligan, 4 Wall. 2, 112, 18 L. Ed. 281; Case of the Sewing Machine Companies, 18 Wall. 553, 585, 21 L. Ed. 914; Kohl *v.* United States, 91 U. S. 367, 375, 23 L. Ed. 449; New Orleans, etc., R. Co. *v.* Mississippi (Dissenting opinion of Miller, J.), 102 U. S. 135, 144, 26 L. Ed. 99; Upshur County *v.* Rich, 135 U. S. 467, 474, 34 L. Ed. 199.

The term suit is of a very broad signification. Gaines *v.* Fuentes, 92 U. S. 10, 24, 23 L. Ed. 524.

The modes of proceeding may be various, but if a right is litigated between parties in a court of justice, the proceeding by which the decision of the court is sought is a suit. Weston *v.* Charleston, 2 Pet. 449, 464, 7 L. Ed. 481; Kohl *v.* United States, 91 U. S. 367, 375, 23 L. Ed. 449.

"In Weston *v.* Charleston, 2 Pet. 449, 464, 7 L. Ed. 481, Chief Justice Marshall, speaking for this court, said: 'The term (suit) is certainly a very comprehensive one, and is understood to apply to any proceeding in a court of justice by which an individual pursues that remedy which the law affords. The modes of proceeding may be various; but, if a right is litigated in a court of justice, the proceeding by which the decision of the court is sought is a suit.'" Kohl *v.* United States, 91 U. S. 367, 375, 23 L. Ed. 449.

A suit is the prosecution of some demand in a court of justice. Cohens *v.* Virginia, 6 Wheat. 264, 5 L. Ed. 257; Ex parte Milligan, 4 Wall. 2, 113, 18 L. Ed. 281; Holmes *v.* Jennison, 14 Pet. 540, 624, 10 L. Ed. 579.

The word suit, applies to any proceeding in a court of justice in which the plaintiff pursues his remedy to recover a right or claim. Case of the Sewing Machine Companies, 18 Wall. 553, 585, 21 L. Ed. 914.

"Webster says 'suit' is the act of suing; the process by which one gains an end or object, and as a word in the law, he says it is 'an attempt to gain an end by legal process;' 'a legal application to a court for justice;' 'an action or process for the recovery of a right of action.'" New Orleans, etc., R. Co. *v.* Mississippi, 102 U. S. 135, 143, 26 L. Ed. 99.

"Worcester defines it thus: 'In modern law, the prosecution of some claim or demand in a court of justice; judicial prosecution;' and perhaps this is as good a definition of the word, when used in reference to legal proceedings, as any that can be framed, and it is peculiarly applicable to the use of the word in the act of 1875." New Orleans, etc., R. Co. *v.* Mississippi, 102 U. S. 135, 143, 26 L. Ed. 99.

"In Cohens *v.* Virginia, 6 Wheat. 264, 5 L. Ed. 257, Chief Justice Marshall declared a suit to be the prosecution by a party of some claim, demand or request in a court of justice for the purpose of being put in possession of a right claimed by him and of which he was deprived." La Abra Silver Mining Co. *v.* United States, 175 U. S. 423, 455, 44 L. Ed. 223.

The legal sense of the word suit adheres to the case after the rendition of

D. "Cause."—A "cause," is "a suit or action in court; any legal process which a party institutes to obtain his demand, or by which he seeks his right, or supposed right."[10] It is not necessary that there be two parties to a proceeding to render it a "cause," as for example, a writ of habeas corpus is a cause when the petition is presented to the court.[11]

E. "Cause of Action."—A cause of action is the subject matter of the controversy, and that is, for all purposes of the suit, whatever the plaintiff declares it to be in his pleadings.[12]

F. "Civil Cause."—"Though the term 'civil causes' is often descriptively applied, in contradistinction to 'criminal causes;' yet it is not uncommon to apply it, likewise, in contradistinction to causes of maritime and admiralty jurisdiction."[13]

G. "Case" and "Cause" Compared.—The words "case" and "cause" are constantly used as synonyms in statutes and judicial decisions, each meaning a proceedings in court, a suit, or action.[14]

H. "Case" and "Suit" Compared.—"Suits of a civil nature at common law" mean the same thing as cases at law.[15]

the judgment. Wayman *v.* Southard, 10 Wheat. 1, 29, 6 L. Ed. 253.

As to what constitutes a suit within the removal of cause act, see the title REMOVAL OF CAUSES.

Habeas corpus.—See the title HABEAS CORPUS.

Mandamus.—See the title MANDAMUS.

Eminent domain proceedings.—See the title EMINENT DOMAIN.

Adjustment of claims by county commissioners.—See the title COUNTIES.

Writ of error.—See the title APPEAL AND ERROR.

Appeal.—See the title APPEAL AND ERROR.

Writ of prohibition.—See the titles APPEAL AND ERROR; PROHIBITION.

Probate proceedings.—See the title WILLS.

Seizure.—See the title SEARCHES AND SEIZURES.

10. Definition of cause.—See, also, CAUSE.

This is a legal, scriptural and popular use of the word, coinciding nearly with case, from cado, and action from ago, to urge and drive. Webster's Dictionary, cited in Ex parte Milligan, 4 Wall. 2, 112, 18 L. Ed. 281.

Cause means a proceedings in court, a suit, or action. Blyew *v.* United States, 13 Wall. 581, 595, 20 L. Ed. 638.

"'A cause,' in its usual and natural meaning, includes all questions that have arisen or may arise in it." Moran *v.* Dillingham, 174 U. S. 153, 157, 43 L. Ed. 930.

As to what constitutes a cause within the removal of cause act, see the title REMOVAL OF CAUSES.

11. Parties necessary in "cause."—Ex parte Milligan, 4 Wall. 2, 112, 18 L. Ed. 281.

12. Cause of action.—See, also, CAUSE OF ACTION. Pirie *v.* Tvedt, 115 U. S. 41, 29 L. Ed. 331; Connell *v.* Smiley, 156 U. S. 335, 340, 39 L. Ed. 443; Little *v.* Giles, 118 U. S. 596, 601, 30 L. Ed. 269; Chesapeake, etc., R. Co. *v.* Dixon, 179 U. S. 131, 138, 45 L. Ed. 121; Torrence *v.* Shedd, 144 U. S. 527, 530, 36 L. Ed. 529; Thorn Wire Hedge Co. *v.* Fuller, 122 U. S. 535, 543, 30 L. Ed. 1235; Louisville, etc., R. Co. *v.* Ide, 114 U. S. 52, 56, 29 L. Ed. 63; Bradford *v.* Southern R. Co., 195 U. S. 243, 248, 49 L. Ed. 178. See the title PLEADING.

Cause of action comprises every fact a plaintiff is obliged to prove in order to obtain judgment, or, controversely, every fact the defendant would have the right to traverse. Chesapeake, etc., R. Co. *v.* Dixon, 179 U. S. 131, 139, 45 L. Ed. 121; Bradford *v.* Southern R. Co., 195 U. S. 243, 248, 49 L. Ed. 178. See the titles APPEAL AND ERROR; REMOVAL OF CAUSES.

13. "Civil cause."—Wiscart *v.* D'Auchy, 3 Dall. 321, 325, 1 L. Ed. 619. See the titles APPEAL AND ERROR; REMOVAL OF CAUSES.

14. Blyew *v.* United States, 13 Wall. 581, 595, 20 L. Ed. 638. See the titles APPEAL AND ERROR; REMOVAL OF CAUSES.

"An attempt has, however, been made to discriminate between the words 'case affecting,' as found in the constitutional provision, and the words 'cause affecting,' contained in the act of congress. We are unable to perceive any substantial ground for a distinction. The words 'case' and 'cause' are constantly used as synonyms in statutes and judicial decisions, each meaning a proceeding in court, a suit, or action. Surely no court can have jurisdiction of either a case or a cause until it is presented in the form of an action." Blyew *v.* United States, 13 Wall. 581, 595, 20 L. Ed. 638, citing United States *v.* Ortega, 11 Wheat. 467, 6 L. Ed. 521.

15. Kendall *v.* United States, 12 Pet.

I. "Action," "Suit" and "Cause" Compared.—Action, suit, and cause are convertible terms.[16]

J. Controversy.—The term "controversies" if distinguishable at all from cases is so in that it is less comprehensive than the latter and includes only suits of a civil nature.[17] Judicial controversy is one which has taken shape for judicial decision.[18]

K. "Original Suit" and "Cause."—As to the terms "original suit" and "cause" as used in the twenty-fourth section of the judiciary act, see the title APPEAL AND ERROR. As to whether a bill of revivor may be considered an original suit, see the title ABATEMENT, REVIVAL AND SURVIVAL, ante, p. 12. As to scire facias, see ante, "As Applicable to Particular Instances," I, A, 2. And see the titles JUDGMENTS AND DECREES; SCIRE FACIAS. As to suit on recognizance of bail, see the title BAIL AND RECOGNIZANCE. As to action of debt, see the title DEBT, THE ACTION OF.

L. Kinds of Actions, Generally—General Statement.—"Actions are of two kinds, first, civil; second, criminal."[19]

Criminal Actions.—"A criminal action is one prosecuted by the state as a party, against a person charged with a public offense, for the punishment thereof."[20]

Civil Action.—Proceedings to enforce civil rights are civil proceedings.[21] Every action, not included within the definition of criminal actions, is a civil action.[22]

M. Penal or Remedial Actions.—See the titles DEATH BY WRONGFUL ACT; PENALTIES AND FORFEITURES.

N. Petition of Right.—By the proceeding known as a "petition of right," the British government accords to citizens of the United States the right to prosecute claims against it.[23]

524, 632, 9 L. Ed. 1181. See the titles APPEAL AND ERROR; REMOVAL OF CAUSES.

16. Ex parte Milligan, 4 Wall. 2, 112, 18 L. Ed. 281. See the titles APPEAL AND ERROR; REMOVAL OF CAUSES.

Action and suit are synonymous. Weston *v.* Charleston, 2 Pet. 449, 7 L. Ed. 481.

"Bouvier's Law Dictionary says that in the practice of the law 'suit' means 'an action.'" New Orleans, etc., R. Co. *v.* Mississippi, 102 U. S. 135, 143, 26 L. Ed. 99.

17. **Controversy.**—Chisholm *v.* Georgia, 2 Dall. 419, 431, 1 L. Ed. 440. See the titles APPEAL AND ERROR; BANKRUPTCY; COURTS. As to what constitutes a controversy between a state and citizens of another state, see the title JURISDICTION. As to what constitutes a controversy within the removal of cause act, see the title REMOVAL OF CAUSES.

18. **Judicial controversy.**—Surrender of Criminals, 5 Wheat., Appendix 1, 16; Florida *v.* Georgia, 17 How. 478, 514, 15 L. Ed. 181.

19. **Actions are of two kinds.**—Dassler's Comp. Laws of Kansas. Ames *v.* Kansas, 111 U. S. 449, 28 L. Ed. 482.

As to whether a particular proceeding is in the nature of a civil or criminal action, see the specific titles in which the treatment of such proceeding will necessarily arise.

20. **Criminal action.**—Dassler's Comp. Laws of Kansas; Ames *v.* Kansas, 111 U. S. 449, 28 L. Ed. 482. See, also, the title CRIMINAL LAW.

Proceedings for punishment of crime are criminal proceedings. Ex parte Tom Tong, 108 U. S. 556, 559, 27 L. Ed. 827.

21. **Civil action.**—Ex parte Tom Tong, 108 U. S. 556, 559, 27 L. Ed. 827.

22. Dassler's Comp. Laws of Kansas, §§ 3528-3529; Ames *v.* Kansas, 111 U. S. 449, 460, 28 L. Ed. 482.

23. **Petition of right.**—United States *v.* O'Keefe, 11 Wall. 178, 20 L. Ed. 131. See United States *v.* Lee, 106 U. S. 196, 205, 27 L. Ed. 171.

"This valuable privilege, secured to the subject in the time of Edward the First, is now crystallized in the common law of England. As the prayer of the petition is grantable ex debito justitiæ, it is called a petition of right, and is a judicial proceeding, to be tried like suits between subject and subject." United States *v.* O'Keefe, 11 Wall. 178, 183, 20 L. Ed. 131.

"It does not exist by virtue of any statute, nor does the recent legislation in England concerning it do more than to regulate the manner of its exercise and to confer on the petitioner the privilege, not before granted, of instituting his proceeding in any one of the superior courts of common law or equity in Westmin-

O. Distinction between Admiralty and Common Law Process.—See the title ADMIRALTY.

P. Proceedings in Rem and Personam.—See the titles ADMIRALTY; ATTACHMENT AND GARNISHMENT; BANKRUPTCY AND INSOLVENCY; COURTS; EJECTMENT; JURISDICTION; PARTITION; SUMMONS AND PROCESS; VENUE. See, also, PROCEEDINGS IN REM AND IN PERSONAM.

Q. Local and Transitory Actions.—See the titles JURISDICTION; VENUE.

R. Joint and Several Actions.—As to what actions are several for the purpose of removal, see the title REMOVAL OF CAUSES.

S. Cases at Common Law and Cases in Equity.—In the interpretation of the clauses of the constitution and the statute referring to the jurisdiction of the federal courts, by cases at common law are to be understood suits in which legal rights are to be ascertained and determined in contradistinction to those where equitable rights alone are recognized, and equitable remedies are administered.[25] And by cases in equity are to be understood suits in which relief is sought according to the principles and practice of the equity jurisdiction, as established in English jurisprudence.[26]

T. Actions ex Delicto and ex Contractu—Definition.—In both the civil and the common law, obligations and causes of action are divided into two great classes—those arising ex contractu (out of a contract), and those ex delicto. The latter are such as grow out of or are founded upon a wrong or tort, e. g., tres-

ster." United States *v.* O'Keefe, 11 Wall. 178, 183, 20 L. Ed. 131.

The only method by which an action may be maintained against the Crown in England, is by what is known as a petition of rights. Chisholm *v.* Georgia, 2 Dall. 419, 436, 1 L. Ed. 440; United States *v.* O'Keefe, 11 Wall. 178, 20 L. Ed. 131; United States *v.* Lee, 106 U. S. 196, 205, 27 L. Ed. 171. See the title UNITED STATES.

25. "Cases at common law" and "cases in equity."—Parsons *v.* Bedford, 3 Pet. 433, 447, 7 L. Ed. 732; Robinson *v.* Campbell, 3 Wheat. 212, 4 L. Ed. 372; Irvine *v.* Marshall, 20 How. 558, 565, 15 L. Ed. 994; Fenn *v.* Holme, 21 How. 481, 16 L. Ed. 198; Root *v.* Lake Shore, etc., R. Co., 105 U. S. 189, 206, 26 L. Ed. 975.

Under the constitution and laws of the United States, the distinction between common law and equity, as existing in England at the time of the separation of the two countries, has been maintained, although both jurisdictions are vested in the same courts. Fenn *v.* Holme, 21 How. 481, 484, 487, 16 L. Ed. 198; Thompson *v.* Central Ohio R. Co., 6 Wall. 134, 18 L. Ed. 765; Heine *v.* Levee Commissioners, 19 Wall. 655, 22 L. Ed. 223; Fitts *v.* McGhee, 172 U. S. 516, 517, 43 L. Ed. 535; In re Sawyer, 124 U. S. 200, 209, 31 L. Ed. 402; White *v.* Berry, 171 U. S. 366, 376, 43 L. Ed. 199. See the titles COURTS; EQUITY; JURISDICTION.

By "common law," the framers of the constitution of the United States meant, what the constitution denominated, in the third article, "law;" not merely suits which the common law recognized among its old and settled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were regarded, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law and of maritime law and equity was often found in the same suit. Parsons *v.* Bedford, 3 Pet. 433, 7 L. Ed. 732. See Osborn *v.* Bank, 9 Wheat. 738, 6 L. Ed. 204.

Suits at common law are a distinct class, so recognized in the constitution, whether they be such as are concurrent with suits of which there is jurisdiction in admiralty, or not. Waring *v.* Clarke, 5 How. 441, 459, 12 L. Ed. 226.

26. Robinson *v.* Campbell, 3 Wheat. 212, 4 L. Ed. 372; United States *v.* Howland, 4 Wheat. 108, 4 L. Ed. 526; Irvine *v.* Marshall, 20 How. 558, 565, 15 L. Ed. 994; Fenn *v.* Holme, 21 How. 481, 16 L. Ed. 198; Root *v.* Lake Shore, etc., R. Co., 105 U. S. 189, 206, 26 L. Ed. 975.

"It would be difficult, and perhaps impossible, to state any general rule which would determine, in all cases, what should be deemed a suit in equity as distinguished from an action at law, for particular elements may enter into consideration which would take the matter from one court to the other; but this may be said, that, where an action is simply for the recovery and possession of specific, real or personal property, or for the recovery of a money judgment, the action is one at law. An action for the recovery of real property, including damages for withholding it, has always been of that class." Whitehead *v.* Shattuck, 138 U. S. 146, 151, 34 L. Ed. 873, cited in Scott *v.* Neely, 140 U. S. 106, 107, 35 L. Ed. 358.

pass, trover, replevin.[27] The difference between actions founded in tort and in contract is not merely formal or technical.[28]

Test.—"Where contract and tort, in the forms of declaration at common law in actions of the case, are with difficulty discriminated, the general test adopted is, if specific breaches are assigned, sounding ex delicto, it is case on the tort."[29]

Waiver of Contract.—There is a class of cases known to the common law, in which a plaintiff having a right of action arising upon contract may waive his remedy directly upon the contract in form, and allege his gravamen as originating in tort, produced by a violation or neglect of duty. The cases in which this alternative is permitted are, in the first place, those in which, independently of the rights of the plaintiff arising from express stipulations with the defendant, there are duties or obligations incumbent on the latter resulting from the peculiar position he occupies with respect to the public, giving the right to redress to all who may suffer from the violation or neglect of these public obligations.[30] Secondly, they are cases in which a kind of quasi tort is supposed to arise from a violation of the contract immediately between the parties. These cases, although they are torts in form, are essentially cases of contract.[31]

Waiver of Tort.—As to waiving the tort and suing in assumpsit, see the title ASSUMPSIT.

U. Remedy.—A remedy is the means employed to enforce a right, or redress an injury.[32] A remedy does not necessarily imply an action.[33] While remedies for nonfulfillment of contracts are generally by action, they are by no means

27. Definition of actions ex contractu and ex delicto.—Black's L. Dict. 444.

Instances of actions ex delicto and ex contractu.—Since the liability of stockholders in New York under the corporation act existing is in contract and not a penalty, the action may be enforced in an action ex contractu against a resident stockholder found in another state. Flash *v.* Conn, 109 U. S. 371, 27 L. Ed. 966.

An action brought to recover what is alleged to be due on the price of a contract is an action sounding in contract. Hyde *v.* Ruble, 104 U. S. 407, 26 L. Ed. 823.

An action against a carrier for damages for negligence sustained while traveling on defendant's road, the action is ex delicto. Railroad *v.* Laird, 164 U. S. 393, 41 L. Ed. 485.

An action to recover for breach of an express warranty as to the validity and genuineness of municipal bonds which in fact were forgeries, and false and fraudulent, is in tort. Shippen *v.* Bowen, 122 U. S. 576, 30 L. Ed. 1172. See the title DEBT, THE ACTION OF.

28. Distinction not merely formal or technical.—Garland *v.* Davis, 4 How. 131, 144, 11 L. Ed. 907.

29. Test.—New Jersey, etc., Nav. Co. *v.* Merchants' Bank, 6 How. 344, 433, 12 L. Ed. 465.

30. Waiver of contract.—New Jersey, etc., Nav. Co. *v.* Merchants' Bank, 6 How. 344, 410, 12 L. Ed. 465.

Such are the instances of attorneys, surgeons, common carriers, and other bailees. The wrong in these instances is rather the infringement of these public and general obligations, than the violation of the private direct agreement between the parties; and agreement, contract, is not the foundation of the demand, nor can it be properly taken as the measure of redress to be adjudged; for, if the relations of the parties are the stipulations of their contract exclusively or essentially, their remedies must be upon such stipulations strictly. New Jersey, etc., Nav. Co. *v.* Merchants' Bank, 6 How. 344, 410, 12 L. Ed. 465.

31. New Jersey, etc., Nav. Co. *v.* Merchants' Bank, 6 How. 344, 410, 12 L. Ed. 465.

"In * * * proof that these actions in form ex delicto, founded on breach of contract, are essentially actions of contract, it is clear that, in such actions, an infant could not be debarred the privilege of his nonage, nor could the operation of the statute of limitations upon the true cause of the action be avoided; both these defenses would apply, according to the real foundation of the action." New Jersey, etc., Nav. Co. *v.* Merchants' Bank, 6 How. 344, 412, 12 L. Ed. 465.

"With respect to these cases ex delicto quasi ex contractu, as they have been called, it has been ruled, that if the plaintiff states the custom, and also relies on an undertaking general or special, the action is in reality founded on the contract, and will be treated as such." New Jersey, etc., Nav. Co. *v.* Merchants' Bank, 6 How. 344, 412, 12 L. Ed. 465.

32. Remedy.—Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 644, 44 L. Ed. 921, quoting Bouvier's Law Dict.

33. Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 644, 44 L. Ed. 921.

universally so. Thus, a landlord has at common law a remedy by distress for his rent—a right also given to him for the purpose of exacting compensation for damages resulting from the trespass of cattle. A bailee of property has a remedy for work done upon such property, or for expenses incurred in keeping it, by detention of possession. An innkeeper has a similar remedy upon the goods of his guests to the amount of his charges for their entertainment; and a carrier has a like lien upon the thing carried. There is also a common-law remedy for nuisances by abatement; a right upon the part of a person assaulted to resist the assailant, even to his death; a right of recaption of goods stolen or unlawfully taken, and a public right against disturbers of the peace by compelling them to give sureties for their good behavior. All these remedies are independent of an action.[34]

V. "Common-Law Remedy."—Some of the cases recognize a distinction between a common-law action and a common-law remedy.[35]

W. Friendly Suits.—See the title FRIENDLY SUITS.

X. Forms and Modes of Procedure.—See the various titles relating to the particular forms of action.

As to forms and modes of procedure, pleading, etc., in federal courts, see the title COURTS.

Y. Hypothecary Action.—"An hypothecary action is a real action which the creditor brings against the property which has been hypothecated to him by his debtor, in order to have it seized and sold for the payment of his debt."[36]

II. Right of Action.

A. Object.—The prime object of all litigation is to establish a right asserted by the plaintiff or to sustain a defense set up by the party pursued.[37]

B. Right to Bring Suit Distinguished from Right to Prosecute Particular Bill.—The right to bring a suit is entirely distinguishable from the right to prosecute the particular bill. One goes to the maintenance of any action; the other to maintenance of the particular action.[38]

C. Test.—It is not universally, though it may be ordinarily, the test of a right, that it may be enforced in a court of justice: claims and debts due by a sovereign are not commonly capable of being so enforced; but it does not follow, that because an unjust sentence cannot be reversed, the party injured has lost all right to justice, or all claim, upon principles of public law, to remuneration.[39]

D. Necessity for Actual Controversy.—See the title APPEAL AND ERROR.

E. As Dependent on Defense.—The right to maintain an action does not

34. Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 644, 44 L. Ed. 921; Cohens *v.* Virginia, 6 Wheat. 264, 407, 5 L. Ed. 257.

35. Taylor *v.* Hammons, 4 Wall. 411, 431, 18 L. Ed. 397; Moran *v.* Sturges, 154 U. S. 256, 276, 38 L. Ed. 981; Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 644, 44 L. Ed. 921. See the titles ADMIRALTY; EQUITY; JURISDICTION.

A statutory proceeding to wind up a corporation is not a common-law remedy. Moran *v.* Sturges, 154 U. S. 256, 277, 38 L. Ed. 981. See the title CORPORATIONS.

36. Louisiana Code of Practice, § 61; Lovell *v.* Cragin, 136 U. S. 130, 142, 34 L. Ed. 372. See the title MORTGAGES AND DEEDS OF TRUST.

37. Object of litigation.—Tyler *v.* Judges of Court, 179 U. S. 405, 406, 45 L. Ed. 252.

38. Distinctions between right to bring suit and right to prosecute particular bill.—Illinois Central R. Co. *v.* Adams, 180 U. S. 28, 35, 45 L. Ed. 410.

"Thus it was held, in the case of Smith *v.* McKay, 161 U. S. 355, 40 L. Ed. 731, and Blythe *v.* Hinckley, 173 U. S. 501, 43 L. Ed. 783, that it was not a question of the jurisdiction of the circuit court that the action should have been brought at law instead of in equity. The question in each case is whether the plaintiff has brought himself within the language of the jurisdictional act, whatever be the form of his action, or whether it be at law or in equity. The objection that plaintiff has failed to comply with the ninety-fourth rule may be raised by demurrer, but the admitted power to decide this question is also an admission that the court has jurisdiction of the case." Illinois Central R. Co. *v.* Adams, 180 U. S. 28, 35, 45 L. Ed. 410.

39. Test.—Comegys *v.* Vasse, 1 Pet. 193, 7 L. Ed. 108; Williams *v.* Heard, 140 U. S. 529, 543, 35 L. Ed. 555; Stanley *v.* Schwalby, 147 U. S. 508, 517, 37 L. Ed. 259. See the title UNITED STATES.

depend upon the defense set up.[40]

F. What Law Governs.—See the title CONFLICT OF LAWS.

G. No Right or Wrong without a Remedy.—There can be no right[41] or wrong[42] without a remedy.

H. Liability without Fault.—"Our jurisprudence affords examples of legal liability without fault."[43]

I. Damnum Absque Injuria—Generally.—"There are cases of injurious acts for which a suit will not lie, unless there be fraud or malice concurring to characterize and distinguish them."[44]

Public Necessity.—"The rights of necessity are a part of the law."[45]

Impending Danger to Individuals.—But impending dangers give no immunity to one man to destroy the property of another.[46]

Unavoidable Accident.—See the title NEGLIGENCE.

Exercise of Public or Statutory Rights or Functions.—It is a general rule that the exercise of rights and powers conferred by statute, for the public benefit, with skill and caution does not confer a right of action on third parties injured thereby.[47]

40. Osborn *v.* Bank, 9 Wheat. 738, 825, 6 L. Ed. 204; Tennessee *v.* Union, etc., Bank, 152 U. S. 455, 459, 38 L. Ed. 511; Pacific Railroad Removal Cases, 115 U. S. 1, 18, 29 L. Ed. 319. See, also, Cooke *v.* Avery, 147 U. S. 375, 385, 37 L. Ed. 209, 212; Filhoil *v.* Torney, 194 U. S. 356, 360, 48 L. Ed. 1014.

"The question respecting the right to make a particular contract, or to acquire a particular property, or to sue on account of a particular injury, belongs to every particular case, and may be renewed in every case. The question forms an original ingredient in every cause. Whether it be, in fact, relied on or not, in the defense, it is still a part of the cause, and may be relied on. The right of the plaintiff to sue, cannot depend on the defense which the defendant may choose to set up. His right to sue is anterior to that defense, and must depend on the state of things when the action is brought. The question which the case involved, then, must determine its character, whether those questions be made in the cause or not." Osborn *v.* Bank, 9 Wheat. 738, 825, 6 L. Ed. 204; Filhoil *v.* Torney, 194 U. S. 356, 360, 48 L. Ed. 1014.

41. No right without a remedy.—Bronson *v.* Kinzie, 1 How. 311, 316, 11 L. Ed. 143; White *v.* Hart, 13 Wall. 646, 20 L. Ed. 685; Wheaton *v.* Peters, 8 Pet. 591, 695, 8 L. Ed. 1055, dissenting opinion of Thompson, J.; Marbury *v.* Madison, 1 Cranch 137, 163, 2 L. Ed. 60.

42. No wrong without a remedy.—Findlay *v.* McAllister, 113 U. S. 104, 115, 28 L. Ed. 930; Marbury *v.* Madison, 1 Cranch 137, 163, 2 L. Ed. 60.

"If there be an admitted wrong, the courts will look far to supply an adequate remedy." De Lima *v.* Bidwell, 182 U. S. 1, 176, 45 L. Ed. 1041.

43. Liability without fault.—Chicago, etc., R. Co. *v.* Zernecke, 183 U. S. 582, 586, 46 L. Ed. 339.

"The law of deodands was such an example. The personification of the ship in admiralty law is another. Other examples are afforded in the liability of the husband for the torts of the wife—the liability of a master for the acts of his servants." Chicago, etc., R. Co. *v.* Zernecke, 183 U. S. 582, 586, 46 L. Ed. 339. See the titles ADMIRALTY; DAMAGES; HUSBAND AND WIFE; MASTER AND SERVANT.

44. Damnum absque injuria.—Adler *v.* Fenton, 24 How. 407, 410, 16 L. Ed. 696. See the titles DAMAGES; FRAUD AND DECEIT.

45. Public necessity.—"At the common law every one had the right to destroy real and personal property, in cases of actual necessity, to prevent the spreading of a fire, and there was no responsibility on the part of such destroyer, and no remedy for the owner." Bowditch *v.* Boston, 101 U. S. 16, 18, 25 L. Ed. 980.

"'For the commonwealth a man shall suffer damage, as for saving a city or town a house shall be plucked down if the next one be on fire; and a thing for the commonwealth every man may do without being liable to an action.' There are many other cases besides that of fire—some of them involving the destruction of life itself—where the same rule is applied. 'The rights of necessity are a part of the law.' Respublica *v.* Sparhawk, 1 Dall. 357, 362, 1 L. Ed. 414." Bowditch *v.* Boston, 101 U. S. 16, 18, 25 L. Ed. 980.

46. Impending danger to individuals.—Richmond *v.* Smith, 15 Wall. 429, 438, 21 L. Ed. 200.

"As well may a man in good health claim the right to take the life of his neighbor who is sick, and offer as a defense for his crime that the sick man would have died of his disease if he, the defendant, had withheld the mortal blow." Richmond *v.* Smith, 15 Wall. 429, 438, 21 L. Ed. 200.

47. Exercise of statutory powers.—Pumpelly *v.* Green Bay Canal Co., 13 Wall. 166, 20 L. Ed. 557; Northern Trans-

J. Trivial Causes.—"The matter of amount does not determine the question of right, and the party who has a legal right may insist upon it, if only a shilling be involved."[48]

K. Motive.—An act legal in itself, and violating no right, cannot be made actionable on account of the motive which superinduced it.[49] It is no defense that the plaintiff may have had some ulterior object in view beyond the recovery of a judgment, so long as such object was not an unlawful one.[50]

L. Action for Use of Another.—See the title PARTIES.

M. Impairment or Modification of Remedy.—See the title CONSTITUTIONAL LAW.

III. Statutory Remedies.

A. New Liability or Right Created without Remedy.—A general liability created by statute without a remedy may be enforced by an appropriate common-law action.[51]

B. New Statutory Remedy or Penalties and Forfeitures for Existing Common-Law Right.—A statute which gives an additional remedy,[52] or inflicts new penalties and forfeitures for the violation of a right, leaves the injured party the option of appealing to the statute or common law for redress.[53] And where a statute gives a remedy, where there was one by the common law, and does not imply a negative of the common-law remedy, there will be two concurrent remedies. In such case, the statute remedy is cumulative.[54]

portation Co. *v.* Chicago, 99 U. S. 635, 25 L. Ed. 336; Baltimore, etc., R. Co. *v.* Fifth Baptist Church, 108 U. S. 317, 27 L. Ed. 739; Hamilton *v.* Vicksburg, etc., R. Co., 119 U. S. 280, 30 L. Ed. 393. See the titles DAMAGES; EMINENT DOMAIN; NAVIGABLE WATERS; NEGLIGENCE; NUISANCES.

See the particular titles relating to officers. See, also, the title PUBLIC OFFICERS.

"The remedy for a consequential injury resulting from the state's action through its agent, if there be any, must be that, and that only, which the legislature shall give." Northern Transportation Co. *v.* Chicago, 99 U. S. 635, 641, 25 L. Ed. 336.

48. Trivial causes.—Gulf, etc., R. Co. *v.* Ellis, 165 U. S. 150, 153, 41 L. Ed. 666.

49. Motive.—Adler *v.* Fenton, 24 How. 407, 410, 16 L. Ed. 696.

50. Dickerman *v.* Nothern Trust Co., 176 U. S. 181, 190, 44 L. Ed. 423.

"If the law concerned itself with the motives of parties, new complications would be introduced into suits which might seriously obscure their real merits." Dickerman *v.* Northern Trust Co., 176 U. S. 181, 190, 44 L. Ed. 423, 430.

"If debt secured by a mortgage be justly due, it is no defense to a foreclosure that the mortgagee was animated by hostility or other bad motive." Dickerman *v.* Northern Trust Co., 176 U. S. 181, 190, 44 L. Ed. 423, 430.

51. Right created without remedy.—Stewart *v.* Baltimore, etc., R. Co., 168 U. S. 445, 447, 42 L. Ed. 537; Pollard *v.* Bailey, 20 Wall. 520, 527, 22 L. Ed. 376; United States *v.* Kaufman, 96 U. S. 567, 570, 24 L. Ed. 792; Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 756, 30 L. Ed. 825. See South Carolina *v.* Gaillard, 101 U. S. 433, 437, 25 L. Ed. 937.

By the internal revenue law the United States are not prohibited from adopting the action of debt or any other common-law remedy for collecting what is due to them. This is true on general principles. Savings Bank *v.* United States, 19 Wall. 227, 228, 22 L. Ed. 80. See the title REVENUE LAWS.

Where no special remedy has been provided for the enforcement of claims against the United States government the general laws governing payment of claims as provided by the court of claims is applicable. United States *v.* Kaufman, 96 U. S. 567, 570, 24 L. Ed. 792. See the titles CLAIMS; UNITED STATES.

52. Statute giving additional remedy.—Wheaton *v.* Peters, 8 Pet. 591, 698, 8 L. Ed. 1055; Amy *v.* The Supervisors, 11 Wall. 136, 138, 20 L. Ed. 101. See Nashua Savings Bank *v.* Anglo-American Land, etc., Co., 189 U. S. 221, 232, 47 L. Ed. 782.

53. Wheaton *v.* Peters, 8 Pet. 591, 698, 8 L. Ed. 1055. See the title COPYRIGHT.

54. Dissenting opinion of Thompson, J., in Wheaton *v.* Peters, 8 Pet. 591, 690, 8 L. Ed. 1055.

A statute of the state of Mississippi, passed on the 15th of February, 1828, provided that if a sheriff should fail to pay over to a plaintiff money collected by execution, the amount collected, with 25 per cent. damages, and 8 per cent. interest, might be recovered against such sheriff and his sureties, by motion before the court to which such execution was re-

C. Statute Creating New Right or Offense and Prescribing a Specific Remedy or Punishment.—Where a statute creates a new right,[55] liability,[56] or offense,[57] and provides a particular or special remedy,[58] punishable. But the marshal himself was always liable to an attachment, under which he could be compelled to bring the money into court; and by the process act of congress, of May, 1828, was also liable, in Mississippi, to have a judgment entered against himself by motion. Held, a marshal and his sureties cannot be proceeded against jointly, in this summary way, but they must be sued as directed by the act of congress. Gwin *v.* Breedlove, 2 How. 29, 11 L. Ed. 167.

55. Statute creating new right.—Savings Bank *v.* United States, 19 Wall. 227, 238, 22 L. Ed. 80; Barnett *v.* Muncie Nat. Bank, 98 U. S. 555, 25 L. Ed. 212; Haseltine *v.* Central Nat. Bank, 183 U. S. 132, 46 L. Ed. 118; Farmers', etc., Bank *v.* Dearing, 91 U. S. 29, 35, 23 L. Ed. 196; Haycraft *v.* United States, 22 Wall. 81, 98, 22 L. Ed. 738; Stephens *v.* Monongahela Nat. Bank, 111 U. S. 197, 199, 28 L. Ed. 399; Wheaton *v.* Peters, 8 Pet. 591, 663, 8 L. Ed. 1055; Banks *v.* Manchester, 128 U. S. 244, 32 L. Ed. 425; Thompson *v.* Hubbard, 131 U. S. 123, 33 L. Ed. 76; Evans *v.* Nellis, 187 U. S. 271, 47 L. Ed. 173; Middletown Nat. Bank *v.* Toledo, etc., R. Co., 197 U. S. 394, 49 L. Ed. 803; Oates *v.* National Bank, 100 U. S. 239, 25 L. Ed. 580; McBroom *v.* Scottish Investment Co., 153 U. S. 318, 325, 38 L. Ed. 729.

56. Statute creating new liability.—Stewart *v.* Baltimore, etc., R. Co., 168 U. S. 445, 447, 42 L. Ed. 537; Pollard *v.* Bailey, 20 Wall. 520, 527, 22 L. Ed. 376; Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 30 L. Ed. 825. See the Harrisburg, 119 U. S. 199, 30 L. Ed. 358.

Where a statute creating an individual liability of stockholders in a corporation, declares the purpose of its creation, and provides a particular manner in equity of expressing this liability; the liability and the remedy being created by the same statute, the statutory remedy is exclusive and hence a stockholder cannot sue at law. Pollard *v.* Bailey, 20 Wall. 520, 22 L. Ed. 376; Stewart *v.* Baltimore, etc., R. Co., 168 U. S. 445, 447, 42 L. Ed. 537; Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 30 L. Ed. 825; Middletown Nat. Bank *v.* Toledo, etc., R. Co., 197 U. S. 394, 49 L. Ed. 803.

57. Statute creating new offense.—Barnet *v.* Muncie Nat. Bank, 98 U. S. 555, 25 L. Ed. 212; Haseltine *v.* Central Nat. Bank, 183 U. S. 132, 136, 46 L. Ed. 118; Farmers', etc., Bank *v.* Dearing, 91 U. S. 29, 35, 23 L. Ed. 196; Oates *v.* National Bank, 100 U. S. 239, 25 L. Ed. 580; McBroom *v.* Scottish Investment Co., 153 U. S. 318, 325, 38 L. Ed. 729.

58. Statute providing particular or special remedy.—Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 30 L. Ed. 825; Pollard *v.* Bailey, 20 Wall. 520, 22 L. Ed. 376; Savings Bank *v.* United States, 19 Wall. 227, 238, 22 L. Ed. 80; Barnet *v.* Muncie Nat. Bank, 98 U. S. 555, 25 L. Ed. 212; Haseltine *v.* Central Nat. Bank, 183 U. S. 132, 46 L. Ed. 118; Stewart *v.* Baltimore, etc., R. Co., 168 U. S. 445, 447, 42 L. Ed. 537; Farmers', etc., Bank *v.* Dearing, 91 U. S. 29, 35, 23 L. Ed. 196; Arnson *v.* Murphy, 109 U. S. 238, 27 L. Ed. 920; Haycraft *v.* United States, 22 Wall. 81, 98, 22 L. Ed. 738; Stephens *v.* Monongahela Nat. Bank, 111 U. S. 197, 199, 28 L. Ed. 399; Wheaton *v.* Peters, 8 Pet. 591, 8 L. Ed. 1055; Banks *v.* Manchester, 128 U. S. 244, 252, 32 L. Ed. 425; Thompson *v.* Hubbard, 131 U. S. 123, 33 L. Ed. 76; Carter *v.* Carusi, 112 U. S. 478, 483, 28 L. Ed. 821; Oates *v.* National Bank, 100 U. S. 239, 25 L. Ed. 580; McBroom *v.* Scottish Investment Co., 153 U. S. 318, 325, 38 L. Ed. 729. See The Harrisburg, 119 U. S. 199, 214, 30 L. Ed. 358.

"The reason of the rule is that the statute, by providing a particular remedy, manifests an intention to prohibit other remedies, and the rule, therefore, rests upon a presumed statutory prohibition. It applies and it is enforced when any one to whom the statute is a rule of conduct seeks redress for a civil wrong. He is confined to the remedy pointed out in the statute, for he is forbidden to make use of any other." Savings Bank *v.* United States, 19 Wall. 227, 239, 22 L. Ed. 80.

Limitation of the rule.—"It may well be that where a purely statutory right is created the special remedy provided by the statute for the enforcement of that right must be pursued, but where the statute simply takes away a common-law obstacle to a recovery for an admitted tort, it would seem not unreasonable to hold that an action for that tort can be maintained in any state in which that common-law obstacle has been removed. At least it has been held, by this court in repeated cases, that an action for such a tort can be maintained 'where the statute of the state in which the cause of action arose is not in substance inconsistent with the statutes or public policy of the state in which the right of action is sought to be enforced. Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, 605, 36 L. Ed. 829. See, also, Dennick *v.* Central R. Co., 103 U. S. 11, 26 L. Ed. 439; Huntington *v.* Attrill, 146 U. S. 657, 36 L. Ed. 1123; Northern Pacific R. Co. *v.* Babcock, 154 U. S. 190, 38 L. Ed. 958; Stewart *v.* Baltimore, etc., R. Co., 168 U. S. 445, 448, 42 L. Ed. 537; Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 30 L. Ed. 825. See the title VENUE.

"In all the diversity of opinion in the

ment,[59] or penalty,[60] for its enforcement or execution, the remedy,[61] or punish-

courts of the different states, upon the question how far a liability, imposed upon stockholders in a corporation by the law of the state which creates it, can be pursued in a court held beyond the limits of that state, no case has been found, in which such a liability has been enforced by any court, without a compliance with the conditions applicable to it under the legislative acts and judicial decisions of the state which creates the corporation and imposes the liability. To hold that it could be enforced without such compliance would be to subject stockholders residing out of the state to a greater burden than domestic stockholders." Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 758, 30 L. Ed. 825.

Copyright Cases.—Congress has provided a special right or remedy for the enforcement of the claim and rights of persons entitled to copyrights, hence the remedy is exclusive of all common-law remedies. Wheaton *v.* Peters, 8 Pet. 591, 8 L. Ed. 1055; Banks *v.* Manchester, 128 U. S. 244, 252, 32 L. Ed. 425; Thompson *v.* Hubbard, 131 U. S. 123, 33 L. Ed. 76. See the title COPYRIGHT.

Revenue laws.—The remedy by suit provided by statute to recover back an internal revenue tax after payment thereof is exclusive. Snyder *v.* Marks, 109 U. S. 189, 27 L. Ed. 901. See the title REVENUE LAWS.

The remedy against a revenue collector to recover back duties illegally assessed is a statutory liability which is exclusive. Arnson *v.* Murphy, 109 U. S. 238, 27 L. Ed. 920; Mitchell *v.* Clark, 110 U. S. 633, 642, 28 L. Ed. 279. See the title REVENUE LAWS.

A statute provided for the appropriation or capture of an enemy's property on land, and provided that certain persons may demand and receive a restoration of their property. If the proceedings be taken within two years, the statutory remedy was exclusive. Haycraft *v.* United States, 22 Wall. 81, 98, 22 L. Ed. 738. See the title ABANDONED AND CAPTURED PROPERTY, ante, p. 1.

Usury.—Rev. Stat., § 5198, providing the right to recover usurious interest paid a national bank also provides the remedy for its recovery; hence, the remedy is exclusive. Stephens *v.* Monongahela Nat. Bank, 111 U. S. 197, 28 L. Ed. 399; Barnet *v.* Muncie Nat. Bank, 98 U. S. 555, 25 L. Ed. 212; Farmers', etc., Bank *v.* Dearing, 91 U. S. 29, 23 L. Ed. 196; McBroom *v.* Scottish Investment Co., 153 U. S. 318, 325, 38 L. Ed. 729; Carter *v.* Carusi, 112 U. S. 478, 483, 28 L. Ed. 821; Oates *v.* National Bank, 100 U. S. 239, 249, 25 L. Ed. 580. See the titles BANKS AND BANKING; USURY.

Section 716 of the Revised Statutes of the District of Columbia providing for a recovery back of unlawful interest is exclusive. Carter *v.* Carusi, 112 U. S. 478, 483, 28 L. Ed. 821. See the titles INTEREST; USURY.

A statute which prescribes a legal rate of interest, and forbids the taking of a higher rate, under penalty of a forfeiture of the entire interest, and declares that the party paying such higher rate of interest, may recover it back by suit brought within twelve months, confers no authority to apply the usurious interest actually paid to the discharge of the principal debt, and a suit for its recovery, brought within twelve months, was the exclusive remedy. Walsh *v.* Mayer, 111 U. S. 31, 28 L. Ed. 338; Carter *v.* Carusi, 112 U. S. 478, 484, 28 L. Ed. 821.

The act of June 3, 1864 (13 Stat. 99, § 30), having prescribed that, as a penalty for such taking, the person paying such unlawful interest, or his legal representative, may, in any action of debt against the bank, recover back twice the amount so paid, he can resort to no other mode or form of procedure. Barnet *v.* Muncie Nat. Bank, 98 U. S. 555, 25 L. Ed. 212; Haseltine *v.* Central Nat. Bank, 183 U. S. 132, 46 L. Ed. 118.

A statutory remedy providing for a recovery back of illegal assessments of taxes is exclusive, where the taxing authorities have exclusive discretion; otherwise, where the statute leaves open to judicial inquiry, jurisdictional matters. Ogden City *v.* Armstrong, 168 U. S. 224, 42 L. Ed. 444. See the title TAXATION.

59. Statute providing particular punishment.—Barnet *v.* Muncie Nat. Bank, 98 U. S. 555, 25 L. Ed. 212; Haseltine *v.* Central Nat. Bank, 183 U. S. 132, 136, 46 L. Ed. 118; Farmers', etc., Bank *v.* Dearing, 91 U. S. 29, 35, 23 L. Ed. 196.

60. Statute providing penalty.—Farmers', etc., Bank *v.* Dearing, 91 U. S. 29, 35, 23 L. Ed. 196; Walsh *v.* Mayer, 111 U. S. 31, 28 L. Ed. 338; Carter *v.* Carusi, 112 U. S. 478, 484, 28 L. Ed. 821; Barnet *v.* Muncie Nat. Bank, 98 U. S. 555, 25 L. Ed. 212; Haseltine *v.* Central Nat. Bank, 183 U. S. 132, 46 L. Ed. 118; Oates *v.* National Bank, 100 U. S. 239, 25 L. Ed. 580; McBroom *v.* Scottish Investment Co., 153 U. S. 318, 325, 38 L. Ed. 729. See the title PENALTIES AND FORFEITURES.

61. Exclusive of all common-law remedies.—Pollard *v.* Bailey, 20 Wall. 520, 22 L. Ed. 376; Haseltine *v.* Central Nat. Bank, 183 U. S. 132, 136, 46 L. Ed. 118; Barnet *v.* Muncie Nat. Bank, 98 U. S. 555, 25 L. Ed. 212; Stewart *v.* Baltimore, etc., R. Co., 168 U. S. 445, 447, 42 L. Ed. 537; Fourth Nat. Bank *v.* Francklyn, 120 U. S. 747, 30 L. Ed. 825; Farmers', etc., Bank *v.* Dearing, 91 U. S. 29, 35, 23 L. Ed. 196; Arnson *v.* Murphy, 109 U. S. 238, 27 L. Ed. 920; Haycraft *v.* United

ment[62] is generally exclusive of all common-law remedies.

D. Enforcement of Statutory Remedies.—*Time for Enforcement.*—Where a statute creates a right not known to the common law, and provides a remedy for the enforcement of such right, and limits the time within which the remedy must be pursued, the remedy in such case forms a part of the right, and must be pursued within the time prescribed, or else the right and remedy are both lost.[63]

Power of Court.—Where the remedy is statutory only, every court which takes jurisdiction for its enforcement is limited in its powers by the statute under which alone it can act.[64]

Necessity for Party to Bring Himself within Terms of Statute.—"Where a right is statutory, the claimant cannot recover unless he brings himself within the terms of the statute."[65]

Place of Enforcement.—Whenever, by either the common law or the statute law of a state, a right of action has become fixed and a legal liability incurred, that liability may be enforced and the right of action pursued in any court which has jurisdiction of such matters and can obtain jurisdiction of the parties.[66]

Repeal of Statute.—It is well settled that if a statute giving a special remedy is repealed without a saving clause in favor of pending suits, all suits must stop where the repeal finds them.[67] And suits pending, which rest upon an act of con-

States, 22 Wall. 81, 98, 22 L. Ed. 738; Wheaton *v.* Peters, 8 Pet. 591, 8 L. Ed. 1055; Banks *v.* Manchester, 128 U. S. 244, 252, 32 L. Ed. 425; Thompson *v.* Hubbard, 131 U. S. 123, 33 L. Ed. 76; Stephens *v.* Monongahela Nat. Bank, 111 U. S. 197, 198, 28 L. Ed. 399; Oates *v.* National Bank, 100 U. S. 239, 25 L. Ed. 580; McBroom *v.* Scottish Investment Co., 153 U. S. 318, 325, 38 L. Ed. 729.

Exclusiveness of statute as to federal questions.—"It is contended, on the other hand, that where taxes are levied upon property which is by law exempt from taxation, the statutory remedy by application to a board of review is only cumulative and that the taxpayer may at his election seek his remedy by injunction in the first instance. But it was for the supreme court of Montana to determine whether the statute was exclusive and whether plaintiff came within its terms or not, and its action in that regard raises no federal question for our consideration." Northern Pacific R. Co. *v.* Patterson, 154 U. S. 130, 133, 38 L. Ed. 934. See the title APPEAL AND ERROR.

62. Exclusiveness of statutory punishment.—Farmers', etc., Bank *v.* Dearing, 91 U. S. 29, 35, 23 L. Ed. 196; Barnet *v.* Muncie Nat. Bank, 98 U. S. 555, 25 L. Ed. 212; Oates *v.* National Bank, 100 U. S. 239, 25 L. Ed. 580; McBroom *v.* Scottish Investment Co., 153 U. S. 318, 325, 38 L. Ed. 729.

63. Time for enforcement.—Bear Lake, etc., Co. *v.* Garland, 164 U. S. 1, 14, 41 L. Ed. 327. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

64. Power of court.—East Tenn., etc., R. Co. *v.* Southern Tel. Co., 112 U. S. 306, 310, 28 L. Ed. 746. See the titles COURTS; STATUTES.

65. United States *v.* Perryman, 100 U. S. 235, 25 L. Ed. 645; Wheaton *v.* Peters, 8 Pet. 591, 696, 8 L. Ed. 1055; Bowditch *v.* Boston, 101 U. S. 16, 25 L. Ed. 980. See the title STATUTES.

66. Dennick *v.* Central R. Co., 103 U. S. 11, 26 L. Ed. 439; Flash *v.* Conn, 109 U. S. 371, 379, 27 L. Ed. 966. See the titles CONFLICT OF LAWS; DEATH BY WRONGFUL ACT; JURISDICTION; VENUE.

67. Effect of repeal.—South Carolina *v.* Gaillard, 101 U. S. 433, 438, 25 L. Ed. 937; Carroll *v.* Green, 92 U. S. 509, 515, 23 L. Ed. 738; Norris *v.* Crocker, 13 How. 429, 14 L. Ed. 210; Baltimore, etc., R. Co. *v.* Grant, 98 U. S. 398, 401, 25 L. Ed. 231.

The act of the general assembly of South Carolina, passed June 9, 1877, entitled "An act to provide the mode of proving bills of the bank of the state tendered for taxes, and the rules of evidence applicable thereto," created no new contract between the state and the taxpayer or billholder, but merely provided a new remedy which formed no part of the contract created by the charter of the bank. After that act was repealed, a party could not institute a proceeding to avail himself of the remedy which it furnished, and all suits then pending thereunder terminated, there being no saving clause as to them. South Carolina *v.* Gaillard, 101 U. S. 433, 25 L. Ed. 937. See the title CONSTITUTIONAL LAW.

A statute provided for a penalty to be recovered by the owner of fugitive slaves. The statute being repealed, the penalty fails. Norris *v.* Crocker, 13 How. 429, 14 L. Ed. 210. See the titles PENALTIES AND FORFEITURES; SLAVES.

As to repeal of statute as revoking jurisdiction, see the titles JURISDICTION; STATUTES.

gress, fall with the repeal.[68] "If final relief has not been granted before the repeal went into effect, it cannot be after. But when a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right, which stands independent of the statute.[69]

E. Form of Action for Breach.—An action arising out of breach of statutory duty must be presented in some particular form of action and not as an action founded upon breach of the statute.[70]

F. Failure to Pursue Statutory Remedies.—A failure to pursue statutory remedies is not always fatal to the rights of a party in possession, and sometimes if full and adequate compensation is made to the plaintiff the possession of the defendant will not be disturbed.[71]

IV. Merger.

See the titles FORMER ADJUDICATION OR RES ADJUDICATA; MERGER.

V. Commencement, Prosecution and Termination of Actions.

A. Commencement.—1. DEMAND.—*Necessity.*—As a general rule demand is one of the prerequisites to the institution of an action.[72]

What Constitutes Legal Demand.—See the titles BILLS, NOTES AND CHECKS; CONTRACTS; DEMAND; PAYMENT.

Necessity for Demand to Be in Writing.—See the titles BILLS, NOTES AND CHECKS; CONTRACTS; DEMAND.

2. WHAT LAW GOVERNS.—See the titles CONFLICT OF LAWS; LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

3. WHAT CONSTITUTES.—To commence a suit is to demand something by the institution of process in a court of justice.[73] An action or suit is generally con-

68. Moffitt *v.* Garr, 1 Black. 273, 283, 17 L. Ed. 207.

69. Baltimore, etc., R. Co. *v.* Grant, 98 U. S. 398, 25 L. Ed. 231; South Carolina *v.* Gaillard, 101 U. S. 433, 438, 25 L. Ed. 937; Steamship Co. *v.* Joliffe, 2 Wall. 450, 17 L. Ed. 805; Bear Lake, etc., Co. *v.* Garland, 164 U. S. 1, 3, 12, 41 L. Ed. 327. See the titles APPEAL AND ERROR; CONSTITUTIONAL LAW.

Where a pilot, licensed under a statute, had tendered his services to pilot a vessel out of port, and such services were refused, his claim to the half-pilotage fees, allowed by the statute in such cases, became perfect; and the subsequent repeal of the statute does not affect a judgment rendered in an action brought to recover the claim, or the jurisdiction of this court to view the judgment on writ of error. Steamship Co. *v.* Joliffe, 2 Wall. 450, 17 L. Ed. 805; Bear Lake, etc., Co. *v.* Garlan, 164 U. S. 1, 3, 12, 41 L. Ed. 327. See the title PILOTS.

70. Form of action.—Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1, 33 L. Ed. 231, citing Carroll *v.* Green, 92 U. S. 509, 23 L. Ed. 738; Beatty *v.* Burnes, 8 Cranch 98, 3 L. Ed. 500; McCluny *v.* Silliman, 3 Pet. 270, 277, 7 L. Ed. 676.

An action by a municipality to recover compensation from a street railroad company for failure to repair pavements in the street which duty it has assumed in its charter, is not an action founded upon the statute but an action founded on an implied assumpsit. Metropolitan R. Co. *v.* District of Columbia, 132 U. S. 1, 33 L. Ed. 231. See the title ASSUMPSIT.

And see, generally, the particular actions titles, as ASSUMPSIT; DEBT, THE ACTION OF; TRESPASS, etc. See, also, the title STATUTES.

71. Failure to pursue statutory remedies.—New York City *v.* Pine, 185 U. S. 93, 103, 46 L. Ed. 820. See the titles EMINENT DOMAIN; STATUTES.

72. Necessity for Demand.—Yeaton *v.* Bank of Alexandria, 5 Cranch 49, 51, 3 L. Ed. 33; Averill *v.* Smith, 17 Wall. 82, 21 L. Ed. 613; Colby *v.* Reed, 99 U. S. 560, 565, 25 L. Ed. 484. See the titles BILLS, NOTES AND CHECKS; CONTRACTS; PAYMENT.

73. What constitutes commencement.—Cohens *v.* Virginia, 6 Wheat. 264, 5 L. Ed. 257; Ex parte Milligan, 4 Wall. 2, 113, 18 L. Ed. 281.

As to when an action is commenced within the meaning of the statutes of limitations, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

As to what constitutes the commencement of an action within the eleventh amendment, see the title STATE.

"Brought" and "commenced" compared.—The words "brought" and "commenced" are synonymous. Goldenbery *v.*

sidered to be commenced when the bill or complaint is filed.[74]

4. Necessity for Process and Appearance.—In order to institute an action, it is necessary that there should have been process issued and appearance thereto.[75]

5. Necessity for Appearance and Return to Summons.—It seems that it is not necessary that a return must be made and the parties appear and begin to try the case before it is a suit.[76]

6. Premature Suits.—See the title Premature Suits.

7. Evidence of Commencement.—See the titles Documentary Evidence; Depositions.

B. Prosecution.—*Definition.*—Since to commence a suit is to demand something by the institution of process in a court of justice, to prosecute a suit is to continue that demand.[77]

Pending of Suit.—A suit is pending from the time of commencement.[78]

C. Termination.—The suit does not terminate with the judgment; proceedings in the execution are proceedings in the suit.[79]

VI. Joinder or Splitting Causes of Action.

A. Joinder of Causes of Action—Contract and Tort.—As a general rule, "A declaration is bad which unites a count in tort with one in contract."[80]

Murphy, 108 U. S. 162, 163, 27 L. Ed. 687.

As to accrual of right of actions in specific instances, see the particular titles.

74. What constitutes commencement.—Ex parte Connaway, 178 U. S. 421, 430, 44 L. Ed. 1134; Farmers' Loan, etc., Co. *v.* Lake St. Rd. Co., 177 U. S. 51, 60, 44 L. Ed. 667; Ely *v.* New Mexico, etc., R. Co., 129 U. S. 291, 292, 293, 32 L. Ed. 688. Richmond Mining Co. *v.* Rose, 114 U. S. 576, 583, 29 L. Ed. 276.

As to a bill of revivor as the commencement of a suit, see the title ABATEMENT, REVIVAL AND SURVIVAL, ante, p. 12.

As to whether a person demanding his release by a writ of habeas corpus has commenced a suit, see the titles APPEAL AND ERROR; HABEAS CORPUS.

75. Necessity for process and appearance.—Smith *v.* Woolfolk, 115 U. S. 143, 29 L. Ed. 357.

After a decree disposing of the parties and subject matter of a suit, it is not permissible to institute new litigations on new and distinct issues not raised by the original pleadings, and between parties who were complainants in the original cause, although connected with the subject matter of the original litigation, simply by terming the new litigation by the title of the original cause, without new process and appearance. Smith *v.* Woolfolk, 115 U. S. 143, 29 L. Ed. 357. See the titles APPEARANCES; SUMMONS AND PROCESS.

76. Necessity for appearance and return to summons.—Ex parte Milligan, 4 Wall. 2, 113, 18 L. Ed. 281. See the titles APPEARANCES; SUMMONS AND PROCESS.

77. Definition.—Cohens *v.* Virginia, 6 Wheat. 264, 5 L. Ed. 257; Ex parte Milligan, 4 Wall. 2, 113, 18 L. Ed. 281.

78. Pendency.—Ex parte Connaway, 178 U. S. 421, 427, 44 L. Ed. 1134. See the titles ABATEMENT, REVIVAL AND SURVIVAL, ante, p. 12; EXECUTORS AND ADMINISTRATORS; SCIRE FACIAS.

79. Termination.—Union Bank of Georgetown *v.* Geary, 5 Pet. 99, 8 L. Ed. 60; Wayman *v.* Southard, 10 Wheat. 1, 6 L. Ed. 253; Bank of U. S. *v.* Halstead, 10 Wheat. 51, 6 L. Ed. 264; Beers *v.* Haughton, 9 Pet. 329, 359, 9 L. Ed. 145.

As to the death of a party as terminating a cause of action, see the title ABATEMENT, REVIVAL AND SURVIVAL, ante, p. 12.

80. Contract and tort.—Garland *v.* Davis, 4 How. 131, 144, 11 L. Ed. 907. See the titles CONTRACTS; TORTS.

When a declaration sounds in tort and the plea is "nonassumpsit," such a plea would be bad, on demurrer. If not demurred to, and the case goes to trial (the issue and verdict following the plea), the defect is so material that it is not cured by verdict, under the statute of jeofails. Garland *v.* Davis, 4 How. 131, 11 L. Ed. 907.

A count in assumpsit for money had and received may, by consent consistently with the rules of pleading, be joined with a count for deceit for falsely representing that one was a creditor of the government thereby obtaining a stock certificate in the public funds. Fenemore *v.* United States, 3 Dall. 357, 1 L. Ed. 634.

A cause of action in tort for the breach of an express warranty is not obliterated, or removed from the case, because it may have been joined with a cause of action for deceit. Shippen *v.* Bowen, 122 U. S. 576, 582, 30 L. Ed. 1172; Dushane *v.*

Joinder of Several Claims in Contract.—Several claims on several contracts cannot be joined.[81]

Contract for Payment of Distinct Sums.—"A contract for the payment of distinct sums of money, at different periods, is very much in the nature of distinct contracts. An action of debt lies for each sum, as it becomes due, and when that sum is paid, the debtor or contractor is forever discharged from the contract to pay it."[82]

Assumpsit and Covenant.—It is opposed to the common-law system of pleading which prevails in some jurisdictions to join the actions of covenant and assumpsit. If this is done in the declaration, the defendant can successfully demur.[83]

Actions Resting on Same Issues and Evidence.—Actions resting on the same evidence, and issues, and supported by the same testimony, may be joined by consent.[84]

Libel in Rem and in Personam.—See the title ADMIRALTY.

Legal and Equitable Claims.—In the courts of the United States it is not permissible to blend into one action an action at law and a suit in equity.[85] The adoption by the federal courts of the proceedings and practice in the state courts will not authorize legal and equitable claims to be blended together in one suit.[86]

B. Splitting Causes of Actions.—*General Rule.*—"It is not in the power of a party, merely by his own acts, to split up a contract into fragments, and to make the promisor liable to every holder of a fragment for his share."[87]

Benedict, 120 U. S. 630, 636, 30 L. Ed. 810; See, also, Schuchardt *v.* Allens, 1 Wall. 359, 368, 17 L. Ed. 642.

81. Several claims in contract.—The plaintiffs united severally in a suit, claiming the return of money paid by them on distinct promissory notes given to the defendants. They are several contracts, having no connection with each other. These parties cannot join their claims in the same bill. Yeaton *v.* Lenox, 8 Pet. 123, 8 L. Ed. 889. See the title CONTRACTS.

Several creditors may not unite in a suit to attach the effects of an absent debtor. They may file their separate claims, and be allowed payment out of the same fund, but they cannot unite in the same original bill. Yeaton *v.* Lenox, 8 Pet. 123, 8 L. Ed. 889.

Where the note is a commercial partnership contract, what the law of Louisiana denominates a contract in solido; by which each party is bound severally as well as jointly, they may be sued severally as well as jointly. Breedlove *v.* Nicolet, 7 Pet. 413, 8 L. Ed. 731.

82. Contract for payment of distinct sums.—Faw *v.* Marsteller, 2 Cranch 10, 23, 2 L. Ed. 191.

83. Assumpsit and covenant.—Phillips, etc., Construction Co. *v.* Seymour, 91 U. S. 646, 654, 23 L. Ed. 341.

84. Actions resting on same issues and evidence.—Insurance Co. *v.* Boykin, 12 Wall. 433, 436, 20 L. Ed. 442.

A policy for $10,000 was signed by four companies, each of whom agreed to become liable for one-fourth of the loss to that extent. Held, that one action could be brought against them all by their consent, the declaration charging the separate promises and praying for separate judgment. Insurance Co. *v.* Boykin, 12 Wall. 433, 20 L. Ed. 442.

85. Legal and equitable claims.—Bennet *v.* Butterworth, 11 How. 669, 674, 13 L. Ed. 859; Hurt *v.* Hollingsworth, 100 U. S. 100, 25 L. Ed. 569; Buzard *v.* Houston, 119 U. S. 347, 351, 30 L. Ed. 451; Cherokee Nation *v.* Southern Kansas R. Co., 135 U. S. 641, 651, 34 L. Ed. 295; Thompson *v.* Central Ohio R. Co., 6 Wall. 134, 18 L. Ed. 765; Jones *v.* McMasters, 20 How. 210, 15 L. Ed. 805; Broderick's Will Case, 21 Wall. 503, 520, 22 L. Ed. 599; Lindsay *v.* Shreveport Bank, 156 U. S. 485, 493, 39 L. Ed. 505.

In the courts of the United States, the union of equitable and legal causes of action in one suit is forbidden by the second section of the process act of May 8, 1792 (1 Stat. 276), which is substantially re-enacted in § 913, Rev. Stat. Hurt *v.* Hollingsworth, 100 U. S. 100, 25 L. Ed. 569. See the title EQUITY.

86. Thompson *v.* Central Ohio R. Co., 6 Wall. 134, 18 L. Ed. 765; Van Norden *v.* Morton, 99 U. S. 378, 380, 25 L. Ed. 454; Bennett *v.* Butterworth, 11 How. 669, 13 L. Ed. 859; Jon s *v.* McMasters, 20 How. 210, 15 L. Ed. 805; Lindsy *v.* Shreveport Bank, 156 U. S. 485, 493, 39 L. Ed. 505; Broderick's Will Case, 21 Wall. 503, 520, 22 L. Ed. 599. See the titles COURTS; EQUITY.

87. Right to split causes of action.—Shankland *v.* Washington, 5 Pet. 390, 394, 8 L. Ed. 166; Mandeville *v.* Welch, 5 Wheat. 277, 288, 5 L. Ed. 87; United States *v.* California, etc., Land Co., 192 U. S. 355, 358, 48 L. Ed. 476. Stark *v.* Starr, 94 U. S. 477, 485, 24 L. Ed. 276; The Haytian Republic, 154 U. S. 118, 125, 38

Distinct Causes of Action.—This principle does not require distinct causes of action, that is to say, distinct matters, each of which would authorize by itself independent relief, to be presented in a single suit, though they existed at the same time and might be considered together.[88]

Splitting Cause of Action to Give Court Jurisdiction.—See the titles APPEAL AND ERROR; JURISDICTION.

Test of Right.—One of the tests laid down for the purpose of determining whether or not the causes of action should have been joined in one suit is whether the evidence necessary to prove one cause of action would establish the other.[89]

L. Ed. 930; Second National Bank *v.* Grand Lodge, 98 U. S. 123, 124, 25 L. Ed. 75; United States *v.* Throckmorton, 98 U. S. 61, 65, 25 L. Ed. 93; Kendall *v.* Stokes, 3 How. 87, 11 L. Ed. 506; The Water Witch, 1 Black, 494, 17 L. Ed. 155. See, also, Bienville Water Supply Co. *v.* Mobile, 186 U. S. 212, 46 L. Ed. 1132; Vinal *v.* West Virginia Oil, etc., Co., 110 U. S. 215, 28 L. Ed. 124.

"A creditor shall not be permitted to split up a single cause of action into many actions, without the assent of his debtor, since it may subject him to many embarrassments and responsibilities, not contemplated in his original contract. He has a right to stand upon the singleness of his original contract, and to decline any legal or equitable assignments, by which it may be broken into fragments." Mandeville *v.* Welch, 5 Wheat. 277, 288, 5 L. Ed. 87.

"It is undoubtedly a settled question that a party seeking to enforce a claim legal or equitable must present to the court, either by the pleadings or proofs, all the grounds upon which he expects a judgment in his favor. He is not at liberty to split up his demand and prosecute it by piecemeal, or present only a portion of the grounds upon which special relief is sought, and leave the rest to be presented in a second suit, if the first fail. There would be no end to litigation if such a practice were permissible." The Haytian Republic, 154 U. S. 118, 125, 38 L. Ed. 930; Stark *v.* Starr, 94 U. S. 477, 485, 24 L. Ed. 276.

88. Distinct causes of action.—The Haytian Republic, 154 U. S. 118, 125, 38 L. Ed. 930; Stark *v.* Starr, 94 U. S. 477, 24 L. Ed. 276; Perkins *v.* Hart, 11 Wheat. 237, 251, 6 L. Ed. 463; Graves *v.* Corbin, 132 U. S. 571, 586, 587, 33 L. Ed. 462.

"Where the agreement embraces a number of distinct subjects, which admit of being separately executed and closed, it must be taken distributively, each subject being considered as forming the matter of a separate agreement, after it is so closed. If, for instance, the agreement between a merchant and his factor be, that the latter shall sell and remit the proceeds of all cargoes which the former shall consign to him, upon a stipulated commission, it can hardly be contended, that the factor cannot recover his commissions in this form of action, upon the proceeds of a single cargo, which have been remitted, while there remain other cargoes yet undisposed of." Perkins *v.* Hart, 11 Wheat. 237, 251, 6 L. Ed. 463.

Claims for price of land and for rents and revenue.—"There does not seem to be any good reason for saying that a claim for the price of land and a claim for rents and revenues against warrantor may not be separated by the act of the parties." New Orleans *v.* Whitney, 138 U. S. 595, 613, 34 L. Ed. 1102.

"The point of the assignment of error is that the prosecution of these suits upon the respective warranties therein propounded and the recovery of a part of the demands under the said warranties, namely, the prices of the lands, operated as a waiver and discharge of the other liabilities arising upon the same warranties, viz, the liabilities to restore the rents, revenues, etc., that the contract of warranty is one and undividable; that although upon the breach of it a recovery may be had against the warrantor for the restitution of the price, for the fruits or revenues, for costs and other damages, yet only one suit can be maintained upon the contract, and not different suits for the different matters recoverable; and that the splitting of actions upon single demands is not allowed by the Code of Practice of Louisiana, the 156th article of which declares, 'If one demand less than is due him, and do not amend his petition, in order to augment his demand, he shall lose the overplus.'" New Orleans *v.* Whitney, 138 U. S. 595, 613, 34 L. Ed. 1102.

Actions on matured coupons upon negotiable bonds.—Each matured coupon upon a negotiable bond is a separable promise, distinct from the promises to pay the bond or other coupons, and gives rise to a separate cause of action. Indeed, the title to several matured coupons of the same bond may be in as many different persons, and upon each a distinct and separate action be maintained. Nesbit *v.* Riverside Independent District, 144 U. S. 610, 36 L. Ed. 562; Edwards *v.* Bates County, 163 U. S. p. 269, 270, 41 L. Ed. 155. See the title MUNICIPAL, COUNTY, STATE AND FEDERAL SECURITIES.

89. Test of right.—The Haytian Republic, 154 U. S. 118, 125, 38 L. Ed. 930.

Separate Actions on Joint Covenants.—See the title COVENANTS.

Separate Actions by Joint Payees or Obligees.—See the title BONDS.

Separate Action by Assignee or Consignee of Part of Claim.—See the title ASSIGNMENTS.

Effect of Recovery of Part of Demand.—See the title FORMER ADJUDICATION OR RES ADJUDICATA.

Objections.—Objections to the splitting of causes of action should be taken early in the proceedings.[90]

VII. Equitable Defenses.

Common-Law Rule.—It is a well-settled rule that independent of statute an equitable defense cannot be made in a court of law.[91]

Under the Statutes.—Under the statutes in some instances equitable defenses are now permitted to be set up in the various actions, for a treatment in relation to which, see the specific titles treating the subject in which the defense would be set up.

90. Objections.—New Orleans *v.* Whitney, 138 U. S. 595, 614, 34 L. Ed. 1102.

91. Equitable Defenses.—Robinson *v.* Cambell, 3 Wheat. 212, 4 L. Ed. 372; Bank of Hamilton *v.* Dudley, 2 Pet. 492, 7 L. Ed. 496; Bagnell *v.* Broderick, 13 Pet. 436, 10 L. Ed. 235; Watkins *v.* Holman, 16 Pet. 25, 10 L. Ed. 873; Hickey *v.* Stewart, 3 How. 750, 11 L. Ed. 814; United States *v.* King, 3 How. 773, 11 L. Ed. 824; Bennett *v.* Butterworth, 11 How. 669, 13 L. Ed. 859; Hendrickson *v.* Hinckley, 17 How. 443, 444, 15 L. Ed. 123; Jones *v.* McMasters, 20 How. 210, 15 L. Ed. 805; Fenn *v.* Holme, 21 How. 481, 16 L. Ed. 198; Hooper *v.* Scheimer, 23 How. 235, 16 L. Ed. 452; Greer *v.* Mezes, 24 How. 268, 16 L. Ed. 661; Smith *v.* McCann, 24 How. 398, 16 L. Ed. 714; Sheirburn *v.* Cordova, 24 How. 423, 16 L. Ed. 741; Singleton *v.* Touchard, 1 Black, 342, 17 L. Ed. 50; Thompson *v.* Central Ohio R. Co., 6 Wall. 134, 18 L. Ed. 765; Payne *v.* Hook, 7 Wall. 425, 19 L. Ed. 260; Gibson *v.* Chouteau, 13 Wall. 92, 20 L. Ed. 534; Carpenter *v.* Montgomery, 13 Wall. 480, 20 L. Ed. 698; Foster *v.* Mora, 98 U. S. 425, 25 L. Ed. 191; Hurt *v.* Hollingsworth, 100 U. S. 100, 25 L. Ed. 569; Embry *v.* Palmer, 107 U. S. 3, 27 L. Ed. 346; Holland *v.* Challen, 110 U. S. 15, 28 L. Ed. 52; Burnes *v.* Scott, 117 U. S. 582, 29 L. Ed. 991; Nothern Pacific R. Co. *v.* Paine, 119 U. S. 561, 30 L. Ed. 513; Ridings *v.* Johnson, 128 U. S. 212, 217, 32 L. Ed. 401; Johnson *v.* Christian, 128 U. S. 374, 382, 32 L. Ed. 412; Willard *v.* Wood, 135 U. S. 309, 314, 34 L. Ed. 210; Scott *v.* Neely, 140 U. S. 106, 109, 110, 35 L. Ed. 358; Scott *v.* Armstrong, 146 U. S. 499, 512, 36 L. Ed. 1059; Lantry *v.* Wallace, 182 U. S. 536, 549, 45 L. Ed. 1218; Montejo *v.* Owen, 14 Blatchford, 324; La Mothe Manufacturing Co. *v.* Nat. Tube Works Co., 15 Blatchford, 432.

"In the courts of the United States, to legal actions legal defenses only can be interposed. If the defendant have equitable grounds for relief against the plaintiff, he must seek to enforce them by a separate suit in equity. If his equitable grounds are deemed sufficient, he may thus stay the further prosecution of the action at law, or be furnished with matter which may be set up as a legal defense to it. Upon the removal, therefore, of the action to the circuit court, the equitable defense could not be considered." Northern Pacific R. Co. *v.* Paine, 119 U. S. 561, 563, 30 L. Ed. 513.

"As a general rule want of consideration is a defense to a promissory note, but it is not always a defense which can be made at law. It frequently requires the aid of a court of equity to give it effect. The plea, to support which the defendant contends the evidence of want of consideration was admissible, clearly sets up an equitable defense. It alleges that the note sued on is based on the 'transactions relating to the business of said partners.' Referring, therefore, to the preceding plea, which states the business of the partners, as we are authorized to do, we learn that the partnership business had not at the time of filing the pleas been settled, or the interest of Winston therein or in the bonds been ascertained. The plea under consideration further avers that the members of the partnership were interested in the said business and were necessary parties to a suit relating to the note, and that the amount due thereon, if anything, could not be ascertained until the final settlement of the partnership. It is plain, therefore, that the defense set up by the plea is not the legal defense of want of consideration, for the plea admits, by implication, that there may be something due on the note, but the equitable defense that the amount due on the note, if anything, is dependent on the amount coming to Winston from the assets of the partnership, which cannot be ascertained without a settle-

ACT OF GOD.—See the titles CARRIERS; MARINE INSURANCE; SHIPS AND SHIPPING. And see ACT OF LAW; INEVITABLE ACCIDENT. The act of God means inevitable accident without the intervention of man and public enemies. It is limited to cases in which no man has any agency whatever.[1]

ACT OF LAW.—See note 2.

ACTS OF BANKRUPTCY.—See the title BANKRUPTCY.

ACTS OF CONGRESS.—See the title STATUTES.

ACTUAL.—The word "actual," in the lexicon, has as a meaning "real" as opposed to "nominal," as well as the meaning of "present."[3]

ment of the partnership affairs in a suit to which all the partners are necessary parties. And yet having so pleaded, the defendant insists, in argument, that in a trial upon the promissory note in a court of law, and without the presence of two of the four partners, evidence is admissible to settle the partnership, and to prove, without making Winston a party to the suit, that there is nothing due him out of the partnership assets. The pleading and the contention of the defendant appear, therefore, to be contradictory and inconsistent." Burnes *v.* Scott, 117 U. S. 582, 586, 29 L. Ed. 991.

1. Act of God.—The Majestic, 166 U. S. 375, 41 L. Ed. 1039. See, also, Hodgson *v.* Dexter, 1 Cranch 345, 2 L. Ed. 130.

In Memphis, etc., R. Co. *v.* Reeves, 10 Wall. 176, 189, 19 L. Ed. 909, it is said: "One of the instances always mentioned by the elementary writers of loss by the act of God is the case of loss by flood and storm."

In Gleeson *v.* Virginia Midland R. Co., 140 U. S. 435, 439, 35 L. Ed. 458, it is said: "Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes, sudden deaths and illnesses, have been held to be 'acts of God'; but we know of no instance in which a rain of not unusual violence, and the probable results thereof in softening the superficial earth, have been so considered."

2. Act of law.—In Taylor *v.* Taintor, 16 Wall. 366, 369, 21 L. Ed. 287, it is said: "It is the settled law of this class of cases that the bail will be exonerated where the performance of the condition is rendered impossible by the act of God, the act of the obligee, or the act of the law? Where the principal dies before the day of performance, the case is within the first category. Where the court before which the principal is bound to appear is abolished without qualification, the case is within the second. If the principal is arrested in the state where the obligation is given, and sent out of the state by the governor, upon the requisition of the governor of another state, it is within the third." See, also, the title BAIL AND RECOGNIZANCE.

3. Astor *v.* Merritt, 111 U. S. 202, 213, 28 L. Ed. 401.

Actual service.—See the title SUMMONS AND PROCESS. In Houston *v.* Moore, 5 Wheat. 1, 61, 5 L. Ed. 19, Johnson, J., said: "Upon the most mature reflection, it is my opinion, that there is a sound distinction between the 'calling forth' of the militia, and their being in the actual service or 'employment' of the United States contemplated both in the constitution and acts of congress." See, also, the titles ARMY AND NAVY; MILITIA.

Actual settler.—In Hickie *v.* Starke, 1 Pet. 94, 97, 7 L. Ed. 67, it is said: "In Henderson *v.* Poindexter, 12 Wheat. 530, 6 L. Ed. 718, the term actual settler, seems to have been understood as synonymous with the resident of the country. That case, however, did not require that the precise meaning of the term should be fixed, and the court is disposed to think, that a settlement made on the land by another person, who cultivated it for the proprietor, would be sufficient; though the proprietor should not reside in person on the estate, or within the territory." See, generally, the title PUBLIC LANDS.

Actual time of service.—In United States *v.* Morton, 112 U. S. 1, 4, 28 L. Ed. 613, it is held that time of service as a cadet in the Military Academy at West Point, was to be regarded as actual time of service in the army. To the same effect, see United States *v.* Watson, 130 U. S. 80, 32 L. Ed. 852. See, generally, the title ARMY AND NAVY.

Actual use.—In Astor *v.* Merritt, 111 U. S. 202, 213, 28 L. Ed. 401, it is said: "It is manifest, that, by the words, in actual use, Congress did not intend that those words should be limited to wearing apparel on the person at the time. They must have a more extended meaning. The test of having worn the article, as a criterion whether it is 'in actual use,' is arbitrary, and without support in the statute. An article of wearing apparel, bought for use, and appropriated and set apart to be used, by being placed in with, and as a part of, what is called a person's wardrobe, is, in common parlance, in use, in actual use, in present use, in real use, as well before it is worn as while it is being worn or afterwards." See, also, Schlesinger *v.* Beard, 120 U. S. 264, 267, 30 L. Ed. 656. And see the title REVENUE LAWS.

Actual value.—See VALUE. And see the title REVENUE LAWS.

In Cummings *v.* National Bank, 101 U.

ACTUAL CONTROVERSY.—As to when moot cases are ground for dismissal or affirmance, see the title APPEAL AND ERROR.

ACTUARIES.—See the title BANKS AND BANKING.

ACUERDO.—See note 1.

ADDICTED.—See note 2.

ADDITIONAL ALLOWANCE OF COSTS.—See the title COSTS.

ADDITIONAL SECURITY ON APPEAL.—See the title APPEAL AND ERROR.

ADDITIONAL SERVITUDE.—See the title EMINENT DOMAIN.

ADDRESS.—As to address of bills in equity, see the title EQUITY. As to presumption that letters properly mailed and addressed were received, see the title PRESUMPTIONS AND BURDEN OF PROOF.

ADEMPTION.—Ademption may be said to be the extinction or withdrawal of a legacy in consequence of some act of the testator equivalent to its revocation or clearly indicative of an intention to revoke.[3]

ADEQUATE REMEDY AT LAW.—See the titles APPEAL AND ERROR; EQUITY; INJUNCTIONS; JUDGMENTS AND DECREES; MANDAMUS; SPECIFIC PERFORMANCE.

ADJACENT.—See note 4.

S. 153, 162, 25 L. Ed. 903, it is said: "The phrases 'salable value,' **actual** value, 'cash value,' and others used in the directions to assessing officers, all mean the same thing, and are designed to effect the same purpose."

Actually in session.—In United States *v.* Pitman, 147 U. S. 669, 671, 37 L. Ed. 324, it is said: "We think the court should be deemed **actually** in session within the meaning of the law, not only when the judge is present in person, but when, in obedience to an order of the judge directing its adjournment to a certain day, the officers are present upon that day, and the journal is opened by the clerk, and the court is adjourned to another day by further direction of the judge." See, generally, the title COURTS.

1. Acuerdo.—In United States *v.* Castillero, 2 Black 1, 322, 17 L. Ed. 360, it is said: "An **acuerdo**, or order on the margin of a letter, petition, or communication of any kind, is merely an expression of the determination of the minister or other functionary to whom it is addressed, in regard to its subject matter. Its chief use was to direct the clerks or other subordinates in the preparation of the reply or in taking other action with regard to it. If the proceedings has been interrupted after the **acuerdo** is affixed, but before the dispatch is written or title issued as directed, it may be regarded, not unreasonably, as a species of equitable title, or as sufficient, coupled with other equitable circumstances, to justify the party in asking the completion of the proceeding so initiated." See, generally, the title PUBLIC LANDS.

2. Addicted.—An applicant for life insurance was asked if he had been **addicted** to the excessive or intemperate use of alcoholic stimulants, or opium. Upon the meaning of this question, the court said in Ætna Life Ins. Co. *v.* Davey, 123 U. S. 739, 742, 31 L. Ed. 315: "The inquiry as to whether the insured had ever been **addicted** to the excessive or intemperate use of alcoholic stimulants, and, whether, at the time of the application, he used alcoholic stimulants 'often or daily' was, in effect, an inquiry as to his habit in that regard; not whether he used such stimulants or opium at all, but whether he used any of them habitually. If he was **addicted** to the excessive use of them, he was habitually intemperate; and to use them often or daily is, according to the ordinary acceptation of those words, to use them habitually." See, generally, the title INSURANCE.

3. Kenaday *v.* Sinnott, 179 U. S. 606, 617, 45 L. Ed. 339. As to **ademption** of legacies, see the title WILLS.

4. Adjacent.—An act granted railway companies the right to take materials from the public lands "**adjacent** to the line of said road." It was held, that **adjacent** lands meant lands in proximity, contiguous to, or near the road, and does not include lands at any distance from the railroad. Stone *v.* United States, 167 U. S. 178, 190, 191, 42 L. Ed. 127. In United States *v.* St. Anthony R. Co., 192 U. S. 524, 530, 48 L. Ed. 548, it is said: "The lands from which materials for the construction of the railroad may be taken must be **adjacent** to this piece of land but two hundred feet wide. The term is a somewhat relative and uncertain one, and in one aspect the case may be determined with at least some reference to the size of the strip or right of way granted, and to which the land must be **adjacent.**" And in that case it was held, that land more than twenty miles from a railroad which was only forty miles long was not **adjacent** to it. See, also, United States *v.* Denver, etc., R. Co., 150 U. S. 1, 11, 37 L. Ed. 975.

ADJOINING LANDOWNERS.

CROSS REFERENCES.

See the titles BOUNDARIES; DAMAGES; EASEMENTS; EMINENT DOMAIN; FENCES; MINES AND MINERALS; NUISANCES; PARTY WALLS; STREET RAILWAYS; STREETS AND HIGHWAYS; TRESPASS; WATERS AND WATERCOURSES.

General Rule as to Use of Property.—An individual who for his own benefit makes an improvement on his own land according to his best skill and diligence, not foreseeing it will produce injury to his neighbor; if he thereby, though unwittingly, injure his neighbor, is liable.[1]

Rule as to Lateral Support.—The general rule may be admitted that every landowner has a right to have his land preserved unbroken, and that an adjoining owner excavating on his own land is subject to this restriction, that he must not remove the earth so near to the land of his neighbor that his neighbor's soil will crumble away under its own weight and fall upon his hand.[2] But this rule extends only to soil in its natural condition.[3]

Obstructing Light.—An adjoining landowner may build a fence as high as he pleases upon his own land even though it obstructs his neighbor's lights.[4]

ADJOURNED SESSION.—See note 5.

1. Northern Trans. Co. *v.* Chicago, 99 U. S. 635, 25 L. Ed. 336.

2. Northern Trans. Co. *v.* Chicago, 99 U. S. 635, 25 L. Ed. 336.

3. This right of lateral support extends only to the soil in its natural condition. It does not protect whatever is placed upon the soil increasing the downward and lateral pressure. If it did, it would put it in the power of a lot owner, by erecting heavy buildings on his lot, to greatly abridge the right of his neighbor to use his lot. It would make the rights of the prior occupant greatly superior to those of the latter. Northern Trans. Co. *v.* Chicago, 99 U. S. 635, 645, 25 L. Ed. 336.

4. It is true that a man may build a fence upon his own land as high as he pleases, even though it obstracts his neighbor's lights, and the weight of authority is that his motives in so doing cannot be inquired into, even though the fence be built expressly to annoy and spite an adjoining owner; and, in this particular, the law takes no account of the selfishness or malevolence of individual proprietors, although there are many strong intimations to the contrary. Camfield *v.* United States, 167 U. S. 518, 523, 42 L. Ed. 260.

5. **Adjourned session.**—Adjourned session is considered as the same session as that at which the adjournment was made. Mechanics' Bank *v.* Withers, 6 Wheat. 106, 109, 5 L. Ed. 217. And see the title ADJOURNMENTS.

ADJOURNMENTS.

CROSS REFERENCES.

See the titles APPEAL AND ERROR; CONTINUANCES; COURTS; JUDGES; JUDGMENTS AND DECREES; JUSTICES OF THE PEACE; REHEARING.

Power of Adjournment Common to All Courts.—The power of adjourning to a distant day is one common to all courts.[1]

Adjourned Session Considered as Same Term.—Where the power of adjournment is exercised, the adjourned session is considered as the same term.[2]

ADJUDICATION.—See note 3.

ADMINISTRATION OF ESTATES.—See the titles BANKRUPTCY; EXECUTORS AND ADMINISTRATORS; WILLS.

ADMINISTRATORS.—See the title EXECUTORS AND ADMINISTRATORS.

1. Power of adjournment common to all courts.—Mechanics' Bank *v.* Withers, 6 Wheat. 107, 5 L. Ed. 217, holding that the circuit court for the District of Columbia has such power.

May be held immediately preceding regular session.—An adjourned term may be held immediately preceding the regular session. Larman *v.* Tisdale, 11 How. 586, 13 L. Ed. 823.

2. Adjourned session considered as same term.—Mechanics' Bank *v.* Withers, 6 Wheat. 107, 5 L. Ed. 217.

Right of defendant to set aside default at adjourned session.—The regular term began on the 3d Monday in April, and the court continued to sit, de die in diem, until the 16th of May, when it adjourned to the 4th Monday of June. Held, that a defendant, against whom an office judgment had been entered on the 16th of May, had a right, under the law and practice of Virginia, to appear at the adjourned session, and have the default set aside, on giving special bail, and pleading issuably. Mechanics' Bank *v.* Withers, 6 Wheat. 107, 5 L. Ed. 217. See the title JUDGMENTS AND DECREES.

3. Adjudication.—In United States *v.* Irwin, 127 U. S. 125, 32 L. Ed. 99, it is said: "But, in our opinion, the controlling words of the act are those which declare that the claims of the parties are thereby referred to the court of claims 'for adjudication according to law.' The force of this phrase cannot be satisfied by anything less than a formal, regular, and final judgment of the judicial tribunal, to which the matter is submitted, acting upon the acknowledged principles of law applicable to the circumstances of the case."

ADMIRALTY.

BY J. N. CLAYBROOK.

I. Jurisdiction, 125.
A. Nature and Extent, 125.
1. Construction of Constitutional Grant of Admiralty and Maritime Jurisdiction, 125.
a. In General, 125.
b. Governed by General Maritime Law in Force When Constitution Adopted, 125.
c. Whether Jurisdiction Coextensive with That of English or Continental Admiralty Courts, 126.
d. Jurisdiction as Affected by Federal Statutes, 126.
e. Jurisdiction as Affected by State Statute, 126.
f. Jurisdiction as Affected by Rules of Court, 127.
2. Concurrent Jurisdiction with State Courts, 127.
a. In General, 127.
b. Saving of Common-Law Remedy, 128.
(1) Statement of Saving Clause, 128.
(2) Construction and Operation of Saving Clause, 128.
(a) In General, 128.
(b) What Remedies Are Saved, 128.
aa. Meaning of Common-Law Remedy, 128.
bb. Proceedings in Personam, 128.
(aa) In General, 128.
(bb) Actions on Contract, 129.
(cc) Actions for Damages for Tort, 129.
(dd) Suits in Equity, 129.
(ee) Proceedings in Personam with Ancillary Attachment, 129.
(ff) Statutory Remedies, 130.
aaa. In General, 130.
bbb. Action for Death by Wrongful Act, 130.
cc. Proceedings in Rem, 130.
3. Jurisdiction of Suits between Foreigners, 131.
a. Discretion of Court as to Assumption of Jurisdiction, 131.
b. Consent of Foreign Consul or Representative, 131.
c. Jurisdiction in Particular Suits or Actions, 132.
4. Waters within Jurisdiction, 132.
a. Former Rule—Waters within Ebb and Flow of Tide, 132.
b. Present Rule—Navigable Waters, 133.
(1) In General, 133.
(2) Mode of Determining Navigability of Waters, 133.
(3) Canals, 133.
(4) Rivers, 134.
(5) Waters within Body of County or State, 134.
c. Foreign Navigable Waters, 134.
5. Vessels or Property within Jurisdiction, 134.
a. Vessels, 134.
(1) Character of Vessel, 134.
(a) Vessels Propelled by Oars, 134.
(b) Canal Boats, 134.
(c) Government Vessels, 134.
aa. Vessels of United States, 134.
bb. Foreign Warships, 135.

(2) Necessity for Vessel to Be Engaged in Foreign or Interstate Commerce, 135.
(a) Former Rule, 135.
(b) Present Rule, 135.
(3) Launching as Prerequisite to Admiralty Jurisdiction, 136.
(4) Vessel Moored to Wharf, 136.
b. Property Other Than Vessels, 136.
(1) Bridge, 136.
(2) Dry Dock, 136.
(3) Proceeds of Property or Vessel, 136.
c. Conflict of Jurisdiction as to Res, 137.
6. Causes of Action within Jurisdiction, 137.
a. Contracts, 137.
(1) In General, 137.
(2) Shipbuilding Contracts, 138.
(3) Contracts of Carriage, 138.
(a) Carriage of Passengers, 138.
(b) Contracts of Affreightment and Charter Party, 138.
(4) Towage Contracts, 139.
(5) Contracts of Consortship, 139.
(6) Services by Master or Seamen, 139.
(a) Services by Master, 139.
(b) Services by Seamen, 139.
(7) Wharfage, 140.
(8) Pilotage, 140.
(9) Mortgages, 140.
(10) Repairs and Supplies, 141.
(a) In General, 141.
(b) Repairs or Supplies Furnished Domestic Vessels, 141.
(c) Repairs or Supplies Furnished to Foreign Vessels, 142.
(d) Repairs to Vessels in Dry Dock or upon Land, 142.
(11) Contribution, 142.
(12) Contracts of Bottomry or Respondentia, 143.
(13) Marine Insurance, 143.
b. Torts, 143.
(1) In General, 143.
(2) Jurisdiction Dependent on Place Where Tort Committed, 143.
(3) Nature and Character of Tort, 143.
(a) In General, 143.
(b) Personal Injuries, 144.
(c) Death by Wrongful Act, 144.
(d) Injuries to Ships or Vessels, 144.
aa. Obstructions to Navigation, 144.
bb. Collision, 144.
(e) Injuries on Land Caused by Ships or Vessels, 145.
(f) Injuries to Aids to Navigation by Ships or Vessels, 145.
(g) Seizure or Dispossession of Property, 145.
(h) Loss of Goods by Carriers, 146.
c. Actions in Regard to Ownership or Possession of Vessels, 146.
d. Equitable Relief, 146.
(1) Direct Proceedings for Equitable Relief, 146.
(2) Applying Equitable Principles to Cases within Admiralty Jurisdiction, 147.

e. General Average, 147.
f. Maritime Liens, 148.
g. Seizures for Forfeitures, 148.
h. Proceedings to Limit Liability of Ship Owners, 149.
i. Prize, 150.
j. Salvage, 151.
k. Surveys, 151.
l. Enforcement of Lien for Duties, 151.
7. Criminal Jurisdiction, 151.
B. Courts, 151.
1. District Courts, 151.
2. Circuit Courts, 152.
3. Appellate Courts, 152.
a. Original Jurisdiction, 152.
b. Appellate Jurisdiction, 153.
4. Territorial Courts, 153.
5. Foreign Courts, 153.
C. Objections, and Waiver of Objections, to Jurisdiction, 154.

II. Maritime Law, 154.

III. Procedure, 156.
A. Forms and Modes of Proceeding, 156.
1. Nature and Characteristics of Admiralty Proceedings, 156.
2. Proceedings in Personam and in Rem, 156.
a. Proceedings in Personam, 156.
b. Proceedings in Rem, 157.
3. Election as to Mode of Proceeding, 157.
3. Power of Congress to Prescribe Forms and Modes of Proceeding, 157.
4. Power of Court to Prescribe Rules of Practice, 158.
B. Venue, 158.
1. Proceedings in Rem, 158.
2. Proceedings in Personam, 158.
C. Joinder and Consolidation of Causes of Action or Proceedings, 158.
1. Joinder of Causes of Action or Proceedings, 158.
a. Joinder of District Causes of Action, 158.
b. Joinder of Proceedings in Personam and Proceedings in Rem, 159.
2. Consolidation of Actions, 159.
D. Parties, 159.
1. Libelants, 159.
a. Who May Sue, 159.
b. Joinder, 160.
2. Respondents, 160.
3. Objections as to Parties, 161.
a. Mode of Objecting, 161.
b. Time of Objecting, 161.
4. Adding New Parties by Supplemental Libel or Petition, 161.
5. Effect of Death of Party, 161.
6. Substitution of Parties, 161.
E. Appearance, Process and Attachment, 161.
1. Appearance, 161.
2. Process, 161.
a. In General, 161.
b. Necessity of Service in Proceeding in Rem, 162.
c. Effect of Service, 162.
3. Attachment, 162.
a. Power to Issue Attachment, 162.

b. Who May Attach, 162.
c. Grounds for Attachment, 162.
d. What May Be Attached, 162.
e. Necessity for Specification of Property in Libel, 162.
f. Issuance and Validity of Attachment, 162.
g. Effect of Default of Respondent after Attachment, 163.
F. Pleadings, 163.
1. In General, 163.
2. Libel, 163.
a. Definition and Nature, 163.
b. Form and Requisites, 163.
(1) Necessary Averments, 163.
(2) Sufficiency of Averments and Accuracy of State ments, 163.
(3) Prayer for Relief, 164.
(4) Informations for Forfeitures, 164.
c. Waiver of Objections, 165.
3. Answer, 165.
a. Definition and Nature, 165.
b. Form and Requisites, 166.
c. Effect as Evidence, 166.
4. Reply, 166.
5. Cross Libel, 166.
a. Definition, 166.
b. Object and Purpose, 166.
c. Necessity, 166.
d. Mode of Proceeding, 166.
e. Subject Matter, 166.
f. Dismissal, 167.
6. Amendments, 167.
a. Attitude of Admiralty toward Amendments, 167.
b. Amendment of Libel, 167.
(1) In General, 167.
(2) Amendment as to Parties, 167.
(3) Amendment on Appeal, 167.
(4) Amendment after Reversal, 168.
c. Amendment of Answer, 168.
G. Laches, 168.
H. Intervention and Claim, 169.
1. Intervention, 167.
2. Claim, 169.
a. In General, 169.
b. Who May Claim, 169.
c. Verification or Affidavit, 170.
d. Effect of Fraudulent Claim, 170.
e. Separate Claims Treated as Separate Proceedings, 170.
f. Disposition of Unclaimed Property, 170.
I. Set-Off, Recoupment and Counterclaim, 170.
J. Custody and Control of Property, 170.
1. Necessity for Seizure of Property, 170.
2. Control of Property by Court Pending Suit, 171.
3. Wrongful Removal of Property from Custody of Court, 171.
4. Abandonment of Seizure, 171.
5. Release of Property on Bond or Stipulation, 171.
a. Power to Take Stipulations and Release Property, 171.
(1) In General, 171.
(2) Seizures for Forfeiture, 172.

b. Form and Requisities, 172.
c. Operation and Effect, 172.
(1) Substitute for Property, 172.
(2) Binding Effect on Appeal, 172.
d. Liability on Stipulations, 172.
(1) Liability of Stipulators to Subsequent Libelants or Intervenors, 172.
(2) Nature and Extent of Liability, 173.
(a) Liability for Amount of Bond or Stipulation, 173.
(b) Liability for Interest and Costs, 173.
(3) Amendment as Discharging Stipulators, 173.
(4) Judgment against Stipulators, 174.
(a) Rendition, 174.
(b) Operation and Effect, 174.
(c) Reformation of Judgment, 174.
(d) Enforcement of Judgment, 174.
(e) Relief from Lien of Judgment Pending Appeal, 174.
e. Recall or Rearrest of Property or Vessel, 174.
(1) Grounds, 171.
(a) Filing New or Intervening Libel, 174.
(b) Fraud, Misrepresentation or Improper Release, 174.
(2) What Court May Recall Property, 174.
(3) Mode of Making Recall or Rearrest, 175.
(4) Time of Recall, 175.
K. Evidence, 175.
1. Mode of Proof, 175.
2. Burden of Proof, 175.
3. Witnesses, 175.
4. Depositions, 175.
5. Weight and Sufficiency, 176.
L. Variance, 176.
M. Trial and Hearing, 176.
1. Mode of Proceeding, 176.
2. Jury Trial, 176.
3. Reference to Masters and Commissioners, 177.
a. Right to Refer Questions, 177.
b. Report, 177.
(1) Form and Requisites, 177.
(2) Exceptions, 177.
(a) Necessity of Exceptions, 177.
(b) Form and Requisites, 177.
(3) Setting Aside Report on Appeal, 177.
N. Decree, 178.
1. What Constitutes Final Decree, 178.
2. Form and Requisites, 178.
3. Operation as a Lien on Real Estate, 178.
4. Conclusiveness, 178.
5. Collateral Attack, 179.
6. Defaults, 179.
7. Personal Decree against Owner for Deficiency, 179.
8. Enforcement of Decrees, 180.
O. Sale of Property, 180.
1. Order of Sale, 180.
2. Effect of Defect in Title on Sale of Property, 180.

P. Disposition of Proceeds of Sale, 180.
1. Right to Share in Proceeds of Sale, 180.
2. Mode of Subjecting Proceeds, 180.
3. Power of Marshal to Control or Distribute Proceeds without Order of Court, 181.
4. Disposition of Unclaimed Property, 181.
Q. Costs, Counsel Fees, Interests and Damages, 181.
1. Costs, 181.
2. Counsel Fees, 181.
3. Interest, 182.
4. Damages, 182.
a. General Rules as to Damages in Admiralty, 182.
b. Award of Damages to Prevailing Party, 182.
R. Review, 182.
1. Mode of Review, 182.
2. Jurisdiction, 183.
a. Courts, 183.
(1) In General, 183.
(2) Circuit Court, 183.
(3) Circuit Court of Appeals, 184.
(4) Supreme Court, 184.
b. Amount in Controversy, 185.
c. Appealable Decisions, 185.
3. Who May Appeal, 185.
4. Time of Appeal, 185.
5. Cross Appeal, 185.
6. Perfecting Appeal, 185..
a. Necessity of Writing, 185.
b. Record, 186.
7. Effect of Appeal, 186.
a. As Suspending Decree of Lower Court, 186.
b. As Carrying Up Property or Stipulation, 186.
(1) Appeal from District to Circuit Court, 186.
(2) Appeal from Circuit to Supreme Court, 187.
8. Dismissal of Appeal, 187.
9. Trial and Hearing, 187.
a. Appeal from District to Circuit Court, 187.
b. Appeal from Circuit to Supreme Court, 188.
(1) Retrial as to Facts, 188.
(a) Rule under Judiciary Act, 188.
(b) Rule under Act of 1803, 188
(c) Rule under Act of 1875, 188.
aa. In General, 188.
bb. To What Cases Statute Applies, 189.
cc. What Rulings May Be Reviewed, 189.
(aa) In General, 189.
(bb) What Are Conclusions of Law Which May Be Reviewed, 189.
dd. Of What Facts Findings Required, 189.
ee. Conclusiveness of Findings, 190.
ff. Effect of Refusal to Make Findings, 190.
gg. Effect of Findings Not Supported by Evidence, 191.
hh. Bill of Exceptions, 191.
(aa) Necessity of Bill, 191.
(bb) Form of Bill, 191.
ii. Hearing and Determination on Findings, 191.

c. Effect Where Evidence Is Conflicting, 192.
(1) In General, 192.
(2) Effect of Concurring Decisions of District and Circuit Courts on Questions of Fact, 192.
d. Further Proof, 193.

CROSS REFERENCES.

See the titles ABATEMENT, REVIVAL AND SURVIVAL, ante, p. 12; ACTIONS, ante, p. 96; AMBASSADORS AND CONSULS; AMENDMENTS; APPEAL AND ERROR; APPEARANCES; CERTIORARI; COLLISION; CONFLICT OF LAWS; CONSOLIDATION OF ACTIONS; CONTRACTS; COSTS; COURTS; CRIMINAL LAW; EMBARGO AND NONINTERCOURSE LAWS; EQUITY; EVIDENCE; EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL; FINDINGS OF COURTS; FORMER ADJUDICATION OR RES ADJUDICATA; GENERAL AVERAGE; JUDGMENTS AND DECREES; JURY; LACHES; MARINE INSURANCE; MARITIME LIENS; NAVIGABLE WATERS; PENALTIES AND FORFEITURES; PILOTS; PIRACY; PLEADING; PRIZE; REVENUE LAWS; SALVAGE; SEAMEN; SET-OFF, RECOUPMENT AND COUNTERCLAIM; SHIPS AND SHIPPING; WAR.

As to pendency of other suits or proceedings as defense to proceedings in admiralty, see the title ABATEMENT, REVIVAL AND SURVIVAL, ante, p. 12. As to affect of death of party or proceedings in admiralty, see the title ABATEMENT, REVIVAL AND SURVIVAL, ante, p. 12. As to arbitration of proceedings pending in a court of admiralty under rule of court, see the title ARBITRATION AND AWARD. As to procedure in suits for collision, see the title COLLISION. As to contributory negligence as a defense to proceedings in admiralty for collision and division of damages in such cases, see the title COLLISION. As to criminal jurisdiction, see the title CRIMINAL LAW. As to dismissal or discontinuance of admiralty causes, see the title DISMISSAL, DISCONTINUANCE AND NONSUIT. As to mandate and proceedings thereon upon appeals in admiralty, see the title MANDATE AND PROCEEDINGS THEREON. As to liens on vessels, whether arising from general maritime law or imposed by federal or state statutes, see the title MARITIME LIENS. As to contributory negligence as barring recovery in action for personal injuries, and division of damages in such case, see the title NEGLIGENCE. As to prohibition to courts of admiralty, see the title PROHIBITION. As to proceedings to limit liability of ship owners, see the title SHIPS AND SHIPPING. As to proceedings for forfeiture of vessel for violation of slave trade, see the title SLAVES.

I. Jurisdiction.

A. Nature and Extent—1. CONSTRUCTION OF CONSTITUTIONAL GRANT OF ADMIRALTY AND MARITIME JURISDICTION—a. *In General.*—The jurisdiction of the federal courts in admiralty and maritime cases is given in general terms by the constitution, and the extent of it is to be ascertained by a reasonable and just construction of the words used when taken in connection with the whole instrument and the purposes for which admiralty and maritime jurisdiction was granted to the federal government.[1]

b. *Governed by General Maritime Law in Force When Constitution Adopted.*—The general system of maritime law which was familiar to the lawyers and statesmen of this country when the constitution was adopted, was intended, and referred to, when it was declared in that instrument, that the judicial power of

1. **Reasonable and just construction of words used.**—The Steamer St. Lawrence, 1 Black 522, 17 L. Ed. 180; Insurance Co. *v.* Dunham, 11 Wall. 1, 24, 20 L. Ed. 90; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654.

The word "maritime" as used in § 2, art. 3, of the constitution providing that the judicial power should extend to all cases of admiralty or maritime jurisdiction, was added out of abundant caution to preclude a narrow interpretation of the word "admiralty." Oregon, etc., Navigation Co. *v.* Balfour, 179 U. S. 55, 45 L. Ed. 82.

the United States shall extend "to all cases of admiralty and maritime jurisdiction."[2]

c. *Whether Jurisdiction Coextensive with That of English or Continental Admiralty Courts.*—Admiralty jurisdiction, as exercised in the federal courts, is not restricted to the subjects cognizable in the English courts of admiralty at the date of the revolution.[3] Nor, on the other hand, is it as extensive as that exercised by the continental courts, organized under, and governed by, the principles of civil law.[4]

d. *Jurisdiction as Affected by Federal Statutes.*—The boundaries and limits of the admiralty and maritime jurisdiction are matters of judicial cognizance, not to be affected or controlled by congressional action.[5]

e. *Jurisdiction as Affected by State Statutes.*—And no state can enlarge or di-

2. Governed by general maritime law in force when constitution adopted.—The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; Workman *v.* New York, 179 U. S. 552, 45 L. Ed. 314; Steamboat New York, 18 How. 223, 226, 15 L. Ed. 359; Ex parte Easton, 95 U. S. 68, 70, 24 L. Ed. 373; Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 556, 32 L. Ed. 1017; The Belfast, 7 Wall. 624, 636, 19 L. Ed. 266; Atkins *v.* Fiber Disintegrating Co., 18 Wall. 272, 304, 21 L. Ed. 841.

The nature and extent of the admiralty jurisdiction must be determined by the laws of congress and the decisions of the supreme court, and by the usages prevailing in the courts of the states at the time the federal constitution was adopted. Ex parte Easton, 95 U. S. 68, 70, 24 L. Ed. 373; Steamboat New York, 18 How. 223, 15 L. Ed. 359; Workman *v.* New York, 179 U. S. 552, 45 L. Ed. 314; The Lottawanna, 21 Wall. 558, 576, 22 L. Ed. 654. See post, "Maritime Law," II.

"The constitution, in the grant of the admiralty jurisdiction, refers to it as it existed in this and other maritime countries at the time of the adoption of that instrument. It was then greatly larger here than in England. The hostility of the common-law courts there had wrought the reduction." Atkins *v.* Fiber Disintegrating Co., 18 Wall. 272, 21 L. Ed. 841, 845, citing Manro *v.* Alimeda, 10 Wheat. 473, 6 L. Ed. 369; Waring *v.* Clarke, 5 How. 441, 455, 12 L. Ed. 226; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, 389, 12 L. Ed. 465; The Steamer St. Lawrence, 1 Black, 522, 527, 17 L. Ed. 180; The Propeller Genesee Chief *v.* Fitzhugh, 12 How. 443, 454, 13 L. Ed. 1058; Insurance Co. *v.* Dunham, 11 Wall. 1, 20 L. Ed. 90; Story Const., § 1666.

3. Jurisdiction not limited to cases cognizable in English admiralty courts.—The Belfast, 7 Wall. 624, 636, 19 L. Ed. 266; Bags of Linseed, 1 Black 108, 113, 17 L. Ed. 35; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; The Blackheath, 195 U. S. 361, 49 L. Ed. 236; Ex parte Easton, 95 U. S. 68, 70, 24 L. Ed. 373; Waring *v.* Clarke, 5 How. 441, 12 L. Ed. 226; Cutler *v.* Rae, 7 How. 729, 732, 12 L. Ed. 890; Insurance Co. *v.* Durham, 11 Wall. 1, 24, 20 L. Ed. 90; The Blackheath, 195 U. S. 361, 365, 49 L. Ed. 236; New Jersey Steam Nav. Co. *v.* Merchanes' Bank, 6 How. 344, 387, 12 L. Ed. 465; Atkins *v.* Fiber Disintegrating Co., 18 Wall. 272, 304, 21 L. Ed. 841.

"This court has frequently declared and decided that the admiralty and maritime jurisdiction of the United States is not limited either by the restraining statutes or the judicial prohibitions of England, but is to be interpreted by a more enlarged view of its essential nature and objects, and with reference to analogous jurisdictions in other countries constituting the maritime commercial world, as well as to that of England." Insurance Co. *v.* Dunham, 11 Wall. 1, 24, 20 L. Ed. 90.

4. Jurisdiction not extensive as continental admiralty courts.—The Belfast, 7 Wall. 624, 636, 19 L. Ed. 266; Bags of Linseed, 1 Black 108, 113, 17 L. Ed. 35; Ex parte Easton, 95 U. S. 68, 70, 24 L. Ed. 373.

5. Boundaries of jurisdiction not affected by federal statutes.—Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 557, 32 L. Ed. 1017; The Steamer St. Lawrence, 1 Black 522, 17 L. Ed. 180; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; Ex parte Garnett, 141 U. S. 1, 35 L. Ed. 631; The Blackheath, 195 U. S. 361, 368, 49 L. Ed. 236; Grant *v.* Poillon, 20 How. 162, 168, 15 L. Ed. 873.

Congress cannot make the admiralty and maritime jurisdiction broader than the judicial power may determine to be its true limits. The Steamer St. Lawrence, 1 Black 522, 17 L. Ed. 180; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; Ex parte Garnett, 141 U. S. 1, 35 L. Ed. 631.

"The fact that congress, under the constitution, cannot extend our admiralty jurisdiction affords an argument for a broad interpretation commensurate with the needs of modern commerce." The Blackheath, 195 U. S. 361, 369, 49 L. Ed. 236.

It has been held, that a statute (act of Aug. 18, 1856, ch. 164, Rev. Stat., § 5576), providing that the punishment of offenses committed on Guano Islands

minish the admiralty or maritime jurisdiction granted by the constitution to the judicial power of the United States.[6]

f. *Jurisdiction as Affected by Rules of Court.*—Rules of court cannot enlarge the admiralty jurisdiction or make it broader than the judicial power may determine to be its true limits.[7]

2. Concurrent Jurisdiction with State Courts—a. *In General.*—The admiralty jurisdiction of the courts of the United States, although exclusive of common-law courts on some subjects, is concurrent upon others.[8] Admiralty jurisdiction in the courts of the United States is not taken away because the courts of common law may have concurrent jurisdiction in a case with the admiralty.[9] The grant to the United States, in the constitution, of all cases of admiralty and maritime jurisdiction, does not extend to a cession of the waters in which those cases may arise, or of general jurisdiction over the same.[10]

shall be governed by the same rules as govern like crimes upon the high seas, is not an attempt to confer admiralty jurisdiction over land, and is not unconstitutional on that ground. Jones *v.* United States, 137 U. S. 202, 34 L. Ed. 691. See the title CRIMINAL LAW.

6. Jurisdiction not affected by state statute.—The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; The Steamer St. Lawrence, 1 Black 522, 17 L. Ed. 180; Ex parte Garnett, 141 U. S. 1, 35 L. Ed. 631; Steamboat New York, 18 How. 223, 15 L. Ed. 359; Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017; J. E. Rumbell, 148 U. S. 1, 37 L. Ed. 345; American Steamboat Co. *v.* Chace, 16 Wall. 522, 531, 21 L. Ed. 369; Watts *v.* Camors, 115 U. S. 353, 362, 29 L. Ed. 406; Workman *v.* New York, 179 U. S. 552, 562, 45 L. Ed. 314.

The statutes of a state have no binding force in an admiralty case. The rule for the decision of the federal courts is derived from the general admiralty law. Steamboat New York, 18 How. 223, 15 L. Ed. 359.

State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a state court to enforce such a lien by a suit or proceeding in rem, as practised in the admiralty courts. The Belfast, 7 Wall. 624, 644, 19 L. Ed. 266; Edwards *v.* Elliott, 21 Wall. 532, 556, 22 L. Ed. 487.

7. Jurisdiction not affected by rules of court.—The Steamer St. Lawrence, 1 Black 522, 17 L. Ed. 180; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654.

8. Jurisdiction concurrent on some subjects.—Taylor *v.* Carryl, 20 How. 583, 15 L. Ed. 1028. See the title COURTS.

"The common-law courts exercise a concurrent jurisdiction in nearly all the cases of admiralty cognizance, whether of tort or contract (with the exception of proceedings in rem)." New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, 390, 12 L. Ed. 465.

The courts of common law deal with ships or vessels as with other personal property. Taylor *v.* Carryl, 20 How. 583, 584, 15 L. Ed. 1028.

It can only be in those cases where, previous to the constitution, state tribunals possessed jurisdiction, independent of national authority, that they can now constitutionally exercise a concurrent jurisdiction. Martin *v.* Hunter, 1 Wheat. 304, 337, 4 L. Ed. 97.

9. Admiralty jurisdiction not affected by concurrent jurisdiction at common law.—Waring *v.* Clarke, 5 How. 441, 12 L. Ed. 226; The Brig Hope, 10 Pet. 108, 9 L. Ed. 363.

10. Power of state over territory within admiralty jurisdiction.—United States *v.* Bevans, 3 Wheat. 336, 4 L. Ed. 404; Smith *v.* Maryland, 18 How. 71, 15 L. Ed. 269; Manchester *v.* Massachusetts, 139 U. S. 240, 259, 35 L. Ed. 159; McCready *v.* Virginia, 94 U. S. 391, 397, 24 L. Ed. 248. See the title NAVIGABLE WATERS.

Congress may pass all laws which are necessary for giving the most complete effect to the exercise of the admiralty and maritime jurisdiction granted to the government of the Union; but the general jurisdiction over the place, subject to this grant, adheres to the territory, as a portion of territory not yet given away; and the residuary powers of legislation still remain in this state. United States *v.* Bevans, 3 Wheat. 336, 4 L. Ed. 404; Smith *v.* Maryland, 18 How. 71, 15 L. Ed. 269.

A state has a right to protect its fisheries by making it unlawful to take or catch oysters with a scoop or drag, and to inflict the penalty of forfeiture upon the vessel employed in this pursuit. Such a law is not repugnant to the constitution as interfering with the admiralty and maritime jurisdiction of the judicial power of the United States. Smith *v.* Maryland, 18 How. 71, 15 L. Ed. 269. See, generally, the title FISH AND FISHERIES; OYSTERS.

"The admiralty jurisdiction under our system can only be exercised under the laws of the United States." Janney *v.* Columbian Ins. Co., 10 Wheat. 411, 6 L. Ed. 354.

b. *Saving of Common-Law Remedy*—(1) *Statement of Saving Clause.*—The judiciary act of 1789 which confers admiralty jurisdiction on the courts of the United States, expressly saves to suitors, in all cases, the right of a common-law remedy, where the common law is competent to give it.[11]

(2) *Construction and Operation of Saving Clause.*—(a) *In General.*—The meaning of the clause of the ninth section of the judiciary act of 1789, saving to suitors, in all cases, a common-law remedy when the common law is competent to give it, is, that in cases of concurrent jurisdiction in admiralty and at common law the jurisdiction in the latter is not taken away.[12] Congress intended by the provision to allow a party to seek redress in the admiralty if he saw fit to do so, but not to make it compulsory in any case where the common law is competent to give him a remedy.[13]

(b) *What Remedies Are Saved*—aa. *Meaning of Common-Law Remedy.*—The clause of the statute in question only saves to suitors "the right of a common-law remedy, where the common law is competent to give it." It is not a remedy in the common-law courts which is saved, but a common-law remedy.[14]

bb. *Proceedings in Personam*—(aa) *In General.*—When a suit is in personam against the owner, the party seeking redress may proceed by libel in the district court, or he may, at his election, proceed in an action at law, either in the circuit court, if he and the defendant are citizens of different states, or in a state court, as in other cases of actions cognizable in the state and federal courts

11. Saving clause stated.—1 Stat. at L. 73, § 9; Rev. Stat. § 563; U. S. Comp. Stat. 1901, p. 457; Waring *v.* Clarke, 5 How. 441, 12 L. Ed. 226; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, 390, 12 L. Ed. 465; The Moses Taylor *v.* Hammons, 4 Wall. 411, 431, 18 L. Ed. 397; The Hine *v.* Trevor, 4 Wall. 555, 571, 18 L. Ed. 451; The Belfast, 7 Wall. 624, 644, 19 L. Ed. 266; Leon *v.* Galceran, 11 Wall. 185, 188, 20 L. Ed. 74; American Steamboat Co. *v.* Chase, 16 Wall. 522, 21 L. Ed. 369; Schoonmaker *v.* Gilmer, 102 U. S. 118, 26 L. Ed. 95; Chappell *v.* Bradshaw, 128 U. S. 132, 32 L. Ed. 369; Moran *v.* Sturges, 154 U. S. 256, 38 L. Ed. 981; The Glide, 167 U. S. 606, 42 L. Ed. 296; Perry *v.* Haines, 191 U. S. 17, 48 L. Ed. 73; Taylor *v.* Carryl, 20 How. 583, 15 L. Ed. 1028; Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 44 L. Ed. 921; The Atlas, 93 U. S. 302, 316, 23 L. Ed. 863.

12. Common-law jurisdiction not destroyed.—Waring *v.* Clarke, 5 How. 441, 12 L. Ed. 226; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, 390, 12 L. Ed. 465.

13. Resort to admiralty not compulsory.—Properly construed a party under that provision may proceed in rem in the admiralty, if a maritime lien arises, or he may bring a suit in personam in the same jurisdiction, or he may elect not to go into admiralty at all, and may resort to his common-law remedy in the state courts, or in the circuit courts of the United States if he can make proper parties to give the circuit court jurisdiction of his case. Leon *v.* Galceran, 11 Wall. 185, 188, 20 L. Ed. 74; American Steamboat Co. *v.* Chase, 16 Wall. 522, 534, 21 L. Ed. 369.

14. Meaning of common-law remedy.—The Moses Taylor *v.* Hammons, 4 Wall. 411, 431, 18 L. Ed. 397; Moran *v.* Sturges, 154 U. S. 256, 38 L. Ed. 981; Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 44 L. Ed. 921.

The reservation is not of an action at common law, but of a common-law remedy; and a remedy does not necessarily imply an action. A remedy is defined by Bouvier as "the means employed to enforce a right, or redress an injury." While, as stated by him, remedies for nonfulfillment of contracts are generally by action, they are by no means universally so. Thus, a landlord has at common law a remedy by distress for his rent—a right also given to him for the purpose of exacting compensation for damages resulting from the trespass of cattle. A bailee of property has a remedy for work done upon such property, or for expenses incurred in keeping it, by detention of possession. An innkeeper has a similar remedy upon the goods of his guests to the amount of his charges for their entertainment; and a carrier has a like lien upon the thing carried. There is also a common-law remedy for nuisances by abatement; a right upon the part of a person assaulted to resist the assailant even to his death; a right of recaption of goods stolen or unlawfully taken, and a public right against disturbers of the peace by compelling them to give sureties for their good behavior. All these remedies are independent of an action. Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 44 L. Ed. 921.

exercising jurisdiction in common-law cases, as provided in the eleventh section of the judiciary act.[15]

(bb) *Actions on Contract.*—Any action which the common law gives for obtaining a judgment in personam against a party liable on a marine contract is saved by the clause in question.[16] Thus, the state courts have a right to entertain a suit for the seizure and sale of the interest of any owner, or part owner, in a vessel, by attachment or by general execution, when the proceeding is a personal action against such owner, to recover a debt for which he is personally liable,[17] and a suit for mariners' wages in personam is also maintainable at common law.[18]

(cc) *Actions for Damages for Tort.*—An action which the common law gives for obtaining a judgment in personam against a party liable on a marine tort is saved by the clause of the judiciary act saving to suitors the right of a common-law remedy in all cases where the common law is competent to give it.[19] The right to bring a common-law action for seizures on navigable waters,[20] for damages by collision at sea,[21] and for damages to a vessel by fire resulting from negligence,[22] is saved by the judiciary act.

(dd) *Suits in Equity.*—A suit in equity to enforce a common-law remedy is saved to the state courts.[23]

(ee) *Proceedings in Personam with Ancillary Attachment.*—If the suit be in personam against an individual defendant, with an ancillary attachment against a particular thing, or against the property of the defendant in general, it is essentially a proceeding according to the course of the common law, and within the saving clause of the statute.[24] And a bond given to relieve the property or

15. Actions in personam.—The Belfast, 7 Wall. 624, 644, 19 L. Ed. 266; The Moses Taylor *v.* Hammons, 4 Wall. 411, 18 L. Ed. 397; The Hine *v.* Trevor, 4 Wall. 555, 18 L. Ed. 451; American Steamboat Co. *v.* Chace, 16 Wall. 522, 533, 21 L. Ed. 369; Leon *v.* Galceran, 11 Wall. 185, 191, 20 L. Ed. 74.

The common law is as competent as the admiralty to give a remedy in all cases where the suit is in personam against the owner of the property. Leon *v.* Galceran, 11 Wall. 185, 191, 20 L. Ed. 74.

16. Actions on contract.—The Hine *v.* Trevor, 4 Wall. 555, 556, 18 L. Ed. 451; Leon *v.* Galceran, 11 Wall. 185, 20 L. Ed. 74; Manchester *v.* Massachusetts, 139 U. S. 240, 262, 35 L. Ed. 159; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, 390, 12 L. Ed. 465.

17. Seizure and sale of vessel in action against owner for debt.—The Hine *v.* Trevor, 4 Wall. 555, 556, 18 L. Ed. 451.

18. Suit for mariners' wages.—Leon *v.* Galceran, 11 Wall. 185, 20 L. Ed. 74. See, generally, the title SEAMEN.

19. Actions for marine tort.—The Hine *v.* Trevor, 4 Wall. 555, 556, 18 L. Ed. 451; Manchester *v.* Massachusetts, 139 U. S. 240, 262, 35 L. Ed. 159; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, 396, 12 L. Ed. 465.

Death by wrongful act.—As to remedy for death by wrongful act, see post, "Action for Death by Wrongful Act," I, A, 2, (2), (b), bb, (ff), bbb.

20. Seizures on navigable waters.—United States *v.* Ames, 99 U. S. 35, 42, 25 L. Ed. 295; Slocum *v.* Mayberry, 2 Wheat. 1, 4 L. Ed. 169.

21. Actions for collision.—Schoonmaker *v.* Gilmore, 102 U. S. 118, 26 L. Ed. 95, citing the Moses Taylor *v.* Hammons, 4 Wall. 411, 477, 18 L. Ed. 397; The Hine *v.* Trevor, 4 Wall. 555, 18 L. Ed. 451; The Belfast, 7 Wall. 624, 19 L. Ed. 266; Leon *v.* Galveran, 11 Wall. 185, 20 L. Ed. 74; American Steamboat Co. *v.* Chace, 16 Wall. 522, 21 L. Ed. 369.

22. Actions for damage to vessel by fire.—An action for trespass on the case for damages by fire to a schooner resulting from the negligence of the defendant's servants in cutting a burning scow loose from a wharf and allowing it to drift against the schooner is a common-law action within the provision of the 9th section of the judiciary act of 1879 as embodied in § 563, Rev. Stat. "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." Chappel *v.* Bradshaw, 128 U. S. 132, 32 L. Ed. 369.

23. Suits in equity.—Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 44 L. Ed. 921.

A suit in equity to enforce a possessory towage lien upon a raft of timber is a common-law remedy saved by the saving clause of the judiciary act. Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 44 L. Ed. 921.

24. Proceedings in personam with ancillary attachment.—Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 44 L. Ed. 921; Johnson *v.* Chicago, etc., Elevator Co., 119 U. S. 388, 30 L. Ed. 447; Leon *v.* Gal-

vessel so sequestered or attached is properly sued on in a state court.[25]

(ff) *Statutory Remedies*—aaa. *In General.*—The saving clause is not limited to such causes of action as were known to the common law at the time of the passage of the judiciary act.[26] But, on the other hand, it could not have been the intention of congress, by the exception in that section, to give the suitor all such remedies as might afterwards be enacted by state statutes, for this would have enabled the states to make the jurisdiction of their courts concurrent in all cases, by simply providing a statutory remedy for all cases, and thus defeat the exclusive jurisdiction of the federal courts.[27]

bbb. *Action for Death by Wrongful Act.*—A statute of a state giving to the next of kin of a person killed an action on the case for damages for the injury caused by death, does not interfere with the admiralty jurisdiction and is within the saving clause although no such remedy enforceable though the admiralty existed when the act was passed, or has existed since.[28]

cc. *Proceedings in Rem.*—The clause saving to suitors the right of a common-law remedy, where the common law is competent to give it, does not save a remedy by proceeding in rem as used in the admiralty courts, as such a proceeding is not a remedy afforded by the common law; it is a proceeding under the civil law, and when used in the common-law courts, it is given by statute.[29] If the cause of action be one cognizable in admiralty, and the suit be in rem against the thing itself, though a monition be also issued to the

ceran, 11 Wall. 185, 20 L. Ed. 74; The Hine *v.* Trevor, 4 Wall. 555, 18 L. Ed. 451; The Belfast, 7 Wall. 624, 19 L. Ed. 266; The Propeller Genesee Chief *v.* Fitzhugh, 12 How. 443, 13 L. Ed. 1058; Jackson *v.* Steamboat Magnolia, 20 How. 296, 15 L. Ed. 909; Taylor *v.* Carryl, 20 How. 583, 15 L. Ed. 1028; Pennywit *v.* Eaton, 15 Wall. 380, 382, 21 L. Ed. 72.

It is no objection to the jurisdiction of a state court in a suit in personam for mariners' wages that the process of sequestration or attachment has been used to bring the vessel on which the services were rendered under the dominion of the court, for the purpose of subjecting it to such judgment as might be rendered in the cause. Leon *v.* Galceran, 11 Wall. 185, 20 L. Ed. 74.

25. Action on attachment bond.—Leon *v.* Galceran, 11 Wall. 185, 20 L. Ed. 74. See, generally, the title ATTACHMENT AND GARNISHMENT.

26. Saving not limited to common-law remedies known at time of passage of judiciary act.—American Steamboat Co. *v.* Chace, 16 Wall. 522, 21 L. Ed. 369; Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 44 L. Ed. 921.

27. Saving does not extend to all statutory remedies.—The Hine *v.* Trevor, 4 Wall. 555, 571, 18 L. Ed. 451.

In the act of 1845, where congress does mean this, the language expresses it clearly; for after saving to the parties, in cases arising under that act, a right of trial by jury, and the right to a concurrent remedy at common law, where it is competent to give it, there is added, "any concurrent remedy which may be given by the state laws where such steamer or other vessel is employed." The Hine *v.* Trevor, 4 Wall. 555, 571, 18 L. Ed. 451.

28. Action for death by wrongful act.—American Steamboat Co. *v.* Chace, 16 Wall. 522, 21 L. Ed. 369.

"Attempt is made to deny the right to such a remedy in this case, upon the ground that the operation of the saving clause must be limited to such causes of action as were known to the common law at the time of the passage of the judiciary act, and the argument is that the cause of action alleged was not known to the common law at that period, which cannot be admitted, as actions to recover damages for personal injuries prosecuted in the name of the injured party were well known, even in the early history of the common law. Such actions, it must be admitted, did not ordinarily survive, but nearly all the states have passed laws to prevent such a failure of justice, and the validity of such laws has never been much questioned." American Steamboat Co. *v.* Chace, 16 Wall. 522, 533, 21 L. Ed. 369. See, generally, the title DEATH BY WRONGFUL ACT.

29. Proceedings in rem.—The Moses Taylor *v.* Hammons, 4 Wall. 411, 431, 18 L. Ed. 397; The Glide, 167 U. S. 606, 42 L. Ed. 296; The Belfast, 7 Wall. 624, 625, 19 L. Ed. 266; J. E. Rumbell, 148 U. S. 1, 37 L. Ed. 345; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; The Hine *v.* Trevor, 4 Wall. 555, 18 L. Ed. 451; Edwards *v.* Elliott, 21 Wall. 532, 557, 22 L. Ed. 487; Norton *v.* Switzer, 93 U. S. 355, 366, 23 L. Ed. 903; United States *v.* Ames, 99 U. S. 35, 42, 25 L. Ed. 295; Leon *v.* Galceran, 11 Wall. 185, 191, 20 L. Ed. 74; Moran *v.* Sturges, 154 U. S. 256, 277, 38 L. Ed. 981.

There is no form of action at common law which, when compared with proceedings in rem in the admiralty can be re-

owner, the proceeding is essentially one in admiralty and is not within the saving clause of the judiciary act.[30]

3. JURISDICTION OF SUITS BETWEEN FOREIGNERS—a. *Discretion of Court as to Assumption of Jurisdiction.*—Where the subject matter of an action is within the admiralty jurisdiction, the fact that all of the parties to the proceeding are foreigners will not prevent it from taking cognizance of the cause. In such case it is within the discretion of the court of admiralty to take or refuse jurisdiction,[31] and, as a general rule, it will assume jurisdiction unless circumstances exist which render the assumption of jurisdiction inexpedient.[32]

b. *Consent of Foreign Consul or Representative.*—While jurisdiction will not be assumed as a general rule without the consent of the representative of the country to which the vessel belongs, such consent is not a condition of jurisdiction, but is only regarded as a material fact to aid the court in deter-

garded as a concurrent remedy. The Belfast, 7 Wall. 624, 644, 19 L. Ed. 266.

State statutes which confer upon state courts remedies for marine torts and on marine contracts by proceedings strictly in rem are void, and do not come within the saving clause of the ninth section of the act of 1789, concerning a common-law remedy. The Hine *v.* Trevor, 4 Wall. 555, 556, 18 L. Ed. 451; Perry *v.* Haines, 191 U. S. 17, 48 L. Ed. 73; The Moses Taylor *v.* Hammons, 4 Wall. 411, 18 L. Ed. 397; Knapp, etc. Co. *v.* McCaffrey, 177 U. S. 638, 44 L. Ed. 921; The Winnebako, 205 U. S. 354, 363, 51 L. Ed. 836; Edwards *v.* Elliott, 21 Wall. 532, 556, 22 L. Ed. 487; The Belfast, 7 Wall. 624, 644, 19 L. Ed. 266.

Proceeding in rem to enforce maritime lien.—The saving in the judiciary act does not authorize a proceeding in rem, to enforce a maritime lien, in a common-law court, whether state or federal. Common-law remedies are not applicable to enforce such a lien, but are suits in personam, though such suits, under special statutes, may be commenced by attachment of the property of the debtor. The Belfast, 7 Wall. 624, 625, 19 L. Ed. 266; Moran *v.* Sturges, 154 U. S. 256, 38 L. Ed. 981; American Steamboat Co. *v.* Chace, 16 Wall. 522, 534, 21 L. Ed. 369; The Hine *v.* Trevor, 4 Wall. 555, 18 L. Ed. 451; The Glide, 167 U. S. 606, 42 L. Ed. 296. See, generally, the title MARITIME LIENS.

30. What is a proceeding in rem.—Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 44 L. Ed. 921. See, ante, "Proceedings in Personam with Ancillary Attachment," I, A, 2, b, (2), (b), bb, (ee).

A statute which provides that vessels may be sued and made defendants without any proceedings against the owners, or even mentioning their names; that a writ may be issued and the vessel seized on filing of a petition similar in substance to a libel, and that after a notice in the nature of a monition the vessel may be condemned and an order made for her sale, if the liability is established for which she was sued, provides a remedy partaking of all the essential features of an admiralty proceeding in rem, and which is in no sense a common-law remedy within the saving clause of the judiciary act. The Hine *v.* Trevor, 4 Wall. 555, 571, 18 L. Ed. 451; Perry *v.* Haines, 191 U. S. 17, 48 L. Ed. 73.

31. Assumption of jurisdiction within discretion of court.—The Maggie Hammond, 9 Wall. 435, 19 L. Ed. 772; The Belgenland, 114 U. S. 355, 29 L. Ed. 152; Ex parte Newman, 14 Wall. 152, 168, 20 L. Ed. 877; Panama R. Co. *v.* Napier Shipping Co., 166 U. S. 280, 41 L. Ed. 1004; The Blaireau, 2 Cranch 240, 2 L. Ed. 266. See, also, Taylor *v.* Carryl, 20 How. 583, 611, 15 L. Ed. 1028.

Where the subjects of a particular nation invoke the aid of our tribunals to adjudicate between them and their fellow subjects, as to matters of contract or tort solely affecting themselves and determinable by their own laws, such tribunals will exercise their discretion whether to take cognizance of such matters or not. The Belgenland, 114 U. S. 355, 365, 29 L. Ed. 152.

What law governs.—See the title CONFLICT OF LAWS.

32. Jurisdiction will be assumed unless inexpedient.—Panama R. Co. *v.* Napier Shipping Co., 166 U. S. 280, 41 L. Ed. 1004; The Maggie Hammond, 9 Wall. 435, 19 L. Ed. 772; The Belgenland, 114 U. S. 355, 29 L. Ed. 152; Ex parte Newman, 14 Wall. 152, 168, 20 L. Ed. 877; The Blaireau, 2 Cranch 240, 2 L. Ed. 266.

The better opinion is that the court will take cognizance of torts to which both parties are foreigners; at least, in the absence of a protest from a foreign consul. Panama R. Co. *v.* Napier Shipping Co., 166 U. S. 280, 41 L. Ed. 1004.

Circumstances which render it inexpedient for the court to take jurisdiction of controversies between foreigners often exist in cases not arising in the country of the forum; as, where they are governed by the laws of the country to which the parties belong, and there is no difficulty in a resort to its courts; or where they have agreed to resort to no other tribunals. The Belgenland, 114 U. S. 355, 363, 29 L. Ed. 152.

mining the question of discretion, whether jurisdiction in the case ought or ought not to be exercised.[33]

c. *Jurisdiction of Particular Suits or Actions.*—A suit for collision on the high seas between two foreign vessels,[34] and a suit upon a contract between foreigners for shipment between foreign countries on a foreign ship,[35] have been held to be within the admiralty jurisdiction.

4. WATERS WITHIN JURISDICTION—a. *Former Rule—Waters within Ebb and Flow of Tide.*—It was formerly the rule that in cases purely dependent upon the locality of the act done, admiralty jurisdiction was limited to the sea, and to tidewaters as far as the tide flowed, and did not reach beyond high-water mark.[36] It was held, that admiralty jurisdiction extended to tidewater although

33. Consent of representative of foreign government.—Ex parte Newman, 14 Wall. 152, 168, 20 L. Ed. 877; The Belgenland, 114 U. S. 355, 363, 29 L. Ed. 152.

Suits by foreign seamen for wages or because of illtreatment.—While admiralty may take jurisdiction of a case of foreign seamen suing for wages, or because of illtreatment, this will not usually be done without the consent of the foreign consul, but if the voyage is ended or the seamen have been dismissed or treated with great cruelty admiralty will entertain jurisdiction even against the protest of the consul. The Belgenland, 114 U. S. 355, 363, 29 L. Ed. 152.

The case of foreign seamen is undoubtedly a special one, when they sue for wages under a contract which is generally strict in its character, and framed according to the laws of the country to which the ship belongs; framed also with a view to secure, in accordance with those laws, the rights and interests of the ship owners as well as those of master and crew, as well when the ship is abroad as when she is at home. Nor is this special character of the case entirely absent when foreign seamen sue the master of their ship for illtreatment. On general principles of comity, admiralty courts of other countries will not interfere between the parties in such cases unless there is special reason for doing so, and will require the foreign consul to be notified and, though not absolutely bound by, will always pay due respect to, his wishes as to taking jurisdiction. The Belgenland, 114 U. S. 355, 364, 29 L. Ed. 152.

If any treaty stipulations exist between the United States and the country to which a foreign ship belongs, with regard to the right of the consul of that country to adjudge controversies arising between the master and crew, or other matters occurring on the ship exclusively subject to the foreign law, such stipulations should be fairly and faithfully observed. The Belgenland, 114 U. S. 355, 364, 29 L. Ed. 152. See, generally, the title SEAMEN.

34. Collision between foreign vessels.—The Belgenland, 114 U. S. 355, 29 L. Ed. 152.

35. Suit for breach of charter party.—Upon a contract between foreigners for shipments between foreign countries, as Scotland and Canada, on a foreign ship, where the master abandons the voyage without lawful excuse, improperly enters into a new contract of affreightment and proceeds on a distant voyage, leaving the goods at a foreign port, and neither carrying them himself to the port of destination, nor seeking to forward them in another vessel, a court of admiralty of the United States has jurisdiction of a proceeding in rem by the owner. The Maggie Hammond, 9 Wall. 435, 19 L. Ed. 772. See, generally, the title SHIPS AND SHIPPING.

36. Waters within ebb and flow of tide.—Waring *v.* Clarke, 5 How. 441, 463, 12 L. Ed. 226; United States *v.* Coombs, 12 Pet. 72, 9 L. Ed. 1004; The Steamboat Planter, 7 Pet. 324, 8 L. Ed. 700; The Steamboat Jefferson, 10 Wheat. 428, 6 L. Ed. 358; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, 391, 12 L. Ed. 465; The Steamboat Orleans *v.* Phœbus, 11 Pet. 175, 9 L. Ed. 677; Railroad Co. *v.* Schurmeier, 7 Wall. 272, 208, 19 L. Ed. 74; Packer *v.* Bird, 137 U. S. 661, 671, 34 L. Ed. 819; Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 487, 36 L. Ed. 1018; Pollock *v.* Farmers' Loan, etc., Co., 157 U. S. 429, 575, 39 L. Ed. 759; St. Anthony Falls Water Power Co. *v.* Commissioners, 168 U. S. 349, 361, 42 L. Ed. 497; Scranton *v.* Wheeler, 179 U. S. 141, 187, 45 L. Ed. 126.

Admiralty had no jurisdiction over a vessel not engaged in maritime trade and navigation, though on her voyages she touched, at one terminus of them, in tidewater, her employment having been substantially on other waters. The true test of its jurisdiction, in all cases of this sort, was, whether the vessel was engaged, substantially, in maritime navigation, or in interior navigation and trade, not on tidewaters. The Steamboat Orleans *v.* Phœbus, 11 Pet. 175, 9 L. Ed. 677; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, 391, 12 L. Ed. 465; The Steamboat Jefferson, 10 Wheat. 428, 6 L. Ed. 358; The Steamboat Planter, 7 Pet. 324, 8 L. Ed. 700; Waring *v.* Clarke, 5 How. 441, 463, 12 L. Ed. 226.

they were within the body of a county or state.[38]

b. *Present Rule—Navigable Waters*—(1) *In General.*—The old rule that admiralty jurisdiction was limited to waters within the ebb and flow of the tide was overruled in The Propeller Genesee Chief *v.* Fitzhugh, 12 How. 443, 13 L. Ed. 1058, and the rule announced, which has since become firmly established, that the admiralty and maritime jurisdiction granted to the federal government by the constitution of the United States is not limited to tidewater, but extends to all public navigable waters, lakes and rivers.[39]

(2) *Mode of Determining Navigability of Waters.*—See the title NAVIGABLE WATERS.

(3) *Canals.*—The only distinction between canals and other navigable waters is that they are rendered navigable by artificial means, and sometimes are wholly within the limits of a particular state, but this does not create any distinction in principle as they are usually constructed to connect waters navigable by nature, and to avoid the portage of property from one navigable lake or river to another, or to improve or deepen a natural channel, and are usually navigated by the

Test as to whether waters are within ebb and flow of tide.—Under this rule it was held, that although the current at a particular place might be so strong as not to be turned backward by the tide, yet if the effect of the tide upon the current was so great as to occasion a regular rise and fall of the tide, it was within the ebb and flow of the tide. Peyroux *v.* Howard, 7 Pet. 324, 342, 8 L. Ed. 700; Waring *v.* Clarke, 5 How. 441, 463, 12 L. Ed. 226.

38. Tidewaters within body of county.—Waring *v.* Clarke, 5 How. 441, 463, 12 L. Ed. 226.

39. Navigable Waters.—Ex parte Garnett, 141 U. S. 1, 35 L. Ed. 631; Fretz *v.* Bull, 12 How. 466, 13 L. Ed. 1068; Jackson *v.* Steamboat Magnolia, 20 How. 296, 15 L. Ed. 909; Nelson *v.* Leland, 22 How. 48, 16 L. Ed. 269; The Steamboat Commerce, 1 Black 574, 17 L. Ed. 107; The Hine *v.* Trevor, 4 Wall. 555, 18 L. Ed. 451; The Belfast, 7 Wall. 624, 19 L. Ed. 266; The Eagle, 8 Wall. 15, 19 L. Ed. 365; The Montello, 20 Wall. 430, 22 L. Ed. 391; Ex parte Boyer, 109 U. S. 629, 27 L. Ed. 1056; United States *v.* Rodgers, 150 U. S. 249, 37 L. Ed. 1071; Ex parte Easton, 95 U. S. 68, 72, 24 L. Ed. 373; Perry *v.* Haines, 191 U. S. 17, 48 L. Ed. 73; Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Towboat Co., 23 How. 209, 16 L. Ed. 433; The Propeller Monticello *v.* Mollison, 17 How. 153, 15 L. Ed. 68; The Steamboat New World *v.* King, 16 How. 469, 14 L. Ed. 1019; Barney *v.* Keokuk, 94 U. S. 324, 24 L. Ed. 224; Walsh *v.* Rodgers, 13 How. 283, 14 L. Ed. 147; Ure *v.* Coffman, 19 How. 56, 15 L. Ed. 567; New York, etc., Steamship Co. *v.* Calderwood, 19 How. 241, 245, 15 L. Ed. 612; Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 556, 32 L. Ed. 1017; Illinois Cent. R. Co. *v.* Illinois, 146 U. S. 487, 36 L. Ed. 1018; Packer *v.* Bird, 137 U. S. 661, 671, 34 L. Ed. 819; Railroad Co. *v.* Schurmeier, 7 Wall. 272, 288, 19 L. Ed. 74; St. Anthony Falls Water Power Co. *v.* Commissioners, 168 U. S. 349, 361, 42 L. Ed. 497; Shively *v.* Bowlby, 152 U. S. 1, 34, 38 L. Ed. 331; Pollock *v.* Farmers' Loan, etc., Co., 157 U. S. 429, 575, 39 L. Ed. 759; Scranton *v.* Wheeler, 179 U. S. 141, 187, 45 L. Ed. 126.

Effect of act of 1845.—The act of congress passed on the 26th of February 1845 (5 Stat. at L., 726), extending the jurisdiction of the district courts to certain cases upon the lakes, and navigable waters connecting the same, is consistent with the constitution of the United States. The Propeller Genesee Chief *v.* Fitzhugh, 12 How. 443, 13 L. Ed. 1058.

But the district courts exercise jurisdiction over fresh water rivers "navigable from the sea," by virtue of the judiciary act of 1789, and not as conferred by the act of 1845, which extends their jurisdiction to the great lakes and waters "not navigable from the sea." Jackson *v.* Steamboat Magnolia, 20 How. 296, 15 L. Ed. 909. The grant of admiralty powers to the district courts of the United States, by the ninth section of the act of September 24th, 1789, is coextensive with this grant in the constitution, as to the character of the waters over which it extends. The Hine *v.* Trevor, 4 Wall. 555, 18 L. Ed. 451.

Power to confer jurisdiction over great lakes not dependent on power to regulate commerce.—The power of congress to confer jurisdiction upon the district courts over the great lakes and navigable waters connecting the same does not rest upon the power granted to congress to regulate commerce. But it rests upon the ground that the lakes and navigable waters connecting them are within the scope of admiralty and maritime jurisdiction, as known and understood in the United States, when the constitution was adopted. The Propeller Genesee Chief *v.* Fitzhugh, 12 How. 443, 13 L. Ed. 1058. See, also, United States *v.* Rodgers, 150 U. S. 249, 257, 37 L. Ed. 1071.

same vessels which ply between the naturally navigable waters at either end of the canal and they are therefore within the admiralty jurisdiction.[40]

(4) *Rivers.*—Navigable rivers, which empty into the sea, or into the bays and gulfs which form a part of the sea, are but arms of the sea, and are as much within the admiralty and maritime jurisdiction of the United States as the sea itself.[41]

(5) *Waters within Body of County or State.*—The jurisdiction of courts of admiralty in torts depends entirely on locality, and it extends to places within the body of a county or state.[42]

c. *Foreign Navigable Waters.*—The fact that the cause of action arose in the waters of a foreign port is immaterial, as the law is entirely well settled, both in England and in this country, that torts originating within the waters of a foreign power may be the subject of a suit in a domestic court.[43]

5. Vessels or Property within Jurisdiction—a. *Vessels*—(1) *Character of Vessel*—(a) *Vessels Propelled by Oars.*—The modern law of England and America rules out of the admiralty jurisdiction all vessels propelled by oars, simply because they are the smallest class and beneath the dignity of a court of admiralty.[44]

(b) *Canal Boats.*—Canal boats, drawn by horses, are ships or vessels within the meaning of the admiralty law and are within the admiralty jurisdiction.[45]

(c) *Government Vessels*—aa. *Vessels of United States.*—A claim for damages exists against a vessel of the United States guilty of a maritime tort, as much as if the offending vessel belonged to a private citizen. And although, for reasons of public policy, the claim cannot be enforced by direct proceedings against the vessel, yet it will be enforced, by the courts, whenever the property itself, upon which the claim exists, becomes, through the affirmative action of the United States, subject to their jurisdiction and control. The government, in such a case, stands, with reference to the rights of the defendants or claimants, as

40. Canals.—Perry *v.* Haines, 191 U. S. 17, 48 L. Ed. 73; Ex parte Boyer, 109 U. S. 629, 27 L. Ed. 1056.

Erie Canal.—The Erie Canal, though wholly within the state of New York, is a great highway of commerce between ports in different states and foreign countries, and is navigated by vessels which also traverse the waters of Hudson river from the head of navigation to its mouth, and is within the admiralty jurisdiction. Perry *v.* Haines, 191 U. S. 17, 48 L. Ed. 73.

Illinois and Michigan canal.—The Illinois and Michigan canal, an artificial navigable water way, 96 miles long, 60 feet wide and 6 feet deep, connecting Lake Michigan and the Chicago river with the Illinois river and the Mississippi river is a public water of the United States and within the legitimate scope of the admiralty jurisdiction, although it is wholly within the body of a state and subject to its ownership and control. Ex parte Boyer, 109 U. S. 629, 27 L. Ed. 1056.

41. Rivers.—The Belfast, 7 Wall. 624, 640, 19 L. Ed. 266; Nelson *v.* Leland, 22 How. 48, 56, 16 L. Ed. 2669; Montgomery *v.* Henry, 1 Dall. 49, 1 L. Ed. 32; New York, etc., Steamship Co. *v.* Calderwood, 19 How. 241, 15 L. Ed. 612.

As to what rivers are navigable and therefore within the admiralty jurisdiction, see the title NAVIGABLE WATERS.

42. Waters within body of county or state.—Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Towboat Co., 23 How. 209, 16 L. Ed. 433; Waring *v.* Clarke, 5 How. 441, 12 L. Ed. 226; Jackson *v.* Steamboat Magnolia, 20 How. 296, 299, 15 L. Ed. 909; The Steamboat Commerce, 1 Black 574, 17 L. Ed. 107; Ex parte Boyer, 109 U. S. 629, 27 L. Ed. 1056; Montgomery *v.* Henry, 1 Dall. 49, 1 L. Ed. 32; American Steamboat Co. *v.* Chace, 16 Wall. 522, 529, 21 L. Ed. 369.

"Remedies for marine torts, it is conceded, may be prosecuted in the admiralty courts, even though the wrongful act was committed on navigable waters within the body of a county." American Steamboat Co. *v.* Chace, 16 Wall. 522, 529, 21 L. Ed. 369.

43. Foreign navigable waters.—Panama R. Co. *v.* Napier Shipping Co., 166 U. S. 280, 41 L. Ed. 1004, distinguishing The Steamboat Commerce, 1 Black 574, 17 L. Ed. 107.

44. Vessels propelled by oars.—Perry *v.* Haines, 191 U. S. 17, 48 L. Ed. 73.

45. Canal boats.—Perry *v.* Haines, 191 U. S. 17, 48 L. Ed. 73; Ex parte Boyer, 109 U. S. 629, 27 L. Ed. 1056. See, also, The Quickstep, 9 Wall. 665, 19 L. Ed. 767.

Admiralty has jurisdiction in case of

do private suitors, except that it is exempt from costs, and from affirmative relief against it, beyond the demand or property in controversy.[46]

bb. *Foreign Warships.*—A public vessel of war of a foreign sovereign at peace with the United States, coming into our ports, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country.[47]

(2) *Necessity for Vessel to Be Engaged in Foreign or Interstate Commerce*—(a) *Former Rule.*—It was held, in several early cases, that, under the act of congress of 1845, extending jurisdiction of the federal courts to the vessels engaged in navigation upon the Great Lakes and waters connecting them between ports and places in the different states, the admiralty jurisdiction did not extend to vessels engaged in commerce between ports in the same states.[48]

(b) *Present Rule.*—But it is now well settled that the admiralty jurisdiction does not depend in any case upon the question of foreign or interstate commerce. If vessels are engaged upon navigable waters of the United States, the fact that they are engaged wholly in commerce between ports in the same state does not defeat the jurisdiction of courts of admiralty.[49] Thus, the admiralty jurisdic-

a collision between canal boats of more than twenty tons burden engaged in commerce upon the Illinois & Michigan canal. Ex parte Boyer, 109 U. S. 629, 27 L. Ed. 1056.

46. Vessels of United States.—The Siren, 7 Wall. 152, 19 L. Ed. 129.

A prize ship, in charge of a prize master and crew, on her way from the place of capture to the port of adjudication, committed a maritime tort by running into and sinking another vessel. Upon the libel of the government, the ship was condemned as lawful prize, and sold, and the proceeds paid into the registry. The owners of the sunken vessel, and the owners of her cargo, thereupon intervened by petition, asserting a claim upon the proceeds for the damages sustained by the collision. Held, that they were entitled to have their damages assessed and paid out of the proceeds before distribution to the captors. The Siren, 7 Wall. 152, 19 L. Ed. 129. See, generally, the title PRIZE.

47. Foreign warships.—The Schooner Exchange, 7 Cranch 116, 3 L. Ed. 287.

48. Former rule.—Allen *v.* Newberry, 21 How. 244, 16 L. Ed. 110; Maguire *v.* Card, 21 How. 248, 16 L. Ed. 118; The Hine *v.* Trevor, 4 Wall. 555, 18 L. Ed. 451. See, also, New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, 392, 12 L. Ed. 465. See, generally, the title COMMERCE.

Contract for supplies.—Thus a contract for supplies furnished to a vessel engaged in trade between ports in same state was held not within the admiralty jurisdiction. Maguire *v.* Card, 21 How. 248, 16 L. Ed. 118.

Contract of affreightment.—And it was held, that the admiralty jurisdiction did not extend, to a case where there was a shipment of goods from a port in a state to another port in the same state, both being in Wisconsin, although the vessel was a general ship, and bound, upon the voyage in question, to Chicago, a port in the state of Illinois. Allen *v.* Newberry, 21 How. 244, 16 L. Ed. 110. See, generally, the title SHIPS AND SHIPPING.

49. Present rule.—Perry *v.* Haines, 191 U. S. 17, 48 L. Ed. 73; Ex parte Garnett, 141 U. S. 1, 35 L. Ed. 631; The Belfast, 7 Wall. 624, 19 L. Ed. 266; Ex parte Boyer, 109 U. S. 629, 27 L. Ed. 1056; The Steamboat Commerce, 1 Black 574, 17 L. Ed. 107; Lord *v.* Goodall, etc., Co., 102 U. S. 541, 26 L. Ed. 224; The Eagle, 8 Wall. 15, 19 L. Ed. 365; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654.

Since the decision (A. D. 1851) in the Genesee Chief, 12 How. 443, which decided that admiralty jurisdiction was not limited in this country to tidewaters, but extended to the lakes and the waters connecting them; the previous act of 1845 (5 Stat. at Large 726), entitled "An act extending the jurisdiction of the district courts to certain cases upon the lakes and navigable waters connecting the same," and which went on the assumption (declared in the Genesee Chief, 12 How. 443, to be a false one) that the jurisdiction of the admiralty was limited to tidewaters, has become inoperative and ineffectual, with the exception of the clause which gives to either party the right of trial by jury when requested. The district courts, upon whom the admiralty jurisdiction was exclusively conferred by the judiciary act of 1789, can, therefore, take cognizance of all civil causes of admiralty jurisdiction upon the lakes and waters connecting them, the same as upon the high seas, bays, and rivers navigable from the sea. The Eagle, 8 Wall. 15, 19 L. Ed. 365.

For the same reason the following clause in the ninth section of the judiciary act of 1789, which confers exclusive original cognizance of all civil causes of admiralty jurisdiction upon the district courts, is equally inoperative: "Including all seizures under laws of impost, navigation, or trade of the United States

tion extends to contracts for repairs of vessels,[50] to contracts of affreightment,[51] to suits for collision,[52] and to suits for enforcement of limited liability,[53] although the vessels in question are engaged in commerce wholly within a state.

(3) *Launching as Prerequisite to Admiralty Jurisdiction.*—A vessel upon the stocks is not a subject of admiralty jurisdiction, and cannot be made liable in admiralty either in rem against herself or in personam against her owners upon contract or torts.[54]

(4) *Vessel Moored to Wharf.*—The jurisdiction of admiralty over a tort by a vessel is not ousted by the fact that when the wrong was done she had completed her voyage and was moored at a wharf where her cargo was to be discharged.[55]

b. *Property Other than Vessels*—(1) *Bridge.*—A bridge is not within the admiralty jurisdiction.[56]

(2) *Dry Dock.*—A dry dock is not a subject of salvage service or of admiralty jurisdiction, because it is not used for the purpose of navigation.[57]

(3) *Proceeds of Property or Vessel.*—By the admiralty law, all maritime claims upon the vessel extend equally to the proceeds arising from its sale, and are to be satisfied out of them.[58]

where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts, as well as upon the high seas." The Eagle, 8 Wall. 15, 19 L. Ed. 365.

50. Contracts for repair of vessels.—Perry *v.* Haines, 191 U. S. 17, 48 L. Ed. 73.

51. Contracts of Affreightment.—Admiralty has jurisdiction of a contract of affreightment, although the shipment is between ports in the same state, and a state statute giving a remedy in rem in state courts for a breach of such a contract is unconstitutional and void. The Belfast, 7 Wall. 624, 19 L. Ed. 266.

52. Collision.—To bring a case of collision within the admiralty jurisdiction of the federal courts, it is not necessary to show that either of the vessels was engaged in foreign commerce or commerce between the states. The Steamboat Commerce, 1 Black 574, 17 L. Ed. 107; The Syracuse, 12 Wall. 167, 20 L. Ed. 382. See, generally, the title COLLISION.

It makes no difference with respect to the admiralty jurisdiction over the Illinois and Michigan canal that the vessel libelled was at the time when the collision occurred on a voyage from one place in the state of Illinois to another place in the same state. Ex parte Boyer, 109 U. S. 629, 27 L. Ed. 1056.

53. Application of limited liability act.—Ex parte Garnett, 141 U. S. 1, 35 L. Ed. 631; Perry *v.* Haines, 191 U. S. 17, 48 L. Ed. 73. Generally, as to limitation of liability of shipowners, see the title SHIPS AND SHIPPING.

54. Launching as prerequisite to admiralty jurisdiction.—Tucker *v.* Alexandroff, 183 U. S. 424, 438, 46 L. Ed. 264.

A ship is born when she is launched, and lives so long as her identity is preserved. Prior to her launching she is a mere congeries of wood and iron—an ordinary piece of personal property—as distinctly a land structure as a house, and subject only to mechanics' liens created by state law and enforcible in the state courts. In the baptism of launching she receives her name, and from the moment her keel touches the water she is transformed, and becomes a subject of admiralty jurisdiction. She acquires a personality of her own; becomes competent to contract, and is individually liable for her obligations, upon which she may sue in the name of her owner, and be sued in her own name. Tucker *v.* Alexandroff, 183 U. S. 424, 438, 46 L. Ed. 264.

Damages caused by act of launching.—If in the process of launching a vessel escapes from the control of those about her and injures another, she is liable to a suit in rem for damages. Tucker *v.* Alexandroff, 183 U. S. 424, 438, 46 L. Ed. 264.

Jurisdiction of claim for repairs and supplies to vessel in dry dock.—See post, "Repairs to Vessel in Dry Dock or on Land," I, A, 6, a, (10), (d).

55. Vessels moored to wharf.—Leathers *v.* Blessing, 105 U. S. 626, 26 L. Ed. 1192.

56. Bridge.—A maritime lien can only exist upon movable things engaged in navigation, or upon things which are the subjects of commerce on the high seas or navigable waters. It cannot arise upon anything which is fixed and immovable. It does not, therefore, exist upon a bridge. The Rock Island Bridge, 6 Wall. 213, 18 L. Ed. 753. See, generally, the title MARITIME LIENS.

57. Dry dock.—Cope *v.* Vallette Dry Dock Co., 119 U. S. 625, 30 L. Ed. 501, Perry *v.* Haines, 191 U. S. 17, 48 L. Ed. 73. See, generally, the title SALVAGE.

58. Proceeds of property or vessel.—The Siren, 7 Wall. 152, 19 L. Ed. 129; Sheppard *v.* Taylor, 5 Pet. 675, 8 L. Ed. 269; Andrews *v.* Wall, 3 How. 568, 572, 11 L. Ed. 729; The St. Jago De Cuba, 9 Wheat. 409, 6 L. Ed. 122.

c. *Conflict of Jurisdiction as to Res.*—In a proceeding in admiralty, a seizure of the res by the marshal protects the property from interference by state process.[59] And on the other hand, a seizure of the res under a process of attachment issuing from a state court, cannot be interfered with by a process in rem against the same res issuing from a court of admiralty.[60]

6. Causes of Action within Jurisdiction—a. *Contracts*—(1) *In General.*—As to contracts, the true criterion whether they are within the admiralty and maritime jurisdiction, is their nature and subject matter, as, whether they are maritime contracts, having reference to maritime service, maritime transactions, or maritime casualties, without regard to the place where they were made. The admiralty jurisdiction, in cases of contract, is limited to contracts, claims, and services, purely maritime, and touching rights and duties appertaining to commerce and navigation.[61]

59. Interference by state process after seizure in admiralty.—Freeman *v.* Howe, 24 How. 450, 456, 16 L. Ed. 749; Buck *v.* Colbath, 3 Wall. 334, 335, 18 L. Ed. 257; The Slaves Reindeer, 2 Wall. 383, 17 L. Ed. 911.

Jurisdiction exclusive in admiralty.—If the case is one of which the admiralty has exclusive jurisdiction, the state court cannot prevent the exercise of that jurisdiction. Thus proceedings in admiralty to enforce maritime liens upon vessels may be sustained although the corporations owning the vessels have commenced proceedings in the state court for voluntary dissolution and the winding up of the corporation, and although a receiver has been appointed by the state court to take possession of the property. The state court having no jurisdiction to enforce a maritime lien, is also incapable of displacing it. Moran *v.* Sturges, 154 U. S. 256, 38 L. Ed. 981.

60. Seizure by state court not to be interfered with by admiralty process.—Where a vessel had been seized under a process of foreign attachment issuing from a state court in Pennsylvania, and a motion was pending in that court for an order of sale, a libel filed in the district court of the United States, for mariners' wages, and process issued under it, could not divest the authorities of the state of their authority over the vessel; and of the two sales made, one by the sheriff and one by the marshal, the sale by the sheriff must be considered as conveying the legal title to the property, and the sale by the marshal is inoperative. Taylor *v.* Carryl, 20 How. 583, 584, 15 L. Ed. 1028. See, generally, the title ATTACHMENT AND GARNISHMENT.

61. Jurisdiction of actions on contract in general.—People's Ferry Co. *v.* Beers, 20 How. 393, 401, 15 L. Ed. 961; The Resolute, 168 U. S. 437, 42 L. Ed. 533; The Belfast, 7 Wall. 624, 19 L. Ed. 266; Andrews *v.* Wall, 3 How. 568, 572, 11 L. Ed. 729; Insurance Co. *v.* Dunham, 11 Wall. 1, 29, 20 L. Ed. 90; The Steamboat Jefferson, 10 Wheat. 428, 429, 6 L. Ed. 358; The Steamboat Orleans *v.* Phœbus, 11 Pet. 175, 9 L. Ed. 677; Grant *v.* Poillon, 20 How. 162 168, 15 L. Ed. 873; Ex parte Easton, 95 U. S. 68, 72, 24 L. Ed. 373; Rea *v.* The Eclipse, 135 U. S. 599, 34 L. Ed. 269; Ex parte Garnett, 141 U. S. 1, 35 L. Ed. 631; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, 391, 12 L. Ed. 465; Martin *v.* Hunter, 1 Wheat. 304, 335, 4 L. Ed. 97; Jackson *v.* Steamboat Magnolia, 20 How. 296, 15 L. Ed. 909; Grant *v.* Poillon, 20 How. 162, 168, 15 L. Ed. 873; Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Towboat Co., 23 How. 209, 215, 16 L. Ed. 433; Ex parte Gordon, 104 U. S. 515, 516, 26 L. Ed. 104; Ex parte McNeil, 13 Wall. 236, 242, 20 L. Ed. 624; Scott *v.* Eaton, 15 Wall. 382, 384, 21 L. Ed. 114.

Admiralty jurisdiction extends to all contracts, claims, and services essentially maritime, among which are bottomry bonds, contracts of affreightment and contracts for the conveyance of passengers, pilotage on the high seas, wharfage, agreements of consortship, surveys of vessels, damages by the repair and outfit of ships belonging to foreign nations or to other states, and the wages of mariners. Ex parte Easton, 95 U. S. 68, 72, 24 L. Ed. 373.

Contracts made and to be performed on land.—Judicial power in cases of admiralty and maritime jurisdiction, has never been supposed to extend to contracts made on land and to be executed on land. The Propeller Genesee Chief *v.* Fitzhugh, 12 How. 443, 452, 13 L. Ed. 1058.

Contracts made on land to be executed at sea or vice versa.—"In general, contracts upon land, though to be executed on the sea, and contracts at sea, if to be executed on the land, are not cognizable by the English admiralty. There are some exceptions to this rule in that country; but none, it is believed, which affect the question now before us." Grant *v.* Poillon, 20 How. 162, 168, 15 L. Ed. 873.

Contracts to be performed on non-navigable waters.—Contracts to be performed on waters not navigable, are not maritime any more than those made to

(2) *Shipbuilding Contracts.*—A contract for building a ship, or supplying engines, timber, etc., is not a maritime contract and is not, therefore, within the admiralty jurisdiction.[62]

(3) *Contracts of Carriage*—(a) *Carriage of Passengers.*—A contract for the transportation of passengers by a steamship on the ocean is a maritime contract, and there is no distinction in principle between it and a contract for the like transportation of merchandise. The same liability attaches upon its execution both to the owner and the steamship.[63]

(b) *Contracts of Affreightment and Charter Party.*—Charter parties and contracts of affreightment are "maritime contracts" within the true meaning and construction of the constitution and act of congress, and cognizable in courts of admiralty by process either in rem or in personam.[64]

be performed on land. The Belfast, 7 Wall. 624, 637, 19 L. Ed. 266.

Mixed cases—Services partly on land and partly on water.—Mixed cases may arise, and often do arise, where the act and services done are of a mixed nature; as, where salvage services are performed partly on tidewaters and partly on shore, for the preservation of the property; in which the admiralty jurisdiction has been constantly exercised, to the extent of decreeing salvage. United States *v.* Coombs, 12 Pet. 72, 9 L. Ed. 1004.

"These mixed cases, however, will be found, not cases of tort, but of contract, which do not depend altogether upon the locality as the test of jurisdiction, such as contracts of materialmen, for supplies, charter parties, and the like. These cases depend upon the nature and subject matter of the contract, whether a maritime contract, and the service a maritime service to be performed upon the sea, or other navigable waters, though made upon land." The Plymouth, 3 Wall. 20, 34, 18 L. Ed. 125.

62. Shipbuilding contracts.—People's Ferry Co. *v.* Beers, 20 How. 393, 400, 15 L. Ed. 961; Roach *v.* Chapman, 22 How. 129, 16 L. Ed. 294; Morewood *v.* Enequist, 23 How. 491, 494, 16 L. Ed. 516; Norton *v.* Switzer, 93 U. S. 355, 366, 23 L. Ed. 903; Edwards *v.* Elliott, 21 Wall. 532, 556, 22 L. Ed. 487; The Winnebago, 205 U. S. 354, 363, 51 L. Ed. 836; Graham *v.* Morton Transp. Co., 203 U. S. 577, 51 L. Ed. 325; J. E. Rumbell, 148 U. S. 1, 11, 37 L. Ed. 345; dissenting opinion of Brewer, J. in Perry *v.* Haines, 191 U. S. 17, 39, 48 L. Ed. 73; Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 643, 44 L. Ed. 921.

For causes of action not cognizable in admiralty, either in rem or in personam, the states may not only grant liens, but may provide remedies for their enforcement. Contracts for the building of a ship are the most prominent examples of such as are not maritime in their character, and hence within this rule. Perry *v.* Haines, 191 U. S. 17, 25, 48 L. Ed. 73, citing People's Ferry Co. *v.* Beers, 20 How. 393, 15 L. Ed. 961; Roach *v.* Chapman, 22 How. 129, 16 L. Ed. 294; Edwards *v.* Elliott, 21 Wall. 532, 22 L. Ed. 487; Johnson *v.* Chicago, etc., Elevator Co., 119 U. S. 388, 30 L. Ed. 447.

Items furnished after launching, but really a part of the original construction are within the above rule. The Winnebago, 205 U. S. 354, 362, 51 L. Ed. 836.

Claims for engines and boilers furnished.—Where a steamboat was built at Louisville, in Kentucky, and the persons who furnished the boilers and engines libelled the vessel in admiralty in the district court of the United States for the eastern district of Louisiana, that court had no jurisdiction of the case. The state law of Kentucky, which creates a lien in such a case, cannot confer jurisdiction on the courts of the United States. Roach *v.* Chapman, 22 How. 129, 16 L. Ed. 294.

63. Carriage of passengers.—The Moses Taylor *v.* Hammons, 4 Wall. 411, 18 L. Ed. 397; The City of Panama, 101 U. S. 453, 25 L. Ed. 1061. See the titles CARRIERS; SHIPS AND SHIPPING.

64. Contracts of affreightment and charter parties.—Morewood *v.* Enequist, 23 How. 491, 493, 16 L. Ed. 516; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, 12 L. Ed. 465; Bags of Linseed, 1 Black 108, 112, 17 L. Ed. 35; The Atlas, 93 U. S. 302, 23 L. Ed. 863; The Eddy, 5 Wall. 481, 494, 18 L. Ed. 486; The Moses Taylor *v.* Hammons, 4 Wall. 411, 18 L. Ed. 397; Grant *v.* Poillon, 20 How. 162, 15 L. Ed. 873; Brittan *v.* Barnaby, 21 How. 527, 538, 16 L. Ed. 177; Raymond *v.* Tyson, 17 How. 53, 59, 15 L. Ed. 47; The Belfast, 7 Wall. 624, 19 L. Ed. 266; The Harriman, 9 Wall. 161, 19 L. Ed. 629; McKinlay *v.* Morrish, 21 Wall. 343, 16 L. Ed. 100; The Keokuk, 9 Wall. 517, 19 L. Ed. 744. See, generally, the title SHIPS AND SHIPPING.

Admiralty has jurisdiction in personam as well as in rem, over controversies arising out of contracts of affreightment between New York and Providence. New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, 12 L. Ed. 465.

Either party to a contract of affreightment may in a proper case enforce his lien by a proceeding in rem in the dis-

(4) *Towage Contracts.*—A contract to tow another vessel is a maritime contract, and there is no distinction in principle in this respect between a vessel and a raft.[65]

(5) *Contracts of Consortship.*—An agreement of consortship between the masters of two vessels engaged in the business known by the name of wrecking, is a contract capable of being enforced in an admiralty court, against property or proceeds in the custody of the court.[66]

(6) *Services by Master or Seamen*—(a) *Services by Master.*—It has been said that the master has no lien for his wages even though his services are maritime.[67] But it has been held, that where the master of a vessel claims a lien for his wages under a state statute, admiralty has jurisdiction of a libel in rem, and it is no defense that the master has not proceeded within the time allowed at law for the enforcement of his claim, as this will not affect the jurisdiction of the court.[68]

(b) *Services by Seamen.*—Over the subject of seamen's wages, the admiralty has an undisputed jurisdiction in rem, as well as in personam;[69] but while an agreement for wages may be sued on in admiralty,[70] and is not affected by the fact that the vessel at the time of the rendition of the services was in the hands of a receiver appointed by the state court,[71] a stipulation in a contract by which the master of a ship agrees to pay a sum of money in case the voyage should be altered or discontinued, can be enforced only at common law.[72] Where-

trict court. The Eddy, 5 Wall. 481, 494, 18 L. Ed. 486; Bags of Linseed, 1 Black 108, 112, 17 L. Ed. 35.

Where the master of a vessel was also part owner, and made a contract of affreightment with a lumber company, of which he was also a member, and the cargo was consigned to the master, it was held, that the case is not within admiralty jurisdiction, but appropriate to that of a court of chancery. Grant *v.* Poillon, 20 How. 162, 15 L. Ed. 873.

A contract to transport a cargo from Hamburg to New York is nothing more than a contract between the owner of property and a carrier to convey a given subject for hire. It is a contract made upon land to be terminated and executed upon the land for a stipulated compensation, and not strictly or properly a maritime contract, in any sense beyond any other contract, in the performance of which a party or agent would be compellable to cross the ocean or even to pass a river. Ship Howard *v.* Wissman, 18 How. 231, 234, 15 L. Ed. 363.

65. Towage contract.—Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 44 L. Ed. 921. See, generally, the title TOWAGE, TUGS AND TOWS.

66. Contract of consortship.—Andrews *v.* Wall, 3 How. 568, 11 L. Ed. 729.

Such an agreement of consortship extends to the owners and crews, and is not merely personal between the masters. Andrews *v.* Wall, 3 How. 568, 11 L. Ed. 729.

67. Services of master.—The Steamboat Orleans *v.* Phœbus, 11 Pet. 175, 184, 9 L. Ed. 677. (But in this case the services were not maritime.) And see The Williams H. Hoag, 168 U. S. 443, 42 L. Ed. 537. See, generally, the title MASTERS OF VESSELS.

68. Enforcement of state lien for master's wages.—The William H. Hoag, 168 U. S. 443, 42 L. Ed. 537. See, generally, the title MASTERS OF VESSELS.

69. Services by seamen.—Sheppard *v.* Taylor, 5 Pet. 675, 8 L. Ed. 269; Grant *v.* Poillon, 20 How. 162, 166, 15 L. Ed. 873; Andrews *v.* Wall, 3 How. 568, 572, 11 L. Ed. 729; The Resolute, 168 U. S. 437, 42 L. Ed. 533; Leon *v.* Galceran, 11 Wall. 185, 20 L. Ed. 74; The St. Jago De Cuba, 9 Wheat. 409, 6 L. Ed. 122. See the title SEAMEN.

70. Agreement to pay wages.—Grant *v.* Poillon, 20 How. 162, 168, 15 L. Ed. 873; The Resolute, 168 U. S. 437, 42 L. Ed. 533.

71. Effect of vessel being in hands of receiver appointed by state court when services rendered.—The fact that a vessel was, at the time the services were rendered, in the hands of a receiver appointed by a state court, is not absolutely inconsistent with a lien in rem for seamen's wages. Prima facie, the rendition of mariner's services imports a lien, and the mere fact that the vessel is navigated by a receiver does not necessarily negative such lien, although there may be facts in the particular case to show that the above statute does not apply, or that credit was expressly given to the owner, to the charterer, or to some third person. In fact, the question of lien or no lien is not one of jurisdiction, but of merits. The Resolute, 168 U. S. 437, 42 L. Ed. 533. See the title RECEIVERS.

72. Stipulation to pay sum upon alteration of discontinuance of voyage.—Grant *v.* Poillon, 20 How. 162, 168, 15 L. Ed. 873.

ever the lien for the wages exists, and attaches upon the proceeds, admiralty will exert its jurisdiction by way of monition to the parties holding the proceeds.[73]

(7) *Wharfage.*—Claims for wharfage, arising out of either an express or implied contract, are cognizable in admiralty.[74]

(8) *Pilotage.*—Claims for pilotage fees are within the jurisdiction of the admiralty,[75] even in cases where a fixed compensation for pilotage is established by state laws.[76]

(9) *Mortgages.*—The courts of the United States, in the exercise of admiralty jurisdiction, cannot take cognizance of questions of property between the mortgagee of a vessel and the owner. The mere mortgage of a ship, other than that of an hypothecated bottomry, is a contract without any of the characteristics or attendants of a maritime loan, and is entered into by the parties to it, without reference to navigation or perils of the sea.[77] But admiralty has

73. Enforcement of claim against proceeds.—Sheppard *v.* Taylor, 5 Pet. 675, 8 L. Ed. 269; Andrews *v.* Wall, 3 How. 568, 572, 11 L. Ed. 729; The St. Jago De Cuba, 9 Wheat. 409, 6 L. Ed. 122.

Enforcement of lien for wages against award of board of treaty commissioners.—When a ship was seized by Spanish authorities, and under subsequent treaty, the owners were awarded a certain sum for the seizure, it was held, that the seamen who have served on the ship before the seizure had a lien on the sum awarded which might be enforced in admiralty. Sheppard *v.* Taylor, 5 Pet. 675, 8 L. Ed. 269.

74. Claims for wharfage.—If the vessel or water craft is a foreign one, or belongs to a port of a state other than that where the wharf is used, the claim of the wharfinger for such use is a maritime lien against the vessel, which he may enforce by a proceeding in rem, or he may resort to a libel in personam against the owner of such vessel or water craft. Ex parte Easton, 95 U. S. 68, 24 L. Ed. 373. See the title WHARVES.

75. Claims for pilotage.—Ex parte McNiel, 13 Wall. 236, 20 L. Ed. 624; Hobart *v.* Drogan, 10 Pet. 108, 9 L. Ed. 363; Ex parte Hagar, 104 U. S. 520, 26 L. Ed. 816; Andrews *v.* Wall, 3 How. 568, 572, 11 L. Ed. 729; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, 391, 12 L. Ed. 465. See, generally, the title PILOTS.

Prohibition will not lie to restrain admiralty from taking jurisdiction of a claim for pilotage fees. Ex parte Hagar, 104 U. S. 520, 26 L. Ed. 816. See the titles PILOTS; PROHIBITION.

76. When compensation fixed by state laws.—Where a fixed compensation for pilotage is established by state laws, under authority of the act of congress, the jurisdiction of the district courts of the United States, in suits for pilotage, is not ousted by the adoption of the state laws, by the act of congress; the only effect is, to leave the jurisdiction concurrent in the state courts; and, if the party should sue in the admiralty, to limit his recovery to the same precise sum, to which he would be entitled under the state laws, adopted by congress, if he should sue in the state courts. The Brig Hope, 10 Pet. 108, 9 L. Ed. 363. See, generally, the title PILOTS.

77. Mortgage of ship.—Bogart *v.* Steamboat John Jay, 17 How. 399, 15 L. Ed. 95; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; J. E. Rumbell, 148 U. S. 1, 15, 37 L. Ed. 345; Rea *v.* The Eclipse, 135 U. S. 599, 34 L. Ed. 269. See, generally, the title MORTGAGES AND DEEDS OF TRUST.

"It has been repeatedly decided in the admiralty and common-law courts in England, that the former have no jurisdiction in questions of property between a mortgagee and the owner. No such jurisdiction has ever been exercised in the United States. No case can be found in either country where it has been done." Bogart *v.* Steamboat John Jay, 17 How. 399, 401, 15 L. Ed. 95.

A debt secured by the mortgage of a ship does not give the ownership of it to the mortgagee. He may use the legal title to make the ship available for its payment. A legal title passes conditionally to the mortgagee. Where there has been a failure to pay, he cannot take the ship manu forti, but he must resort either to a court of equity or to statutory remedies for the same purpose when they exist, to bar the mortgagor's right of redemption by a foreclosure, which is to operate at such time afterward, when there shall be a foreclosure without a sale, as the circumstances of the case may make it equitable to allow. Indeed, after a final order of foreclosure has been signed and enrolled, and the time fixed by it for the payment of the money has passed, the decree may be opened to give further time, if there are circumstances to make it equitable to do so, with an ability in the mortgagor to make prompt payment. Bogart *v.* Steamboat John Jay, 17 How. 399, 402, 15 L. Ed. 95.

Courts of admiralty have always taken

jurisdiction, after a vessel has been sold by its order and the proceeds have been paid into the registry, to pass upon the claim of the mortgagee, as of any other person, to the fund, and to determine the priority of the various claims.[78]

(10) *Repairs and Supplies*—(a) *In General.*—The admiralty possesses a general jurisdiction in cases of suits by materialmen, in personam, and in rem.[79]

(b) *Repairs or Supplies Furnished Domestic Vessels.*—As to repairs or necessaries in the port or state to which the ships belong, the case is governed altogether by the local law of the state, as no lien is implied, unless it is recognized by that law; if, however, the local law gives a lien, it may be enforced in the admiralty in proceedings in rem.[80]

the same view of a mortgage of a ship, and of the remedies for the enforcement of them, that courts of chancery have done of such a mortgage and of any other mortgaged chattel. But, from the organization of the former and its modes of proceeding, they cannot secure to the parties to such a mortgage the remedies and protection which they have in a court of chancery. They have, therefore, never taken jurisdiction of such a contract to enforce its payment, or by a possessory action to try the title, or a right to the possession of a ship. Bogart *v.* Steamboat John Jay, 17 How. 399, 402, 15 L. Ed. 95.

English courts exercise jurisdiction under statute.—Where admiralty courts in England exercise jurisdiction upon the subject of mortgages of ships, it is under a statute of Victoria; and in the United States the admiralty and maritime jurisdiction remains as it was before. Bogart *v.* Steamboat John Jay, 17 How. 399, 15 L. Ed. 95.

78. Jurisdiction as to claim of mortgagee to fund in court.—J. E. Rumbell, 148 U. S. 1, 15, 37 L. Ed. 345, citing Andrews *v.* Wall, 3 How. 568, 11 L. Ed. 729; Schuchardt *v.* Baggage, 19 How. 239, 15 L. Ed. 625; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654.

79. General jurisdiction over suits by materialmen.—The General Smith, 4 Wheat. 438, 4 L. Ed. 609. See, generally, the title MARITIME LIENS.

80. Repairs or supplies furnished domestic vessels.—The General Smith, 4 Wheat. 438, 4 L. Ed. 609; The Steamboat Planter, 7 Pet. 324, 8 L. Ed. 700; Ramsay *v.* Allegree, 12 Wheat. 611, 6 L. Ed. 746; J. E. Rumbell, 148 U. S. 1, 12, 37 L. Ed. 345; The St. Jago De Cuba, 9 Wheat. 409, 6 L. Ed. 122; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; The Edith, 94 U. S. 518, 24 L. Ed. 167; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, 390, 12 L. Ed. 465; The John G. Stevens, 170 U. S. 113, 117, 42 L. Ed. 969; Perry *v.* Haines, 191 U. S. 17, 24, 48 L. Ed. 73; The Glide, 167 U. S. 606, 624, 42 L. Ed. 296; Meyer *v.* Tupper, 1 Black 522, 17 L. Ed. 180; The Steamboat Orleans *v.* Phœbus, 11 Pet. 175, 9 L. Ed. 677. See, generally, the title MARITIME LIENS.

The 12th admiralty rule adopted in 1844 authorized proceedings in rem where the libellant was entitled to a lien under the local or state law. Meyer *v.* Tupper, 1 Black 522, 17 L. Ed. 180; The Lottawanna, 20 Wall. 201, 218, 22 L. Ed. 259.

The 12th rule of admiralty practice adopted in 1844 was repealed by the rule adopted in 1858 which denied the process in rem to a party in admiralty except where the maritime law gives a lien. Meyer *v.* Tupper, 1 Black 522, 17 L. Ed. 180; The Lottawanna, 20 Wall. 201, 218, 22 L. Ed. 259; The Lulu, 10 Wall. 192, 19 L. Ed. 906; The Belfast, 7 Wall. 624, 644, 19 L. Ed. 266; Leon *v.* Galceran, 11 Wall. 185, 191, 20 L. Ed. 74; American Steamboat Co. *v.* Chace, 16 Wall. 522, 533, 21 L. Ed. 369; Maguire *v.* Card, 21 How. 248, 16 L. Ed. 118.

By the rule adopted May 6, 1872, where a lien is given by the local law, the party in whose favor it exists may proceed either in rem or in personam. The Lottawanna, 21 Wall. 558, 581, 22 L. Ed. 654.

If the action was instituted while the rule was in force, the court may enforce the lien by a proceeding in rem after the repeal of the rule. Meyer *v.* Tupper, 1 Black 522, 17 L. Ed. 180.

Whenever the statute of a state gives a lien, to be enforced by process in rem against the vessel, for repairs or supplies in her home port, this lien, being similar to the lien arising in a foreign port under the general law, is in the nature of a maritime lien, and therefore may be enforced in admiralty in the courts of the United States. J. E. Rumbell, 148 U. S. 1, 12, 37 L. Ed. 345; The Steamboat Planter, 7 Pet. 324, 8 L. Ed. 700; Meyer *v.* Tupper, 1 Black 522, 17 L. Ed. 180; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; Rule 12 in Admiralty as amended in 1872; Webb *v.* Sharp, 13 Wall. 14, 20 L. Ed. 478.

This lien, in the nature of a maritime lien, and to be enforced by process in the nature of admiralty process, is within the exclusive jurisdiction of the courts of the United States, sitting in admiralty. J. E. Rumbell, 148 U. S. 1, 12, 37 L. Ed. 345; The Moses Taylor *v.* Hammons, 4 Wall. 411, 18 L. Ed. 397; The Hine *v.* Trevor, 4 Wall. 555, 18 L. Ed. 451; The Belfast, 7 Wall. 624, 19 L. Ed. 266; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; Johnson *v.* Chicago, etc., Elevator Co.,

(c) *Repairs or Supplies Furnished to Foreign Vessels.*—Where the repairs have been made, or necessaries furnished, to a foreign ship, or to a ship in the ports of a state to which she does not belong, the general maritime law gives a lien on ships as security, and the party may maintain a suit in the admiralty to enforce his right.[81]

(d) *Repairs to Vessels in Dry Dock or upon Land.*—A contract for repairs to a vessel in dry dock is a maritime contract, of which admiralty has jurisdiction,[82] but the repair of articles of a ships furniture or machinery on land, is not a maritime contract enforceable in admiralty.[83]

(11) *Contribution.*—Where two vessels are held to be both in fault for a collision and the damages are divided, and subsequently one of them pays to the cargo owners a loss sustained by the collision, its claim against the other for

119 U. S. 388, 30 L. Ed. 447; The Glide, 167 U. S. 606, 607, 42 L. Ed. 296.

In Louisiana, workmen employed in the construction or repairs of ships or boats enjoy the privilege of a lien on such ships or boats, without being bound to reduce their contracts to writing, whatever may be their amount, but this privilege ceases, if they have allowed the ship or boat to depart, without exercising their rights. The state law, therefore, gives a lien and admiralty has jurisdiction. The Steamboat Planter, 7 Pet. 324, 8 L. Ed. 700.

A libel was filed in the district court of the United States for the eastern district of Louisiana, against the steamship Planter, by H. & V., citizens of New Orleans, for the recovery of a sum of money alleged to be due to them, as shipwrights, for work done and materials found in the repairs of the Planter; the libel asserted, that, by the admiralty law and the laws of the state of Louisiana, they had a lien and privilege upon the boat, her tackle, etc., for the payment of sums due for the repairs and materials, and prayed admiralty process against the boat, etc.; the answer of the owners of the Planter averred, that they were citizens of Louisiana, residing in New Orleans, that the libellants are also citizens, and that the court have no jurisdiction of the cause. Held, that this was a case of admiralty jurisdiction. The Steamboat Planter, 7 Pet. 324, 8 L. Ed. 700.

Lien under state law must be perfected.—The lien claimed under the state law must be perfected. The Lottawanna, 21 Wall. 558, 559, 22 L. Ed. 654.

If no lien is given by a state law for repairs and supplies to a domestic ship in a port of that state, the materialmen may nevertheless maintain a libel in personam. The General Smith, 4 Wheat. 438, 4 L. Ed. 609; Andrews *v.* Wall, 3 How. 568, 572, 11 L. Ed. 729. And see Ramsay *v.* Allegre, 12 Wheat. 611, 6 L. Ed. 746, where it was doubted whether a proceeding in personam could be maintained in any case where there was no lien which could be enforced by a proceeding in rem.

But a proceeding in personam cannot be maintained against the owner of a ship by materialmen furnishing supplies, for the ship, in her home port, where the local law gives no specific lien, where the owner has given a negotiable promissory note for the debt, and it is not tendered to be given up, or actually surrendered, at the hearing. Ramsay *v.* Allegre, 12 Wheat. 611, 6 L. Ed. 746.

81. Repairs or supplies furnished to foreign vessels.—The General Smith, 4 Wheat. 438, 4 L. Ed. 609; The Steamboat Planter, 7 Pet. 324, 8 L. Ed. 700; Andrews *v.* Wall, 3 How. 568, 572, 11 L. Ed. 729; The Ship Virgin, 8 Pet. 538, 8 L. Ed. 1036; J. E. Rumbell, 148 U. S. 1, 19, 37 L. Ed. 345; The Glide, 167 U. S. 606, 624, 42 L. Ed. 296; The John G. Stevens, 170 U. S. 113, 117, 42 L. Ed. 969; The Lottawanna, 20 Wall. 201, 218, 22 L. Ed. 259; The Guy, 9 Wall. 758, 19 L. Ed. 710; The Kalorama, 10 Wall. 204, 214, 19 L. Ed. 941; The St. Jago De Cuba, 9 Wheat. 409, 6 L. Ed. 122; The Laura, 19 How. 22, 15 L. Ed. 534; The Grapeshot, 9 Wall. 129, 19 L. Ed. 651; The Lula, 10 Wall. 192, 19 L. Ed. 906. See the title MARITIME LIENS.

Effect of pendency of action in state courts.—It is no objection to the assertion in the admiralty of a maritime lien against a vessel for necessary repairs and supplies to her in a foreign port that the libellant has brought a common-law action for the value of the repairs and supplies, the action not being yet determined. The Kalorama, 10 Wall. 204, 19 L. Ed. 941. See, generally, the title ABATEMENT, REVIVAL AND SURVIVAL, ante, p. 12.

82. Repairs to vessels in dry dock.—"As all serious repairs upon the hulls of vessels are made in dry dock, the proposition that such repairs are made on land would practically deprive the admiralty courts of their largest and most important jurisdiction in connection with repairs." Perry *v.* Haines, 191 U. S. 17, 48 L. Ed. 73. See, ante, "Launching as Prerequisite to Admiralty Jurisdiction," I, A, 5, a, (3).

83. Repairs on land.—Perry *v.* Haines, 191 U. S. 17, 32, 48 L. Ed. 73

contribution for its share of the damage which has been thus paid to the cargo owners is one within the admiralty jurisdiction.[84]

(12) *Contracts of Bottomry or Respondentia.*—The jurisdiction of admiralty over contracts of bottomry and respondentia is treated in another title.[85]

(13) *Marine Insurance.*—Admiralty has jurisdiction of a libel in personam upon a policy of marine insurance, to recover for a loss.[86]

b. *Torts*—(1) *In General.*—The courts of the United States, proceeding as courts of admiralty and maritime jurisdiction, have jurisdiction in cases of maritime torts, in personam as well as in rem.[87]

(2) *Jurisdiction Dependent on Place Where Tort Committed.*—The wrong and injury complained of must have been committed wholly upon the high seas or navigable waters, or, at least the substance and consummation of the same must have taken place upon these waters, to be within the admiralty jurisdiction. In other words the cause of damage, in technical language, whatever else attended it, must have been there complete.[88]

(3) *Nature and Character of Tort*—(a) *In General.*—The definition of the term "torts," when used in reference to admiralty jurisdiction, is not confined to wrongs or injuries committed by direct force. It includes, also, wrongs suffered in consequence of the negligence or malfeasance of others, where the remedy at common law is by an action on the case.[89]

84. Contribution, where one of two vessels mutually in fault has paid cargo owners entire loss.—Erie R. Co. *v.* Erie, etc., Trans. Co., 204 U. S. 220, 225, 51 L. Ed. 450. See, generally, the title COLLISION.

"The rule of the common law, even, that there is no contribution between wrongdoers, is subject to exception. Pollock, Torts, 7th ed., 195, 196. Whatever its origin, the admiralty rule in this country is well known to be the other way." Erie R. Co. *v.* Erie Trans. Co., 204 U. S. 220, 225, 51 L. Ed. 450, citing The North Star, 106 U. S. 17, 27 L. Ed. 91; The Sterling & Equator, 106 U. S. 647, 27 L. Ed. 98. See the title CONTRIBUTION AND EXONERATION.

85. Contracts of bottomry or respondentia.—See the title BOTTOMRY AND RESPONDENTIA.

86. Marine insurance.—Insurance Co. *v.* Dunham, 11 Wall. 1, 20 L. Ed. 90; In re Louisville Underwriters, 134 U. S. 488, 33 L. Ed. 991. See, generally, the title MARINE INSURANCE.

87. Jurisdiction over torts—In general.—Manro *v.* Almeida, 10 Wheat. 473, 6 L. Ed. 369; The Plymouth, 3 Wall. 20, 36, 18 L. Ed. 125; Ex parte Easton, 95 U. S. 68, 72, 24 L. Ed. 373; Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Towboat Co., 23 How. 209, 215, 16 L. Ed. 433; The Rock Island Bridge, 6 Wall. 213, 215, 18 L. Ed. 753; Talbott *v.* Three Brigs, 1 Dall. 95, 1 L. Ed. 52; Martin *v.* Hunter, 1 Wheat. 304, 335, 4 L. Ed. 97; Ex parte Fasset, 142 U. S. 479, 35 L. Ed. 1087; Ex parte Gordon, 104 U. S. 575, 576, 26 L. Ed. 104; Murray *v.* The Charming Betsey, 2 Cranch 64, 2 L. Ed. 208; The Apollon, 9 Wheat. 362, 6 L. Ed. 111; The Belfast, 7 Wall. 624, 19 L. Ed. 266.

88. Jurisdiction dependent on place where tort committed.—The Plymouth, 3 Wall. 20, 34, 18 L. Ed. 125; The Rock Island Bridge, 6 Wall. 213, 215, 18 L. Ed. 753; Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Towboat Co., 23 How. 209, 215, 16 L. Ed. 433; The Steamboat Commerce, 1 Black 574, 579, 17 L. Ed. 107; The Belfast, 7 Wall. 624, 637, 19 L. Ed. 266; The Steamboat New World *v.* King, 16 How. 469, 14 L. Ed. 1019; Insurance Co. *v.* Dunham, 11 Wall. 1, 29, 20 L. Ed. 90; Ex parte Garnett, 141 U. S. 1, 18, 35 L. Ed. 631.

The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or navigable waters where it occurred. The Plymouth, 3 Wall. 20, 36, 18 L. Ed. 125; The Rock Island Bridge, 6 Wall. 213, 215, 18 L. Ed. 753.

The locus, or territory, of maritime jurisdiction where torts must be committed, and where business must be transacted in order to be maritime in their character, extends not only to the main sea, but to all the navigable waters of the United States, or bordering on the same, whether land locked or open, salt or fresh, tide or no tide. Insurance Co. *v.* Dunham, 11 Wall. 1, 20 L. Ed. 90. See, generally, the title NAVIGABLE WATERS.

89. Nature and character of tort.—Philadelphia, etc., R. Co. *v.* Philadelphia etc., Towboat Co., 23 How. 209, 215, 16 L. Ed. 433; Leathers *v.* Blessing, 105 U. S. 626, 630, 26 L. Ed. 1192, 1194.

Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance. The Plymouth, 3 Wall. 20, 36, 18 L. Ed. 125.

Marine torts and injuries of which admiralty has jurisdiction include assaults or other personal injuries, collision, spoliation, and damage, illegal seizures or

(b) *Personal Injuries.*—A libel for injuries sustained by a passenger on a steamboat, proceeding on navigable waters is within the admiralty jurisdiction, and may be enforced by a proceeding in rem against the vessel,[90] and an injury to persons rightfully going on board a vessel at a wharf, is also within the admiralty jurisdiction.[91]

(c) *Death by Wrongful Act.*—In the absence of an act of congress or a state statute giving a right of action therefor, a suit in admiralty cannot be maintained to recover damages for the death of a human being caused by negligence.[92] Indeed, admiralty has no jurisdiction to entertain a libel in rem in such case even where, by the local law, a right of action survives to the administrator or relatives of the deceased, unless a lien is expressly created by the law.[93]

(d) *Injuries to Ships or Vessels*—aa. *Obstructions to Navigation.*—It is a rule of maritime law, from the earliest time, "that if a ship run foul of an anchor left without a buoy, the person who placed it there shall respond in damages."[94] This rule extends to injuries to ships or vessels by piles left in navigable waters so as to cause injuries to vessels,[95] to an injury to a vessel by collision with a pier,[96] and to an injury to a vessel by a sunken wreck at a dock where the ship discharges her cargo.[97]

bb. *Collision.*—Controversies growing out of collisions are cognizable in the admiralty.[98]

other depredation on property, and illegal dispossession or withholding of possession from the owners of ships. Ex parte Easton, 95 U. S. 68, 72, 24 L. Ed. 373.

90. Injury to passengers.—The Steamboat New World *v.* King, 16 How. 469, 14 L. Ed. 1019; The City of Panama, 101 U. S. 453, 463, 25 L. Ed. 1061.

91. Injury to persons rightfully on board while vessel is moored to wharf.—Where a vessel was moored to a wharf on the Mississippi river, with her gang plank extending to the shore, and the plaintiff, in accordance with the usual custom, went on board to ascertain whether there was any freight for him, and was injured owing to the negligent manner in which the goods were stored on the vessel, it was held, that admiralty had jurisdiction. Leathers *v.* Blessing, 105 U. S. 626, 26 L. Ed. 1192.

92. Death by Wrongful Act.—The Corsair, 145 U. S. 335, 36 L. Ed. 727; The Harrisburg, 119 U. S. 199, 30 L. Ed. 358; The Alaska, 130 U. S. 201, 32 L. Ed. 923.

But prohibition will not lie to the district court of the United States sitting in admiralty to prevent it from taking jurisdiction of a libel for damages for the death of seamen caused by collision, the court having jurisdiction of the vessel and of the tort. Ex parte Gordon, 104 U. S. 515, 26 L. Ed. 104; Ex parte Ferry Co., 104 U. S. 519, 26 L. Ed. 815. See the title PROHIBITION.

As to whether right of action for death by wrongful act is within the clause saving to suitors the right of common-law remedies, see ante, "Action for Death by Wrongful Act," I, A, 2, b, (2), (b), bb, (ff), bbb.

93. Right to sue in rem under state statute givig right of action.—The Corsair, 145 U. S. 335, 36 L. Ed. 727; The Albert Dumois, 177 U. S. 240, 258, 44 L. Ed. 751. See, also, Workman *v.* New York, 179 U. S. 532, 587, 45 L. Ed. 314.

94. Injuries to ships by obstructions to navigation.—Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Towboat Co., 23 How. 209, 215, 16 L. Ed. 433. See, generally, the title NAVIGABLE WATERS.

95. Piles obstructing navigation.—Where a railroad company employed contractors to build a bridge, and for that purpose to drive piles in a river, and, owing to the abandonment of the contract, the piles were left in the river, in such a condition as to injure a vessel when sailing on her course, the railroad company were responsible for the injury. Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Towboat Co., 23 How. 209, 16 L. Ed. 433.

96. Injury to a vessel by collision with a pier.—Atlee *v.* Packet Co., 21 Wall. 389, 22 L. Ed. 619.

97. Injuries to vessel by sunken wreck.—Panama R. Co. *v.* Napier Shipping Co., 166 U. S. 280, 41 L. Ed. 1004.

98. Collision.—The Continental, 14 Wall. 345, 355, 20 L. Ed. 801; The Belgenland, 114 U. S. 355, 29 L. Ed. 152; The Moses Taylor *v.* Hammons, 4 Wall. 411, 18 L. Ed. 397; The Hine *v.* Trevor, 4 Wall. 555, 18 L. Ed. 451; The Belfast, 7 Wall. 624, 19 L. Ed. 266; Leon *v.* Galceran, 11 Wall. 185, 20 L. Ed. 74; American Steamboat Co. *v.* Chace, 16 Wall. 522, 21 L. Ed. 369; Schoonmaker *v.* Gilmore, 102 U. S. 118, 119, 26 L. Ed. 95; Workman *v.* New York, 179 U. S. 532, 573, 45 L. Ed. 314; Peters *v.* Warren Ins. Co., 14 Pet. 99, 10 L. Ed. 371; The Siren, 7 Wall. 152, 19 L. Ed. 129. See, generally, the title COLLISION.

A vessel is liable in rem for collision, whether operated by owner or a char-

(e) *Injuries on Land Caused by Ships or Vessels.*—Admiralty has no jurisdiction over injuries on shore caused by ships or vessels.[99] Thus admiralty has no jurisdiction of an action for injuries to a building caused by the spars of a vessel;[1] nor of an action for damage by fire to buildings on land due to the negligence of those in charge of a ship engaged on navigable waters.[2]

(f) *Injuries to Aids to Navigation by Ships or Vessels.*—Admiralty has jurisdiction over injuries to a beacon, although it is built on piles driven in the bottom.[3]

(g) *Seizure or Dispossession of Property.*—Every violent dispossession of property on the ocean is, prima facie, a maritime tort, and, as such, it belongs to the admiralty jurisdiction.[4] In case of the violent seizure on the ocean of a sum of money, the owner is entitled to admiralty process against the property, where it is brought within the reach of admiralty process.[5] And in such case, where the property cannot be reached by admiralty process, the remedy in personam is pursued in admiralty.[6] The owner of property wrongfully seized by

terer. The China, 7 Wall. 53, 70, 19 L. Ed. 67; The Barnstable, 181 U. S. 464, 468, 45 L. Ed. 955. See, generally, the title COLLISION.

Municipal fire boat.—A libel in personam may be maintained in admiralty against the city of New York to recover for injuries to a vessel by collision caused by the negligence of those in charge of a fire boat belonging to the city while answering a fire call. Workman *v.* New York, 179 U. S. 552, 45 L. Ed. 314.

The local law yields to the general maritime law with respect to the liability of a city for an injury to a vessel by collision with its fireboat on its way to assist in putting out the fire. Workman *v.* New York, 179 U. S. 552, 45 L. Ed. 314.

Collision on high seas between foreign ships.—See, ante, "Jurisdiction of Suits between Foreigners." I, A, 3.

99. Injuries on shore by vessels.—Johnson *v.* Chicago, etc., Elevator Co., 119 U. S. 388, 30 L. Ed. 447; Homer Ramsdell Transp. Co. *v.* La Compagnie Generale Transatlantique, 182 U. S. 406, 411, 45 L. Ed. 1155, 1159; The Blackhealth, 195 U. S. 361, 49 L. Ed. 236.

Where damages done is done wholly upon land, the fact that the cause of the damage originated on water subject to the admiralty jurisdiction does not make the cause one for the admiralty. The Plymouth, 3 Wall. 20, 18 L. Ed. 125.

1. Injury to building.—Where the jib boom of a vessel which was being towed up the Chicago river, at Chicago, struck a warehouse on the shore and caused the loss of a large quantity of corn stored therein, it was held, that the cause of action was not within the admiralty jurisdiction. Johnson *v.* Chicago, etc., Elevator Co., 119 U. S. 388, 30 L. Ed. 447.

The fact that the state laws give a lien on the vessel does not alter the rule. The cases in which state statutes have been held void by this court, to the extent in which they authorized suits in rem against vessels, because they gave to the state courts admiralty jurisdiction, were only cases where the causes of action were cognizable in the admiralty. Johnson *v.* Chicago, etc., Elevator Co., 119 U. S. 388, 30 L. Ed. 447.

2. Fires on land set by vessels.—Where buildings on land are ignited through the negligence of those in charge of a ship in navigable waters, admiralty has no jurisdiction of a suit, either in rem or in personam, by any one of the sufferers by the fire, to recover damages from the vessel or her owner, the substance and consummation of the tort having taken place on land. The Plymouth, 3 Wall. 20, 30, 18 L. Ed. 125; Ex parte Phenix Ins. Co., 118 U. S. 610, 30 L. Ed. 274.

Hence, where a vessel lying at a wharf, on waters subject to admiralty jurisdiction, took fire, and the fire, spreading itself to certain storehouses on the wharf, consumed these and their stores, it was held, not to be a case for admiralty proceeding. The Plymouth, 3 Wall. 20, 18 L. Ed. 125.

3. Injuries to beacon.—The Blackheath, 195 U. S. 361, 49 L. Ed. 236. (Beacon 15 or 20 feet from the channel of Mobile river or bay, in water 12 or 15 feet deep.)

4. Seizure on ocean.—L'Invincible, 1 Wheat. 238, 255, 4 L. Ed. 80; Slocum *v.* Mayberry, 2 Wheat. 1, 4 L. Ed. 169.

Seizure by commissioned cruiser during war.—But sitting and judging, as such courts do, by the law of nations, the moment it is ascertained to be a seizure by a commissioned cruiser, made in the legitimate exercise of the rights of war, the progress of a neutral court of admiralty is arrested; for the circumstance is, in those courts, a sufficient evidence of right. L'Invincible, 1 Wheat. 238, 255, 4 L. Ed. 80. See the title PRIZE.

5. Jurisdiction in rem.—Manro *v.* Almeida, 10 Wheat. 473, 486, 6 L. Ed. 369.

6. Jurisdiction in personam.—Manro *v.* Almeida, 10 Wheat. 473, 486, 6 L. Ed. 369, citing Maley *v.* Shattuck, 3 Cranch 458, 22 L. Ed. 498; Murray *v.* The Charming Betsey, 2 Cranch 64, 2 L. Ed. 208.

the collector of customs may maintain a libel in admiralty against the collector, the seizure being a marine tort cognizable in admiralty.[7]

(h) *Loss of Goods by Carriers.*—Admiralty has jurisdiction of a proceeding against a ship for loss of goods carried.[8]

c. *Actions in Regard to Ownership or Possession of Vessels.*—The courts of admiralty of the United States have jurisdiction of petitory as well as mere possessory actions.[9]

d. *Equitable Relief*—(1) *Direct Proceedings for Equitable Relief.*—Admiralty has no general equity jurisdiction and cannot afford equitable relief in a direct proceeding for that purpose.[10] It cannot entertain a bill or libel to correct a mistake,[11] or declare or enforce a trust or equitable title,[12] or exercise jurisdiction in matters of account,[13] or entertain a bill for specific perform-

7. Seizure of yacht by collector of port.—Where a pleasure yacht was purchased in England and brought to this country and was seized by the collector at the port of New York on the ground that she was subject to duty, it was held, that the owner could maintain a libel against the collector, the seizure being a marine tort cognizable in admiralty. Ex parte Fassett, 142 U. S. 479, 35 L. Ed. 1087; The Conquerer, 166 U. S. 110, 41 L. Ed. 937; Schoenfeld *v.* Hendricks, 152 U. S. 691, 694, 38 L. Ed. 601. See, generally, the title REVENUE LAWS.

8. Loss of goods by carrier.—Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788; Pearce *v.* Page, 24 How. 228, 16 L. Ed. 623. See ante, "Contracts of Affreightment and Charter Party," I, A, 6, a, (3), (b).

9. Actions in regard to ownership or possession of vessel.—Ward *v.* Peck, 18 How. 267, 15 L. Ed. 383.

"In the case of the New England Ins. Co. *v.* Brig Sarah Anne, 13 Pet. 387, 10 L. Ed. 213, in this court, the only question was the title or ownership of the brig yet the cause was entertained without any expression of doubt as to jurisdiction." Ward *v.* Peck, 18 How. 267, 15 L. Ed. 383.

10. Equitable relief in direct proceedings for equitable relief.—United States *v.* Cornell Steamboat Co., 202 U. S. 184, 50 L. Ed. 987; Rea *v.* The Eclipse, 135 U. S. 599, 34 L. Ed. 269. See, generally, the title EQUITY.

11. Bill or libel to correct mistake.—Ward *v.* Thompson, 22 How. 330, 16 L. Ed. 249; Rea *v.* The Eclipse, 135 U. S. 599, 34 L. Ed. 269. See, generally, the title MISTAKE AND ACCIDENT.

12. Bill or libel to enforce trust or equitable title.—Ward *v.* Thompson, 22 How. 330, 16 L. Ed. 249; Rea *v.* The Eclipse, 135 U. S. 599, 34 L. Ed. 269. See, generally, the title MISTAKE AND ACCIDENT.

Where persons authorized to sell a vessel, sold it, upon condition that it was not damaged, beyond a certain sum, and one of the owners refused to sell upon such condition, it was held, that admiralty had no jurisdiction to grant relief to the purchaser who had paid part of the purchase money, the contract of sale upon condition being entirely unauthorized and the purchaser's rights being purely equitable. Rea *v.* The Eclipse, 135 U. S. 599, 34 L. Ed. 269.

13. Matters of account.—Grant *v.* Poillon, 20 How. 162, 15 L. Ed. 873; Minturn *v.* Maynard, 17 How. 477, 15 L. Ed. 235; Rea *v.* The Eclipse, 135 U. S. 599, 34 L. Ed. 269. See, generally, the title ACCOUNTS AND ACCOUNTING, ante, p. 70.

Accounting between part owners of vessels.—Admiralty has no jurisdiction in matters of account between part owners of a ship or vessel. Ward *v.* Thompson, 22 How. 330, 333, 16 L. Ed. 249; Grant *v.* Poillon, 20 How. 162, 168, 15 L. Ed. 873; Orleans *v.* Phoebus, 11 Pet. 175, 9 L. Ed. 677; Vandewater *v.* Mills, 19 How. 82, 92, 15 L. Ed. 554.

If the party desires an account, his remedy is in a court of chancery. If his complaint be for a breach of some independent covenant, he should seek his remedy in a court of common law. Ward *v.* Thompson, 22 How. 330, 333, 16 L. Ed. 249.

A contract between two persons, one of whom had chartered a vessel, whereby he was to act as master, and the other as mate of the vessel, and the two were to share equally in the profits of the contemplated voyages, was held not to be within the admiralty jurisdiction. Grant *v.* Poillon, 20 How. 162, 169, 15 L. Ed. 873.

Where certain parties joined together to carry on an adventure in trade for their mutual benefit—one contributing a vessel, and the other his skill, labor, experience, etc.—and there was to be a communion of profits on a fixed ratio, it was a contract over which a court of admiralty had no jurisdiction. Ward *v.* Thompson, 22 How. 330, 16 L. Ed. 249.

Accounting between principal and agent.—Where a libel was filed in personam, against the owners of a steamboat in California, by their general agent or broker, for the balance of an account for money paid, laid out, and expended, in paying for supplies, repairs, and advertising of the steamboat, together with commissions

ance,[14] or take jurisdiction of a suit for the foreclosure of a mortgage upon vessels,[15] or decree the sale of a vessel to settle a dispute between part owners,[16] and, unlike a court of equity, admiralty has no power to sequester property.[17]

(2) *Applying Equitable Principles to Cases within Admiralty Jurisdiction.*—But courts of admiralty may apply equitable principles to subjects within their jurisdiction, and, in the distribution of proceeds in their possession or under their control, may give effect to equitable claims.[18]

e. *General Average.*—The owner of cargo jettisoned has a maritime lien on the vessel for the contributory share due from the vessel on an adjustment of the general average, which lien may be enforced by a proceeding in rem in the admiralty.[19] But since in cases of general average the lien is a qualified one, dependent upon the possession of the goods, and ceases when they are delivered to the owner or consignee, after such delivery the admiralty has no jurisdiction of a suit in personam by the owner of the vessel against the consignee for contribution by way of general average.[20]

on the disbursements, the libel was properly dismissed, for want of jurisdiction, since there was nothing in the case to bring it within the class of maritime contracts; and the local law of California, which authorized an attachment of vessels for supplies or repairs, does not extend to the balance of accounts between agent and principal, who have never dealt on the credit, pledge, or security of the vessel. Mintburn *v.* Maynard, 17 How. 477, 15 L. Ed. 235. See, generally, the title PRINCIPAL AND AGENT.

14. Specific performance.—Montgomery *v.* Henry, 1 Dall. 49, 1 L. Ed. 32; Rea *v.* The Eclipse, 135 U. S. 599, 34 L. Ed. 269. See, generally, the title SPECIFIC PERFORMANCE.

15. Foreclosure of mortgages.—A court of admiralty cannot decree the sale of a ship for an unpaid mortgage, or declare her to be the property of the mortgagees, and direct possession of her to be given to them. Bogart *v.* The Steamboat John Jay, 17 How. 399, 15 L. Ed. 95; Rea *v.* The Eclipse, 135 U. S. 599, 34 L. Ed. 269; J. E. Rumbell, 148 U. S. 1, 15, 37 L. Ed. 345. See ante, "Mortgages," I, A, 6, a, (9). And see, generally, the title MORTGAGES AND DEEDS OF TRUST.

16. Sale of vessel to settle dispute between part owners.—The jurisdiction of courts of admiralty, in cases of part owners having unequal interest and shares, is not, and never has been, applied to direct a sale, upon any dispute between them as to the trade and navigation of the ship engaged in maritime voyages, properly so called; the majority of the owners have a right to employ the ship on such voyages as they please, giving a stipulation to the dissenting owners for the safe return of the ship, if the latter, upon a proper libel filed in the admiralty, require it; and the minority of the owners may employ the ship in the like manner, if the majority decline to employ her at all. The Steamboat Orleans *v.* Phoebus, 11 Pet. 175, 9 L. Ed. 677; Grant *v.* Poillon, 20 How. 162, 168, 15 L. Ed. 873.

17. Sequestering property.—Ex parte Phillips, 131 U. S. Appendix CXLVII, 25 L. Ed. 781.

18. Applying equitable principals to cases within jurisdiction.—United States *v.* Cornell Steamboat Co., 202 U. S. 184, 50 L. Ed. 987; Rea *v.* The Eclipse, 135 U. S. 599, 34 L. Ed. 269; Watts *v.* Camors, 115 U. S. 353, 29 L. Ed. 406; The Ship Virgin, 8 Pet. 538, 8 L. Ed. 1036; Bags of Linseed, 1 Black 108, 114, 17 L. Ed. 35.

When the facts before a court of admiralty, in a matter within its jurisdiction, are such that a court of equity would relieve, and a court of law could not, it is the duty of the court of admiralty to grant relief. Watts *v.* Camors, 115 U. S. 353, 29 L. Ed. 406; The Ship Virgin, 8 Pet. 538, 8 L. Ed. 1036.

"Even in cases of marine torts, independent of prize, courts of admiralty are in the habit of giving or withholding damages upon enlarged principles of justice and equity, and have not circumscribed themselves within the positive boundaries of mere municipal law. They have exercised a conscientious discretion upon the subject. A party who is in delicto, ought to make a strong case, to entitle himself to general relief." The Marianna Flora, 11 Wheat. 1, 54, 6 L. Ed. 405.

19. General average.—Dupont de Nemours *v.* Vance, 19 How. 162, 15 L. Ed. 584. See, generally, the title GENERAL AVERAGE.

20. Suit by owner of vessel against consignee, after delivery of goods.—Cutler *v.* Rae, 7 How. 729, 12 L. Ed. 890.

Where a vessel was run on shore by the captain in order to save the lives of those on board, and for the preservation of the cargo, by which act the vessel was totally lost, but the cargo saved and delivered to the consignee, a libel in personam, filed by the owner of the vessel against the consignee of the cargo (and the result would be the same if filed against the owner of the cargo), for a contribution by way of general average, cannot be sustained in the admiralty courts of the United States. Cutler *v.* Rae, 7 How. 729, 12 L. Ed. 890.

f. *Maritime Liens.*—Jurisdiction to enforce maritime liens by a proceeding in rem is exclusive in the admiralty.[21] But, a party may, of course, waive his maritime lien and resort to his common-law remedy either in the state or federal courts.[22]

g. *Seizures for Forfeitures.*—Informations to recover municipal forfeitures, where the seizure is made in navigable waters, are cognizable in admiralty,[23]

21. Maritime liens.—Leon *v.* Galceran, 11 Wall. 185, 20 L. Ed. 74; Norton *v.* Switzer, 93 U. S. 355, 23 L. Ed. 903. Moran *v.* Sturges, 154 U. S. 256, 38 L. Ed. 981; The Belfast, 7 Wall. 624, 19 L. Ed. 266; The Eagle, 8 Wall. 15, 19 L. Ed. 365; Edwards *v.* Elliott, 21 Wall. 532, 22 L. Ed. 487; The Lottawanna, 20 Wall. 201, 22 L. Ed. 259; United States *v.* Ames, 99 U. S. 35, 25 L. Ed. 295; American *v.* Chace, 16 Wall. 522, 21 L. Ed. 369; Norton *v.* Switzer, 93 U. S. 355, 23 L. Ed. 903; Johnson *v.* Chicago, etc., Elevator Co., 119 U. S. 388, 397, 30 L. Ed. 447; J. E. Rumbell, 148 U. S. 1, 37 L. Ed. 345; The Glide, 167 U. S. 606, 42 L. Ed. 296; Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 642, 44 L. Ed. 921; Perry *v.* Haines, 191 U. S. 17, 24, 48 L. Ed. 73; The General Smith, 4 Wheat. 438, 4 L. Ed. 609; The Lottawanna, 21 Wall. 558, 579, 22 L. Ed. 654; The Steamer St. Lawrence, 1 Black 522, 529, 17 L. Ed. 180; The John G. Stevens, 170 U. S. 113, 117, 42 L. Ed. 969; The Maggie Hammond, 9 Wall. 435, 19 L. Ed. 772; The Kalorama, 10 Wall. 204, 19 L. Ed. 941. See, generally, the title MARITIME LIENS.

A proceeding in a state court to wind up a corporation owning vessels, and the appointment of a receiver, does not divest the admiralty of jurisdiction to enforce maritime liens existing against the vessels, and a judgment of the state court enjoining libellants from any further proceedings to enforce their liens upon such vessels is improper, especially where the vessels were seized under process issued from the admiralty court before the receiver had qualified. Moran *v.* Sturges, 154 U. S. 256, 38 L. Ed. 981.

Lien added by state statute to maritime cause of action.—Wherever any lien is given by a state statute for a cause of action cognizable in admiralty, either in rem or in personam, proceedings in rem to enforce such lien are within the exclusive jurisdiction of the admiralty courts. Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 642, 44 L. Ed. 921; The Belfast, 7 Wall. 624, 19 L. Ed. 266; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; J. E. Rumbell, 148 U. S. 1, 37 L. Ed. 345; The Glide, 167 U. S. 606, 42 L. Ed. 296; Moran *v.* Sturges, 154 U. S. 256, 38 L. Ed. 981.

"It is competent for the states to create liens for necessaries furnished to domestic vessels, and that such liens will be enforced by the courts of admiralty under their general jurisdiction over the subject of necessaries. The General Smith, 4 Wheat. 438, 4 L. Ed. 609; The Steamboat Planter, 7 Pet. 324, 8 L. Ed. 700; The Steamer St. Lawrence, 1 Black 522, 17 L. Ed. 180; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; The Belfast, 7 Wall. 624, 19 L. Ed. 266; J. E. Rumbell, 148 U. S. 1, 12, 37 L. Ed. 345." The Roanoke, 189 U. S. 185, 194, 47 L. Ed. 770. See, generally, the title MARITIME LIENS.

Lien given by state statute for non-maritime cause of action.—State legislatures have no authority to create a maritime lien, nor can they confer any jurisdiction upon a state court to enforce such a lien by a suit or proceeding in rem as practised in the admiralty courts. The Belfast, 7 Wall. 624, 19 L. Ed. 266; Edwards *v.* Elliott, 21 Wall. 532, 22 L. Ed. 487; The Moses Taylor *v.* Hammons, 4 Wall. 411, 18 L. Ed. 397; The Hine *v.* Trevor, 4 Wall. 555, 18 L. Ed. 451; Knapp, etc., Co. *v.* McCaffrey, 177 U. S. 638, 642, 44 L. Ed. 921; The Roanoke, 189 U. S. 185, 47 L. Ed. 770; Perry *v.* Haines, 191 U. S. 17, 48 L. Ed. 73; The Winnebago, 205 U. S. 354, 363, 51 L. Ed. 836; The John G. Stevens, 170 U. S. 113, 117, 42 L. Ed. 969.

22. Waiver of lien and resort to common-law remedy.—Leon *v.* Galceran, 11 Wall. 185, 20 L. Ed. 74; Shoonmaker *v.* Gilmore, 102 U. S. 118, 26 L. Ed. 95; Norton *v.* Switzer, 93 U. S. 355, 23 L. Ed. 903; American Steamboat Co. *v.* Chace, 16 Wall. 522, 21 L. Ed. 369; The Belfast, 7 Wall. 624, 646, 19 L. Ed. 266; The Moses Taylor *v.* Hammons, 4 Wall. 411, 18 L. Ed. 397; The Hine *v.* Trevor, 4 Wall. 555, 18 L. Ed. 451; Johnson *v.* Chicago, etc., Elevator Co., 119 U. S. 388, 397, 30 L. Ed. 447; The Glide, 167 U. S. 606, 42 L. Ed. 297; Perry *v.* Haines, 191 U. S. 17, 24, 48 L. Ed. 73; The Lottawanna, 21 Wall. 558, 579, 22 L. Ed. 654; The Kalorama, 10 Wall. 204, 19 L. Ed. 941.

23. Seizure on navigable waters.—Confiscation Cases, 7 Wall. 454, 19 L. Ed. 196; Morris's Cotton, 8 Wall. 507, 511, 19 L. Ed. 481; Armstrong's Foundry *v.* United States, 6 Wall. 766, 769, 18 L. Ed. 882; Insurance Co. *v.* United States, 6 Wall. 759, 765, 18 L. Ed. 879; United States *v.* Hart, 6 Wall. 770, 772, 18 L. Ed. 914; Garnhart *v.* United States, 16 Wall. 162, 165, 21 L. Ed. 275; The Sarah, 8 Wheat. 391, 394, 5 L. Ed. 644; Cleveland Ins. Co. *v.* Globe Ins. Co., 98 U. S. 366, 375, 25 L. Ed. 201; Whelan *v.* United States, 7 Cranch 112, 3 L. Ed. 286. See, generally, the title REVENUE LAWS.

Cases of seizure upon waters navigable from the sea by vessels of more than ten tons burden, for breach of the laws

but it is otherwise where the seizure is made on land.[24] Thus, informations for forfeiture for violation of the nonintercourse[25] or nonimportation laws,[26] for violation of the act of congress against the slave trade,[27] and for violation of the laws against piracy,[28] are cases of admiralty and maritime jurisdiction. Proceedings in rem for forfeiture are in no way dependent upon the personal conviction of the offender.[29]

h. *Proceedings to Limit Liability of Ship Owners.*—A proceeding under the act of March, 1851, to limit the liability of ship owners is one pre-eminently of admiralty jurisdiction,[30] provided the cause of action for which the limitation of

of the United States, are civil cases of admiralty and maritime jurisdiction. Whelan *v.* United States, 7 Cranch 112, 3 L. Ed. 286.

The place of seizure, and not the place of committing the offense, decides jurisdiction. The Betsey and Charlotte, 4 Cranch 443, 2 L. Ed. 673; The Merino, 9 Wheat. 391, 6 L. Ed. 118.

24. Where the seizure is made on land the suit is one at common law. Confiscation Cases, 7 Wall. 454, 19 L. Ed. 196; Morris's Cotton, 8 Wall. 507, 19 L. Ed. 481; Armstrong's Foundry *v.* United States, 6 Wall. 766, 769, 18 L. Ed. 882; Insurance Co. *v.* United States, 6 Wall. 759, 765, 18 L. Ed. 879; United States *v.* Hart, 6 Wall. 770, 772, 18 L. Ed. 914; Garnhart *v.* United States, 16 Wall. 162, 165, 21 L. Ed. 275; The Sarah, 8 Wheat. 391, 394, 5 L. Ed. 644; Cleveland Ins. Co. *v.* Globe Ins. Co., 98 U. S. 366, 375, 25 L. Ed. 201; United States *v.* Winchester, 99 U. S. 372, 25 L. Ed. 479. See, generally, the title REVENUE LAWS.

Cotton found on land in Mississippi was, February 18, 1863, seized by the naval forces of the United States, without the order of the president, and delivered by an officer of the navy to the marshal of the United States for the southern district of Illinois. A libel was filed in the district court for that district, alleging as the ground of seizure that the cotton belonged to a person in armed rebellion against the United States. The cotton was sold, and a decree rendered, whereby one-half of the proceeds was paid into the treasury of the United States, and the other half ordered to be paid to the officer as informer, who declined to accept it, and the check therefor was deposited with the assistant treasurer at St. Louis, on whom it had been drawn. At the instance of the admiral, the supreme court of the district of Columbia sitting in admiralty took jurisdiction of the case, and ordered the check to be deposited with the assistant treasurer at Washington, and the money to remain in his hands subject to the further order of the court. The check was so deposited, and the court by its decree distributed the money to the captors. Held, that the decrees were void, and that the owner of the cotton was entitled to recover the net proceeds of the sale of it. United States *v.* Winchester, 99 U. S. 372, 25 L. Ed. 479.

25. Violation of nonintercourse act.—The Octavia, 1 Wheat. 20, 4 L. Ed. 25; The Betsey & Charlotte, 4 Cranch 443, 2 L. Ed. 673. See, generally, the title EMBARGO AND NONINTERCOURSE LAWS.

26. Violation of nonimportation laws.—The Samuel, 1 Wheat. 9, 4 L. Ed. 23; The Sarah, 8 Wheat. 391, 5 L. Ed. 644. See, generally, the title EMBARGO AND NONINTERCOURSE LAWS.

27. Violation of slave trade act.—The Josefa Segunda, 10 Wheat. 312, 6 L. Ed. 329; The Scooner Sally, 2 Cranch 406, 2 L. Ed. 320. See, generally, the title SLAVES.

The district courts have jurisdiction, under the slave trade acts, to determine who are the actual captors, under a state law made in pursuance of the 4th section of the slave trade act of 1807, c. 77, and directing the proceeds of the sale of the negroes to be paid, "one moiety for the use of the commanding officer of the capturing vessel," etc. The Josefa Segunda, 10 Wheat. 312, 6 L. Ed. 329.

28. Violation of laws against piracy.—The Palmyra, 12 Wheat. 1, 6 L. Ed. 531. See, generally, the title PIRACY.

29. Personal conviction of the offender not necessary.—The Palmyra, 12 Wheat. 1, 6 L. Ed. 531; The Three Friends, 166 U. S. 1, 41 L. Ed. 897 (seizure for breach of neutrality laws).

30. Proceedings to limit liability of ship owners.—Oregon, etc., Navigation Co. *v.* Balfour, 179 U. S. 55, 45 L. Ed. 82; Providence, etc., Steamship Co. *v.* Hill Mfg. Co., 109 U. S. 578, 27 L. Ed. 1038; The Benefactor, 103 U. S. 239, 26 L. Ed. 351; The Scotland, 105 U. S. 24, 26 L. Ed. 1001; Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017; In re Morrison, 147 U. S. 14, 37 L. Ed. 60, 67; Norwich Co. *v.* Wright, 13 Wall. 104, 20 L. Ed. 585; In re Garnett, 141 U. S. 1, 35 L. Ed. 631; The City of Norwich, 118 U. S. 468, 30 L. Ed. 134; The Great Western, 118 U. S. 520, 30 L. Ed. 156; Ex parte Slayton, 105 U. S. 451, 26 L. Ed. 1066.

A proceeding to limit the liability of shipowners is an equitable action, but one not in any sense inconsistent with the admiralty jurisdiction. In re Morrison, 147 U. S. 14, 37 L. Ed. 60, 67; Oregon, etc., Navigation Co. *v.* Balfour, 179 U. S. 55, 45 L. Ed. 82.

Generally, as to proceedings to limit

liability is sought is within the admiralty jurisdiction.[31]

i. *Prize.*—Jurisdiction in cases of prize is conferred upon the admiralty courts by the grant of jurisdiction of all causes of "admiralty and maritime jurisdiction" as prize is a branch of admiralty jurisdiction.[32] Admiralty courts, sitting as prize courts, are authorized to decree restitution in whole or in part when the capture is wrongful; and if it is made without probable cause, may order and decree damages and costs against the captors.[33]

the liability of ship owners, see the title SHIPS AND SHIPPING.

31. Original cause of action must be within admiralty jurisdiction.—A district court cannot take jurisdiction in admiralty of a petition for a limitation of liability where it would not have had cognizance in admiralty originally of the cause of action involved. Ex parte Phenix Ins. Co., 118 U. S. 610, 30 L. Ed. 274.

32. Prize.—The Admiral, 3 Wall. 603, 18 L. Ed. 58; United States *v.* Ames, 99 U. S. 35, 25 L. Ed. 295; The City of Panama, 101 U. S. 453, 25 L. Ed. 1061; The Paquete Habana, 175 U. S. 677, 680, 44 L. Ed. 320; Glass *v.* The Sloop Betsey, 3 Dall. 6, 1 L. Ed. 485; Penhallow *v.* Doane, 3 Dall. 54, 97, 1 L. Ed. 507; Brown *v.* United States, 8 Cranch 110, 137, 3 L. Ed. 504; The L'Invincible, 1 Wheat. 238, 259, 4 L. Ed. 80; The Thompson, 3 Wall. 155, 162, 18 L. Ed. 55; United States *v.* Weed, 5 Wall. 62, 18 L. Ed. 531; The Siren, 7 Wall. 152, 162, 19 L. Ed. 129; United States *v.* Peters, 3 Dall. 121, 1 L. Ed. 535; The Santissima Trinidad, 7 Wheat. 283, 350, 5 L. Ed. 454; The Alerta *v.* Moran, 9 Cranch 359, 3 L. Ed. 758; Bingham *v.* Cabbot, 3 Dall. 19, 1 L. Ed. 491; W. B. *v.* Latimer, 4 Dall. App. 1, 1 L. Ed. 915; Martin *v.* Hunter, 1 Wheat. 304, 4 L. Ed. 97; Talbot *v.* Three Brigs, 1 Dall. 95, 1 L. Ed. 52; Kean *v.* The Gloucester, 2 Dall. 36, 1 L. Ed. 278; The Adeline, 9 Cranch 244, 3 L. Ed. 719; The Amiable Nancy, 3 Wheat. 546, 4 L. Ed. 456; Jennings *v.* Carson, 4 Cranch 2, 2 L. Ed. 531; Talbot *v.* Jasen, 3 Dall. 133, 1 L. Ed. 540. See, generally, the title PRIZE.

Judicial cognizance of prize cases is derived from that article of the constitution which ordains that the judicial power shall extend to all cases of admiralty and maritime jurisdiction; and the district courts for many years exercised jurisdiction in such cases without any other authority from congress than what was conferred by the ninth section of the judiciary act, which gave those courts exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including the seizures therein mentioned, the rule adopted being that prize jurisdiction was involved in the general delegation of admiralty and maritime cognizance, as conferred by the language of that section. United States *v.* Ames, 99 U. S. 35, 25 L. Ed. 295; Glass *v.* The Sloop Betsey, 3 Dall. 6, 1 L. Ed. 485; The Admiral, 3 Wall. 603, 18 L. Ed. 58; Jennings *v.* Carson, 4 Cranch 2, 29, 2 L. Ed. 531.

The district court holds both its prize jurisdiction and its jurisdiction as an instance court of admiralty from the constitution and the act of congress, and it is but one court, with these different branches of admiralty jurisdiction, as well as cognizance of other and distinct subjects. United States *v.* Weed, 5 Wall. 62, 69, 18 L. Ed. 531; The Siren, 7 Wall. 152, 161, 19 L. Ed. 129.

Jurisdiction not dependent on prize act.—The district courts of the United States have jurisdiction of questions of prize, and its incidents, independent of the special provisions of the prize act of June 26th, 1812, ch. 430. The Amiable Nancy, 3 Wheat. 546, 4 L. Ed. 456.

Suits by prize crew for prize money.—The crew of a privateer may file a libel in admiralty for their share of the prize money. Kearn *v.* The Gloucester, 2 Dall. 36, 1 L. Ed. 278.

Capture on navigable river.—Admiralty has jurisdiction of a capture on a navigable river of property belonging to a citizen of the state wherein the capture is made. W. B. *v.* Latimer, 4 Dall. Appendix 1, 12, 1 L. Ed. 915.

Recaptures.—Recaptures are emphatically cases of prize; for the definition of prize goods is, that they are goods taken on the high seas, jure belli, out of the hands of the enemy. When so taken, the captors have an undoubted right to proceed against them as belligerent property, in a court of prize; for in no other way, and in no other court, can the questions presented on a capture jure belli be properly or effectually examined. The Adeline, 9 Cranch 244, 285, 3 L. Ed. 719.

Where vessel is not within jurisdiction of court.—The United States district court in admiralty has no jurisdiction of a libel against a former privateer for the wrongful seizure as prize of war of a vessel belonging to a citizen of the United States, where the vessel so seized is not within the jurisdiction of the court. United States *v.* Peters, 3 Dall. 121, 1 L. Ed. 535. See, also, The Santissima Trinidad, 7 Wheat. 283, 350, 5 L. Ed. 454.

33. Power to decree restitution or give damages.—The Thompson, 3 Wall. 155, 162, 18 L. Ed. 55; Glass *v.* The Sloop Betsey, 3 Dall. 16, 1 L. Ed. 485; The

j. *Salvage.*—A claim for salvage may be enforced in the admiralty either by proceedings in rem or in personam.[34] And incidentally admiralty has the power to determine to whom the residue of the property ought to be delivered.[35]

k. *Surveys.*—The subject of surveys is one of admiralty jurisdiction, since mariners and freighters have to claim the aid of the admiralty to release them from their contract in cases of a defect of seaworthiness.[36]

l. *Enforcement of Lien for Duties.*—The lien for duties cannot in any case, be enforced by a libel of information in the admiralty; the revenue jurisdiction of the district courts, proceeding in rem, only extending to cases of seizures for forfeitures under laws of impost, navigation or trade of the United States. But a suit at common law may be instituted in the district or circuit courts, in the name of the United States, founded upon their legal right to recover the possession of goods upon which they have a lien for duties, or to recover damages for the illegal taking or detaining the same.[37]

7. Criminal Jurisdiction.—Under the grant by the constitution of judicial power to the United States in all cases of admiralty and maritime jurisdiction, and under the rightful legislation of congress, the courts of the United States, merely by virtue of this grant of judicial power, and in the absence of legislation by congress, have no criminal jurisdiction whatever. The criminal jurisdiction of the courts of the United States is wholly derived from the statutes of the United States.[38]

B. Courts—1. District Courts.—As to cases of admiralty and maritime jurisdiction, including prize causes, the judiciary act of 1789, in § 9, vested the

Santissima Trinidad, 7 Wheat. 283, 5 L. Ed. 454.

Prize courts have exclusive jurisdiction and an enlarged discretion as to the allowance of freight, damages, expenses, and costs in all cases of captures, and as to all torts, and personal injuries, and ill-treatments, and abuse of power connected with captured jure belli; and the courts will frequently award large and liberal damages in those cases. The Siren, 7 Wall. 152, 161, 19 L. Ed. 129.

The jurisdiction is not, therefore, limited to the determination of the simple question of prize or no prize. But whatever may be the limitation upon the jurisdiction of a prize court in England, there is no such limitation upon the district court sitting as a prize court in this country. The Siren, 7 Wall. 152, 161, 19 L. Ed. 129.

Outstanding claims upon the vessel, existing previous to the capture, cannot be considered. This exclusion rests not on the ground of any supposed inability of the court to pass upon these claims correctly, but because they are superseded by the capture. The Siren, 7 Wall. 152, 162, 19 L. Ed. 129, citing The Battle, 6 Wall. 498, 18 L. Ed. 933; The Hampton, 5 Wall. 372, 18 L. Ed. 659; The Frances, 8 Cranch 418, 3 L. Ed. 609.

Jurisdiction of state courts after decree of restitution.—Where restitution is ordered by a prize court, common-law courts have jurisdiction of an action to recover the value of the vessel. Taxier *v.* Sweet, 2 Dall. 81, 1 L. Ed. 298.

34. Salvage.—Admiralty Rule 19; United States *v.* Connell Steamboat Co., 202 U. S. 184, 190, 50 L. Ed. 987; McDonough *v.* Dannery, 3 Dall. 188, 1 L. Ed. 563; The Sybil, 4 Wheat. 98, 4 L. Ed. 522; The Sabine, 101 U. S. 384, 25 L. Ed. 982; Hobart *v.* Drogan, 10 Pet. 108, 9 L. Ed. 363; Peisch *v.* Ware, 4 Cranch 347, 2 L. Ed. 643; The Schooner North Carolina, 15 Pet. 40, 48, 10 L. Ed. 653. See, also, Cope *v.* Vallette Dry Dock Co., 119 U. S. 625, 30 L. Ed. 501 (holding dry docks not to be a subject of salvage). See ante, "Contracts of Consortship," I, A, 6, a, (5). And see, generally, the title SALVAGE.

35. Disposition of residue after allowance of salvage.—McDonough *v.* Dannery, 3 Dall. 188, 1 L. Ed. 563.

36. Surveys.—Dorr *v.* Pacific Ins. Co., 7 Wheat. 581, 612, 5 L. Ed. 528. See, generally, the title SHIPS AND SHIPPING.

37. Enforcement of lien for duties.—United States *v.* 350 Chests of Tea, 12 Wheat. 486, 487, 6 L. Ed. 702. See, generally, the title REVENUE LAWS.

38. Criminal jurisdiction.—Manchester *v.* Massachusetts, 139 U. S. 240, 262, 35 L. Ed. 159; Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 32 L. Ed. 1017; The Belfast, 7 Wall. 624, 19 L. Ed. 266; The Eagle, 8 Wall. 15, 19 L. Ed. 365; Leon *v.* Galceran, 11 Well. 185, 20 L. Ed. 74; Steamboat Co. *v.* Chace, 16 Wall. 522, 21 L. Ed. 369; Schoonmaker *v.* Gilmore, 102 U. S. 118, 26 L. Ed. 95; Insurance Co. *v.* Dunham, 11 Wall. 1, 20 L. Ed. 90; Jones *v.* United States, 137 U. S. 202, 211, 34 L. Ed. 691. Generally, as to criminal jurisdiction of offenses on high seas, see the title CRIMINAL LAW.

exclusive original jurisdiction in the district court, without regard to the sum or value in controversy.[39]

2. Circuit Courts.—The only admiralty and maritime jurisdiction which belongs to the circuit courts of the United States is appellate.[40]

3. Appellate Courts—a. *Original Jurisdiction.*—The supreme court has not original jurisdiction of a personal suit against a state to recover property in its possession, where the property is not in the custody of a court of admiralty, or brought within its jurisdiction, and in the possession of a private person.[41]

39. District courts.—The Paquete Habana, 175 U. S. 677, 680, 44 L. Ed. 320; American Ins. Co. *v.* Canter, 1 Pet. 511, 7 L. Ed. 242; Jennings *v.* Carson, 1 Pet. 2, 7, 2 L. Ed. 531; Glass *v.* The Sloop Betsey, 3 Dall. 16, 1 L. Ed. 485; The Admiral, 3 Wall. 603, 612, 18 L. Ed. 58; Moran *v.* Sturges, 154 U. S. 256, 38 L. Ed. 981; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, 390, 12 L. Ed. 465; The Moses Taylor *v.* Hammons, 4 Wall. 411, 18 L. Ed. 397; The Hine *v.* Trevor, 4 Wall. 555, 18 L. Ed. 451; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; Johnson *v.* Chicago, etc., Elevator Co., 119 U. S. 388, 30 L. Ed. 447; J. E. Rumbell, 148 U. S. 1, 37 L. Ed. 345; Gelston *v.* Hoyt, 3 Wheat. 246, 312, 4 L. Ed. 381; The Sarah, 8 Wheat. 391, 394, 5 L. Ed. 644; Penhallow *v.* Doane, 3 Dall. 133, 1 L. Ed. 540; Talbot *v.* Jansen, 3 Dall. 133, 1 L. Ed. 540; The Belfast, 7 Wall. 624, 19 L. Ed. 266; American Steamboat Co. *v.* Chace, 12 Wall. 522, 531, 21 L. Ed. 369; United States *v.* Beavns, 3 Wheat. 336, 287, 4 L. Ed. 404; Stratton *v.* Jarvis, 8 Pet. 4, 8 L. Ed. 846.

It was held, that the provision of the ninth section of the judiciary act, vesting in the district courts of the United States exclusive cognizance of civil causes of admiralty and maritime jurisdiction, was constitutional. The Moses Taylor *v.* Hammons, 4 Wall. 411, 18 L. Ed. 397.

The district court holds both its prize jurisdiction and its jurisdiction as an instance court of admiralty from the constitution and the act of congress, and it is but one court, with these different branches of admiralty jurisdiction, as well as cognizance of other and distinct subjects. United States *v.* Weed, 5 Wall. 62, 69, 18 L. Ed. 531; Glass *v.* The Sloop Betsey, 3 Dall. 6, 16, 1 L. Ed. 485; The Admiral, 3 Wall. 603, 612, 18 L. Ed. 58; The Sarah, 8 Wheat. 391, 394, 5 L. Ed. 644; The Siren, 7 Wall. 152, 161, 19 L. Ed. 129.

Admiralty jurisdiction distinct from common-law jurisdiction.—By the act constituting the judicial system of the United States, the district courts are courts both of common law and admiralty jurisdiction. But although the two jurisdictions are vested in the same tribunal, they are as distinct from each other as if they were vested in different tribunals and can be no more blended than a court of chancery with a court of common law. The Sarah, 8 Wheat. 391, 5 L. Ed. 644.

40. Original jurisdiction of circuit court.—Ex parte Cooper, 143 U. S. 472, 36 L. Ed. 232; Governor *v.* Madrazo, 1 Pet. 110, 7 L. Ed. 73.

In the district court of the United States for the district of Georgia, a libel was filed, claiming certain Africans, as the property of the libellant, which had been brought into the state of Georgia, and were seized by the authority of the governor of the state, for an alleged illegal importation; process was issued against the slaves, but was not served, the case was taken by appeal to the circuit court, and the governor of Georgia, filed a paper, in the nature of a stipulation, importing to hold the Africans subject to the decree of the circuit court, etc. Held, that such a stipulation could not give jurisdiction in the case to the circuit court, as process could not issue legally from the circuit court against the Africans; because it would be the exercise of original jurisdiction in admiralty, which the circuit court does not possess. Governor *v.* Madrazo, 1 Pet. 110, 7 L. Ed. 73.

Appellate jurisdiction of circuit court.—See post, "Review," III, R.

41. Original jurisdiction.—Ex parte Madrazo, 7 Pet. 627, 8 L. Ed. 808.

Juan Madrazo, a subject of the king of Spain, filed a libel praying admiralty process against the state of Georgia, alleging that the state was in possession of a certain sum of money, the proceeds of the sale of certain slaves which had been seized as illegally brought into the state of Georgia; and which seizure had been subsequently, under admiralty proceedings, adjudged to have been illegal, and the right of Madrazo to the slaves, and the money arising from the sale thereof, established by the decision of the circuit court of the United States for the district of Georgia. The counsel for the petitioner claimed, that the supreme court had jurisdiction of the case, alleging that the 11th amendment of the constitution of the United States which declares that the judicial power of the United States shall not extend to any suits in law or equity, did not take away the jurisdiction of the courts of the United States, in suits in the admiralty, against a state. Held, that this is not a

b. *Appellate Jurisdiction.*—See post, "Review," III, R.

4. Territorial Courts.—The district courts of the territories, established in pursuance of acts of congress for that purpose, usually have the same admiralty jurisdiction as that possessed by district courts within the states.[42] Although admiralty jurisdiction can be exercised in the states, in those courts only which are established in pursuance of the third article of the constitution, the same limitation does not extend to the territories; in legislating for them, congress exercises the combined powers of the general and state governments.[43] And a territorial legislature may create a court within the territory and confer upon it such powers as are usually exercised by admiralty courts.[44]

5. Foreign Courts.—*English Courts of Admiralty.*—Under the statute of 24th and 25th Victoria, commonly known as the admiralty court act, jurisdiction exists in the English courts of admiralty to enforce by proceedings in rem a claim by an owner, domiciled in Canada, arising out of the breach of a contract of affreightment to carry goods to an English port.[45]

case where property is in custody of a court of admiralty; or brought within its jurisdiction, and in the possession of any private person; it is a mere personal suit against a state, to recover proceeds in its possession, and such a suit cannot be commenced in this court against a state. Ex parte Madrazo, 7 Pet. 627, 8 L. Ed. 808.

42. Territorial courts.—The City of Panama, 101 U. S. 453, 25 L. Ed. 1061; Ex parte Cooper, 143 U. S. 472, 36 L. Ed. 232; McAllister *v.* United States, 141 U. S. 174, 184, 35 L. Ed. 693; Steamer Coquitlam *v.* United States, 163 U. S. 346, 351, 41 L. Ed. 184.

District court of Washington territory.—The act of Congress approved March 2, 1853, entitled "An act to establish the territorial government of Washington" (10 Stat. 172), enacts that the district courts of the territory shall have and exercise the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States, and also of all cases arising under the laws of the territory. Held, that the district courts of the territory have jurisdiction in admiralty cases. The City of Panama, 101 U. S. 453, 25 L. Ed. 1061.

District court of Alaska.—Under the act of congress of May 17, 1884, entitled an act providing for a civil government for Alaska (23 St., p. 24) the district court of Alaska acquired all the admiralty jurisdiction within the district of Alaska belonging to the district courts of the United States. Ex parte Cooper, 143 U. S. 472, 36 L. Ed. 232; McAllister *v.* United States, 141 U. S. 174, 35 L. Ed. 693; Steamer Coquitlam *v.* United States, 163 U. S. 346, 41 L. Ed. 184.

The district court of Alaska has jurisdiction in admiralty to forfeit a vessel for violation of § 1956 of the Revised Statutes, in relation to the killing of seals and other fur-bearing animals, on any of the navigable waters within the dominion of the United States acquired by the treaty of March 30, 1867, with Russia. Ex parte Cooper, 143 U. S. 472, 36 L. Ed. 232.

43. Power of congress with respect to creation of territorial courts.—American Ins. Co. *v.* Canter, 1 Pet. 511, 512, 7 L. Ed. 242; McAllister *v.* United States, 141 U. S. 174, 180, 35 L. Ed. 693.

44. Creation of admiralty court by territorial legislature.—The act of the territorial legislature of Florida, erecting a court which proceeded, under the provisions of the law, to decree, for salvage, the sale of a cargo of a vessel, which had been stranded, and which cargo had been brought within the territorial limits, is not inconsistent with the laws and constitution of the United States, and is valid; and consequently, a sale of the property, made in pursuance of it, changed the property. American Ins. Co. *v.* Canter, 1 Pet. 511, 512, 7 L. Ed. 242. See, also, Downes *v.* Bidwell, 182 U. S. 244, 263, 45 L. Ed. 1088.

"By § 1910 of the Revised Statutes the district courts of the territory have the same jurisdiction in all cases arising under the constitution and laws of the United States as is vested in the circuit and district courts of the United States. We have often so decided. American Ins. Co. *v.* Canter, 1 Pet. 511, 7 L. Ed. 242; Banner *v.* Porter, 9 How. 235, 18 L. Ed. 119; Clinton *v.* Englebrecht, 13 Wall. 434, 20 L. Ed. 659. They are courts of the territories, invested for some purposes with the powers of the courts of the United States." Reynolds *v.* United States, 98 U. S. 154, 25 L. Ed. 244. See, also, United States *v.* Coe, 155 U. S. 76, 85, 39 L. Ed. 79.

45. English courts of admiralty.—English courts of admiralty held to have jurisdiction—where the master abandoned the voyage without lawful excuse, improperly entered into a new contract of affreightment, and proceeded on a distant voyage, leaving the goods at the Welsh port, neither carrying them himself to their port of destination, nor seek-

French Courts of Admiralty.—The jurisdiction of the French courts, as to seizures, is not confined to seizures made within two leagues of the coast.[46]

Foreign Courts of Admiralty within United States Territory.—No foreign power can, of right, institute or erect any court of judicature of any kind, within the jurisdiction of the United States, but such only as may be warranted by, and be in pursuance of, treaties. Therefore, the admiralty jurisdiction which was formerly exercised in the United States by the consuls of France, not being so warranted, was not of Right.[47]

C. Objections, and Waiver of Objections, to Jurisdiction.—An objection for want of jurisdiction need not be made in the lower court or even in the appellate court, as the court will of its own motion dismiss the case when the want of jurisdiction is apparent.[48] But where a libel alleges that the place where the fact was done, was within the jurisdiction of the admiralty, and this is not contradicted in the answer, the court will take the matter as it stands upon the libel, not on the evidence.[49]

II. Maritime Law.

Admiralty courts proceed upon principles, rules and usages which belong to the admiralty, as contradistinguished from courts of common law.[50] While it is true that the great mass of maritime law is the same in all commercial countries having for its basis the general maritime law of the world,[51] yet as every nation is at liberty to adopt its own maritime law,[52] and the general maritime law is operative as law in any country only so far as it is adopted by the laws and usages of that country,[53] in each country peculiarities exist either as to some of

ing to forward them in another vessel. The Maggie Hammond, 9 Wall. 435, 19 L. Ed. 772.

46. French courts of admiralty.—Hudson *v.* Questier, 6 Cranch 281, 3 L. Ed. 224, overruling Rose *v.* Himely, 4 Cranch 241, 2 L. Ed. 608.

A seizure, beyond the limits of the territorial jurisdiction, for breach of a municipal regulation, is warranted by the law of nations. Hudson *v.* Guestier, 6 Cranch 281, 3 L. Ed. 224, overruling Rose *v.* Himely, 4 Cranch 241, 2 L. Ed. 608.

Of their own jurisdiction, so far as it depends upon municipal laws, the courts of France are the exclusive judges. Rose *v.* Himely, 4 Cranch 241, 2 L. Ed. 608.

47. Foreign courts within United States.—Glass *v.* The Sloop Betsey, 3 Dall. 6, 15, 1 L. Ed. 485.

48. Necessity for objection.—Where a libel was filed against a foreign ship, in an admiralty case, in an admiralty court of the United States, the libellant and claimant both being foreigners, the place of shipping and the place of consignment being foreign ports, and the whole ground of libel a matter which occurred abroad, the supreme court considered the question of jurisdiction open for argument, though it was not raised by the pleadings, and had not been suggested by any one in the court below. The Maggie Hammond, 9 Wall. 435, 19 L. Ed. 772.

49. Waiver of, or estoppel to raise, objections.—Montgomery *v.* Henry, 1 Dall. 49, 50, 1 L. Ed. 32.

50. Distinguished from common law.—The Wanata, 95 U. S. 600, 24 L. Ed. 461; Manro *v.* Almeida, 10 Wheat. 473, 6 L. Ed. 369; American Ins. Co. *v.* Canter, 1 Pet. 511, 7 L. Ed. 242.

A case in admiralty does not, in fact, arise, under the constitution or laws of the United States; these cases are as old as navigation itself, and the law, admiralty and maritime, as it existed for ages, is applied by our courts to the cases, as they arise. American Ins. Co. *v.* Canter, 1 Pet. 511, 512, 7 L. Ed. 242.

Application of equitable principles by admiralty courts.—See ante, "Applying Equitable Principles to Cases within Admiralty Jurisdiction," I, A, 6, d, (2).

51. Maritime law of all countries based on general maritime law.—The Lottawanna, 21 Wall. 558, 572, 22 L. Ed. 654.

52. Every nation may adopt its own maritime code.—The Lottawanna, 21 Wall. 558, 572, 22 L. Ed. 654; Perry *v.* Haines, 191 U. S. 17, 49, 48 L. Ed. 73.

53. Maritime law operative only so far as adopted—The Lottawanna, 21 Wall. 558, 22 L. Ed. 654, 572; The Scotland, 105 U. S. 24, 29, 26 L. Ed. 1001; Workman *v.* New York, 179 U. S. 552, 45 L. Ed. 314; Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 556, 32 L. Ed. 1017; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788; The Belgenland, 114 U. S. 355, 29 L. Ed. 152; The Harrisburg, 119 U. S. 199, 30 L. Ed. 358; The John G. Stevens, 170 U. S. 113, 126, 42 L. Ed. 969; Ralli *v.* Troop, 157 U. S. 386, 407; 39 L. Ed. 742. Perry *v.* Haines, 191 U. S. 17, 49, 48 L. Ed. 73; The Siren, 13 Wall. 389, 20 L. Ed. 505.

"In this respect it is like international law or the laws of war, which have the

the rules, or in mode of enforcing them.[54] In the United States we have a maritime law of our own, it being the general system of maritime law which was familiar to the lawyers and statesmen of the country when the constitution was adopted.[55]

Modifications or changes in the general maritime law may be made by each country so as to render it suited to its locality and the genius of its own people and institutions.[56] In the United States, congress has the power under

effect of law in no country any further than they are accepted and received as such; or, like the case of the civil law, which forms the basis of most European laws, but which has the force of law in each state only so far as it is adopted therein, and with such modifications as are deemed expedient. The adoption of the common law by the several states of this union also presents an analogous case. It is the basis of all the state laws; but is modified as each sees fit." The Lottawanna, 21 Wall. 558, 572, 22 L. Ed. 654.

"Perhaps the maritime law is more uniformly followed by commercial nations than the civil and common laws are by those who use them. But, like those laws, however fixed, definite, and beneficial the theoretical code of maritime law may be, it can have only so far the effect of law in any country as it is permitted to have. But the actual maritime law can hardly be said to have a fixed and definite form as to all the subjects which may be embraced within its scope." The Lottawanna, 21 Wall. 558, 572, 22 L. Ed. 654.

"The maritime usages of foreign countries are not obligatory upon us, and will not be respected as authority, except so far as they are consonant with the well settled principles of English and American jurisprudence. The John G. Stevens, 170 U. S. 113, 126, 42 L. Ed. 969." The Elfrida, 172 U. S. 186, 203, 43 L. Ed. 413.

54. Maritime law different in different countries.—The Lottawanna, 21 Wall. 558, 572, 22 L. Ed. 654; The Steamer St. Lawrence, 1 Black 522, 526, 17 L. Ed. 180.

"Especially is this the case on the outside boundaries of the law, where it comes in contact with, or shades off into the local or municipal law of the particular country and affects only its own merchants or people in their relations to each other. Whereas, in matters affecting the stranger or foreigner, the commonly received law of the whole commercial world is more assiduously observed—as, in justice, it should be." The Lottawanna, 21 Wall. 558, 572, 22 L. Ed. 654.

"It will be found, therefore, that the maritime codes of France, England, Sweden, and other countries, are not one and the same in every particular; but that whilst there is a general correspondence between them arising from the fact that each adopts the essential principles, and the great mass of the general maritime law, as the basis of its system, there are varying shades of difference corresponding to the respective territories, climate, and genius of the people of each country respectively. Each state adopts the maritime law, not as a code having any independent or inherent force, proprio vigore, but as its own law, with such modification and qualifications as it sees fit. Thus adopted and thus qualified in each case, it becomes the maritime law of the particular nation that adopts it." The Lottawanna, 21 Wall. 558, 573, 22 L. Ed. 654.

55. Maritime law of United States.—The Lottawanna, 21 Wall. 558, 572, 22 L. Ed. 654. See, also, Butler *v.* Boston, etc., Steamship Co., 130 U. S. 527, 555, 32 L. Ed. 1017; In re Garnett, 141 U. S. 1, 12, 35 L. Ed. 631. See ante, "Governed by General Maritime Law in Force When Constitution Adopted," I, A, 1, b.

"To ascertain, therefore, what the maritime law of this country is, it is not enough to read the French, German, Italian, and other foreign works on the subject, or the codes which they have framed; but we must have regard to our own legal history, constitution, legislation, usages, and adjudications as well. The decisions of this court illustrative of these sources, and giving construction to the laws and constitution are especially to be considered; and when these fail us, we must resort to the principles by which they have been governed." The Lottawanna, 21 Wall. 558, 576, 22 L. Ed. 654.

The admiralty law is to be gathered from accepted practice of courts of admiralty at home and abroad. The Oceola, 189 U. S. 158, 168, 47 L. Ed. 760.

While the American colonies were a part of the British empire, the English maritime law, including the law of prize, was the maritime law of this country. From the close of the Revolution down to this time it has continued to be our law, so far as it is adopted to the altered circumstances and condition of the country, and has not been modified by the proper national authorities. The Siren, 13 Wall. 389, 392, 20 L. Ed. 505.

Rules of navigation.—See the title COLLISION.

Rules applicable in prize cases.—See the title PRIZE.

56. Modification of maritime law.—The Lottawanna, 21 Wall. 558, 572, 22 L. Ed. 654.

"Undoubtedly, no single nation can change the law of the sea. That law is of universal obligation, and no statute of

the commercial law to introduce such changes in the maritime law as may be needed,[57] but the courts can neither make nor change it.[58]

The construction of the maritime law should, so far as possible, be the same by courts of all maritime nations.[59]

III. Procedure.

A. Forms and Modes of Proceeding—1. NATURE AND CHARACTERISTICS OF ADMIRALTY PROCEEDINGS.—The distinguishing and characteristic feature of a suit in admiralty, is that the vessel or thing proceeded against itself is seized and impleaded as the defendant, and is judged and sentenced accordingly.[60]

2. PROCEEDINGS IN PERSONAM AND IN REM—a. *Proceedings in Personam.*—Actions in personam are those in which an individual is charged personally in respect to some matter of admiralty and maritime jurisdiction.[61] The pre-

one or two nations can create obligations for the world. Like all the laws of nations, it rests upon the common consent of civilized communities. It is of force, not because it was prescribed by any superior power, but because it has been generally accepted as a rule of conduct. Whatever may have been its origin, whether in the usages of navigation or in the ordinances of maritime states, or in both, it has become the law of the sea only by the concurrent sanction of those nations who may be said to constitute the commercial world." The Scotia, 14 Wall. 170, 187, 20 L. Ed. 822.

57. Power of congress to change maritime law.—The Lottawanna, 21 Wall. 558, 572, 22 L. Ed. 654.

The act of congress which limits the liability of ship owners was passed in amendment of the maritime law of the country, and the power to make such amendments is coextensive with that law. It is not confined to the boundaries or class of subjects which limit and characterize the power to regulate commerce; but, in maritime matters, it extends to all matters and places to which the maritime law extends. Ex parte Garnett, 141 U. S. 1, 12, 35 L. Ed. 631. Generally, as to limitation of liability of ship owners, see the title SHIPS AND SHIPPING.

58. Power of courts to make or change maritime law.—The Lottawanna, 21 Wall. 558, 572, 22 L. Ed. 654.

59. Uniformity of construction.—The Irrawaddy, 171 U. S. 187, 202, 43 L. Ed. 130.

60. Characteristics of admiralty proceedings.—The Moses Taylor *v.* Hammons, 4 Wall. 411, 18 L. Ed. 397; Perry *v.* Haines, 191 U. S. 17, 48 L. Ed. 73.

A proceeding in rem against the vessel as debtor or "offending thing," is the characteristic of a suit in admiralty. Perry *v.* Haines, 191 U. S. 17, 48 L. Ed. 73.

Proceedings to confiscate real estate under the act of July 17th, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels," etc., are not "proceedings in admiralty," although the act declares that they "shall be in rem, and conform as near as may be to proceedings in admiralty or in revenue cases." Ex parte Graham, 10 Wall. 541, 19 L. Ed. 981.

When an information under the said act, filed in the district court, is really in common-law form, and the proceeding has the substance and all the requisites of a common-law proceeding, the fact that the information is entitled "a libel" of information, and that the warrant and citation is called "a monition," does not convert it into a proceeding on the admiralty side of the court. The Confiscation Cases, 20 Wall. 92, 93, 22 L. Ed. 320.

Under the act of August 6, 1861, "to confiscate property used for insurrectionary purposes" and providing for its condemnation in the district or circuit court, or in admiralty, a proceeding brought for the condemnation of such property, although analogous to a proceeding in admiralty, does not constitute "a cause in admiralty." Union Ins. Co. *v.* United States, 6 Wall. 759, 18 L. Ed. 879.

Action in state court instituted by attachment.—A proceeding in a state court against the person of the defendant, instituted by attachment, is not a proceeding in admiralty. Pennywit *v.* Eaton, 15 Wall. 380, 382, 21 L. Ed. 72; The Genesee Chief *v.* Fitzhugh, 12 How. 443, 13 L. Ed. 1058; Jackson *v.* Steamboat Magnolia, 20 How. 296, 15 L. Ed. 909; Taylor *v.* Carryl, 20 How. 583, 15 L. Ed. 1028; The Hine *v.* Trevor, 4 Wall. 555, 18 L. Ed. 451; The Belfast, 7 Wall. 624, 19 L. Ed. 266; Leon *v.* Galceran, 11 Wall. 185, 20 L. Ed. 74.

61. Proceedings in personam.—The Sabine, 101 U. S. 384, 388, 25 L. Ed. 982.

Common-law remedies in cases of tort, as given in common-law courts, and suits in personam in the admiralty courts of this country, bear a strong resemblance to each other in respect to parties, and the effect of a recovery by the injured party against one or all of the wrongdoers, and the extent of redress to which an innocent party is entitled against the wrongdoer. The Atlas, 93 U. S. 302, 316, 23 L. Ed. 863; The Belfast, 7 Wall. 624, 644, 19 L. Ed. 266.

requisite to resort to a libel in personam in the admiralty is the existence of a cause of action maritime in its nature.[62]

b. *Proceedings in Rem.*—Actions in rem are prosecuted to enforce a right to things arrested, to perfect a maritime privilege or lien attaching to a vessel or cargo or both, and in which the thing to be made responsible is proceeded against as the real party.[63] A proceeding in rem must be founded on a lien,[64] and may be maintained in all cases where a lien is given by the general maritime law,[65] and by the 12th rule of admiralty practice, such a proceeding may be maintained where a lien is given by the local law.[66]

c. *Election as to Mode of Proceeding.*—A party having a maritime lien may pursue his remedy by a suit in rem or by a suit personam, at his election.[67]

3. Power of Congress to Prescribe Forms and Modes of Proceeding.—Congress may prescribe the forms and modes of proceeding in the tribunals established to carry the power conferred upon them with respect to admiralty and maritime jurisdiction into execution.[68]

62. Prerequisite to suit in personam.—Workman *v.* New York; 179 U. S. 552, 573, 45 L. Ed. 314.

Proceedings in personam in the admiralty is the appropriate remedy for the redress of maritime torts. The Rock Island Bridge, 6 Wall. 213, 215, 18 L. Ed. 753.

63. Proceedings in rem.—The Sabine, 101 U. S. 384, 388, 25 L. Ed. 982.

Both the process and proceedings in actions in rem are different from those in proceedings in personam, and the appropriate decree in the one might be absolutely absurd in the other. The Sabine, 101 U. S. 384, 388, 25 L. Ed. 982.

64. Necessity for lien.—The Lottawanna, 21 Wall. 558, 22 L. Ed. 654; The Resolute, 168 U. S. 437, 440, 42 L. Ed. 533; The Rock Island Bridge, 6 Wall. 213, 215, 18 L. Ed. 753; The Siren, 7 Wall. 152, 155, 19 L. Ed. 129; The Belfast, 7 Wall. 624, 644, 19 L. Ed. 266.

65. Lien given by maritime law.—The Lottawanna, 21 Wall. 558, 581, 22 L. Ed. 654; The Resolute, 168 U. S. 437, 440, 42 L. Ed. 533; The Rock Island Bridge, 6 Wall. 213, 215, 18 L. Ed. 753; The Siren, 7 Wall. 152, 155, 19 L. Ed. 129; The Belfast, 7 Wall. 624, 644, 19 L. Ed. 266. See ante, "Maritime Liens," I, A, 6, f. And see, generally, the title MARITIME LIENS.

Where a maritime tort gives rise to a maritime lien it may be redressed by a proceeding in rem in the admiralty, this being the appropriate remedy for the enforcement of maritime liens. The Rock Island Bridge, 6 Wall. 213, 215, 18 L. Ed. 753.

A lien for damages occasioned by collision may be enforced by a proceeding in rem, except where the vessel in fault is the property of the United States. The Siren, 7 Wall. 152, 155, 19 L. Ed. 129. See, generally, the title MARITIME LIENS.

When maritime lien arises.—See the title MARITIME LIENS.

66. Lien given by state law.—The Lottawanna, 21 Wall. 558, 579, 22 L. Ed. 654. See ante, "Repairs and Supplies," I, A, 6, a, (10).

This rule of practice first adopted in 1844 (The Steamer St. Lawrence, 1 Black 522, 17 L. Ed. 180; The Lottawanna, 20 Wall. 201, 218, 22 L. Ed. 259) was repelled in 1858 (The Steamer St. Lawrence, 1 Black 522, 17 L. Ed. 180; The Lottawanna, 20 Wall. 201, 218, 22 L. Ed. 259; The Lulu, 10 Wall. 192, 19 L. Ed. 906; The Belfast, 7 Wall. 624, 644, 19 L. Ed. 266; Leon *v.* *v.* Galceran, 11 Wall. 185, 191, 20 L. Ed. 74; American Steamboat Co. *v.* Chace, 16 Wall. 522, 533, 21 L. Ed 369; Maguire *v.* Card, 21 How. 248, 16 L. Ed. 118) but was again reinstated in 1872; The Lottawanna, 21 Wall. 558, 579, 22 L. Ed. 654.

67. Election of remedies.—The Belfast, 7 Wall. 624, 19 L. Ed. 266; Norton *v.* Switzer, 93 U. S. 355, 356, 23 L. Ed. 903; The Rock Island Bridge, 6 Wall. 213, 215, 18 L. Ed. 753; Leon *v.* Galceran, 11 Wall. 185, 187, 20 L. Ed. 74. See ante, "Maritime Liens," I, A, 6, f. And see, generally, the titles ELECTION OF REMEDIES; MARITIME LIENS.

Materialmen having a lien may elect to proceed in rem or in personam. The Belfast, 7 Wall. 624, 643, 19 L. Ed. 266. See, generally, the title MARITIME LIENS.

Seamen suing for wages may proceed either in rem against the ship or in personam against the master. Leon *v.* Galceran, 11 Wall. 185, 187, 20 L. Ed. 74. See, generally, the title SEAMEN.

Resort to common-law remedy.—Indeed parties in maritime causes are not compelled to proceed in the admiralty at all. They may resort to their common-law remedy in state courts, or in the circuit court of the United States, provided the parties are citizens of different states. Norton *v.* Switzer, 93 U. S. 355, 356, 23 L. Ed. 903. See the titles COURTS; JURISDICTION.

68. Power of congress to prescribe forms and modes of proceeding.—The Steamer St. Lawrence, 1 Black 522, 17

4. Power of Court to Prescribe Rules of Practice.—Congress has given to the supreme court the authority to alter and change the forms and modes of proceeding by admiralty rules.[69] While the courts have power over their own process and mode of procedure, they cannot enlarge or diminish their own jurisdiction by a rule of practice.[70] A change in a rule is prospective in its operation, and does not defeat a suit previously commenced.[71]

B. Venue—1. Proceedings in Rem.—Libels in rem may be prosecuted in any district of the United States where the property is found.[72]

2. Proceedings in Personam.—By the ancient and settled practice of courts of admiralty, a libel in personam may be maintained for any cause within their jurisdiction, wherever a monition can be served upon the libelee, or an attachment made of any personal property or credits of his.[73] A libel in personam may be sustained against a corporation in a district not within the state in which it is incorporated.[74]

C. Joinder and Consolidation of Causes of Action or Proceedings—1. Joinder of Causes of Action or Proceedings—a. *Joinder of Distinct Causes of Action.*—It is irregular, and against the known principles of courts of ad-

L. Ed. 180. See the title RULES OF COURT.

69. Power of court to prescribe rules of practice.—The Steamer St. Lawrence, 1 Black 522, 17 L. Ed. 180; The Sabine, 101 U. S. 384, 388, 25 L. Ed. 982.

"Our admiralty rules were promulgated in accordance with the act of Congress." The Sabine, 101 U. S. 384, 388, 25 L. Ed. 982.

70. Enlargement or diminishment of jurisdiction by rules of practice.—The Steamer St. Lawrence, 1 Black 522, 17 L. Ed. 180.

71. Change in rule prospective in operation.—The Steamer St Lawrence, 1 Black 522, 523, 17 L. Ed. 180.

72. Venue of proceedings in rem.—The Slavers, 2 Wall. 383, 384, 17 L. Ed. 911; Nelson *v.* Leland, 22 How. 48, 16 L. Ed. 269; The Propeller Commerce, 1 Black, 574, 581, 17 L. Ed. 107.

If the seizure be made on the high seas, or within the territory of a foreign power, the jurisdiction is conferred on the court of the district where the property is carried and proceeded against. The Merino, 9 Wheat. 391, 6 L. Ed. 118.

A municipal seizure, within the territory of a foreign power, does not oust the jurisdiction of the district court, into whose district the property may be carried for adjudication. The Merino, 9 Wheat. 391, 6 L. Ed. 118; The Richmond, 9 Cranch 102, 3 L. Ed. 670; Ex parte Johnson, 167 U. S. 120, 124, 42 L. Ed. 103.

Proceedings to limit liability.—A vessel not having been libelled to answer for a loss resulting from collision, and no suit therefor having been commenced against her owner, proceedings to limit her liability are instituted lawfully in the district in which the vessel is at the time the proceedings were instituted, and she being at that time subject to the control of that court for the purposes of the case. In re Morrison, 147 U. S. 14, 33, 37 L. Ed. 60; Ex parte Slayton, 105 U. S. 451, 26 L. Ed. 1066. See, generally, the title SHIPS AND SHIPPING.

73. Venue of proceedings in personam.—Rule 2 in Admiralty; In re Louisville Underwriters, 134 U. S. 488, 33 L. Ed. 991; Manro *v.* Almeida, 10 Wheat. 473, 6 L. Ed. 369; Atkins *v.* Fiber Disintegrating Co., 18 Wall. 272, 21 L. Ed. 841; Ins. Co. *v.* Navigation Co., 18 Wall. 307, 21 L. Ed. 846; Cushing *v.* Laird, 107 U. S. 69, 27 L. Ed. 391; In re Manf. Co., 108 U. S. 401, 27 L. Ed. 764. See, generally, the title VENUE.

Rule not affected by act of March 3, 1887.—The act of March 3, 1887, c. 373, § 1 (24 St., p. 552), providing that no person shall be arrested in one district, for trial in another in any civil action before a circuit or district court, and no civil suit shall be brought before either of such courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, does not apply to proceeding in admiralty. In re Louisville Underwriters, 134 U. S. 488, 33 L. Ed. 991; Atkins *v.* Fiber Disintegrating Co., 18 Wall. 272, 21 L. Ed. 841.

A proceeding in admiralty is not a "civil suit" within the meaning of the prohibition. Atkins *v.* The Fiber Disintegrating Co., 18 Wall. 272, 301, 21 Ed. 841.

74. Suits in personam against foreign corporations.—In re Louisville Underwriters, 134 U. S. 488, 33 L. Ed. 991; Atkins *v.* The Fiber Disintegrating Co., 18 Wall. 272, 301, 21 L. Ed. 841; In re Devoe Mfg. Co., 108 U. S. 401, 27 L. Ed. 764.

The United States district court for New Jersey has jurisdiction of a proceeding in rem against a foreign corporation, where it seizes, by attachment, a vessel belonging to such a corporation, in the body of water between Staten Island and New Jersey, known as the Kill von Kull, the vessel being moored to a dock situated in the city of Bayonne. In re Devoe Mfg. Co., 108 U. S. 401, 27 L. Ed. 764. See, generally, the title VENUE.

miralty, to allow, in a libel in rem, and quasi for possession, the introduction of any other matters of an entirely different character; such as an account of the vessel's earnings, or the claim of a part owner for his wages and advances as master.[75]

b. *Joinder of Proceedings in Personam and Proceedings in Rem.*—While admiralty rules prescribe a remedy appropriate to each class of cases in admiralty, and allow in certain cases a joinder of ship and freight, or ship and master, or alternative actions against the ship, master or owner alone, in no case under these rules, except in possessory suits, can the ship and owner be joined in the same libel, though perhaps they may be in cases not falling within the rules.[76]

2. Consolidation of Actions.—Where causes of a like nature, or relative to the same question, are pending before a court of the United States, the court may make such orders and rules concerning proceedings therein as may be conformable to the usages of courts for avoiding unnecessary costs or delay in the administration of justice, and may consolidate said causes when it appears reasonable to do so.[77]

D. Parties—1. Libelants—a. *Who May Sue.*—While in admiralty, the party entitled to relief should be made libelant,[78] a libel may be filed by an agent of the person entitled to relief,[79] or by one of several partners.[80] The consignee of a cargo has such an interest, that he may file a libel for recovery of property consigned to him,[81] and the indorsee of a bill of lading may libel

75. Joinder of distinct causes of action.—The Steamboat New Orleans *v.* Phoebus, 11 Pet. 175, 9 L. Ed. 677. See, generally, the title ACTIONS.

76. Joinder of proceedings in personam and in rem.—The Corsair, 145 U. S. 335, 341, 36 L. Ed. 727, explaining Newell *v.* Norton, 3 Wall. 257, 18 L. Ed. 271, where it was held, that a libel in rem against a vessel and personally against her owner might be joined. The Sabine, 101 U. S. 384, 25 L. Ed. 982.

Salvors cannot in the same libel proceed in rem against a vessel and in personam against the consignees of her cargo. The Steamboat Mayflower *v.* The Steamboat Sabine, 101 U. S. 384, 25 L. Ed. 982. See, also, Bondies *v.* Sherwood, 22 How. 214, 216, 16 L. Ed. 238. See the title SALVAGE.

77. Consolidation of actions.—Rev. Stat., § 921; The North Star, 106 U. S 17, 27, 27 L. Ed. 91. See, generally, the title CONSOLIDATION OF ACTIONS.

"The power of consolidation here given enables the district courts sitting in admiralty to provide for cases under consideration in a manner adapted to the ends of justice and the exact rights of the parties. The North Star, 106 U. S. 17, 27, 27 L. Ed. 91.

In collision cases.—See the title COLLISION.

78. Party entitled to relief.—Fretz *v.* Bull, 12 How. 466, 13 L. Ed. 1068. See, generally, the title PARTIES.

Equitable claimant.—In courts of common-law, the injured party alone can sue for a trespass, as the damages are not legally assignable; and if there be an equitable claimant, he can sue only in the name of the injured party; whereas, in admiralty, the person equitably entitled may sue in his own name. The Propeller Monticello *v.* Mollison, 17 How. 153, 155, 15 L. Ed. 68.

79. Agent.—An agent of absent owners may libel, either in his own name, as agent, or in the names of his principals, as he thinks best. The North Carolina, 15 Pet. 40, 10 L. Ed. 653; The Thames, 14 Wall. 98, 20 L. Ed. 804; McKinlay *v.* Morrish, 21 How. 343, 16 L. Ed. 100. See, generally, the title PRINCIPAL AND AGENT.

Master representing owner and crew.—Salvage suits are frequently promoted by the master alone, in behalf of himself and the owners and crew, or in behalf of the owners and crew, or the owners alone, without making any claim in his own behalf, and the practice has never led to any practical difficulty, as the whole subject, in case of controversy, is within the control of the court. The Blackwall, 10 Wall. 1, 10, 19 L. Ed. 870. See, generally, the title SALVAGE.

Subsequent ratification of acts of agent.—A power of attorney given subsequent to the libel, is a sufficient ratification of what the agent had before done in behalf of the owner. The North Carolina, 15 Pet. 40, 10 L. Ed. 653; McKinlay *v.* Morrish, 21 How. 343, 355, 16 L. Ed. 100.

80. One of several partners.—If the contract was made and the work done by the libelant, his right to recover, in his own name, cannot be defeated by showing that he had a partner interested in the contract. The Ship Potomac, 2 Black 581, 17 L. Ed. 263. See, generally, the title PARTNERSHIP.

81. Consignee of cargo.—A consignee may sue in a court of admiralty, either

a vessel for failure to deliver the goods.[82] The master or owner of a vessel may represent the insurers' claim for the loss of the cargo.[83]

b. *Joinder.*—All persons entitled, on the same state of facts, to participate in the same relief, may join as libelants, whether the suit be in personam or in rem.[84] Thus, several owners of cargo conveyed in the same ship,[85] or several seamen or mariners having cause of complaint of the like kind against the same ship or vessel,[86] may join as libelant, in the same suit.

2. RESPONDENTS.—Where an injury is due to the negligence of two vessels,

in his own name, as agent, or in the name of his principal, as he thinks best. McKinlay *v.* Morrish, 21 How. 343, 16 L. Ed. 100; The Thames, 14 Wall. 98, 108, 20 L. Ed. 804; Houseman *v.* The Schooner North Carolina, 15 Pet. 40, 49, 10 L. Ed. 653; Lawrence *v.* Minture, 17 How. 100, 15 L. Ed. 58; The Vaughan & Telegraph, 14 Wall. 258, 266, 20 L. Ed. 807.

The consignees of a cargo have a sufficient interest in the cargo, that they may proceed in the admiralty for the recovery not only of their own property, but for that part of it which may be consigned to them. The North Carolina, 15 Pet. 40, 10 L. Ed. 653; McKinlay *v.* Morrish, 21 How. 343, 355, 16 L. Ed. 100.

A consignee of goods has a right, in his own name, to libel a vessel for their nondelivery, unless there is something to show that he had no interest in them. The presumption is, that he had an interest, and to defeat the right to sue, in his own name, this presumption must be rebutted by proof. Lawrence *v.* Minturn, 17 How. 100, 15 L. Ed. 58.

82. Indorsee of bill of lading.—The indorsee of a bill of lading may libel the vessel on which the goods are shipped, for failure to deliver them, though he may be but an agent or trustee of the goods for others. The Thames, 14 Wall. 98, 20 L. Ed. 804. See, generally, the title BILLS OF LADING.

83. Owner or master of vessel suing for benefit of insurer.—Newell *v.* Norton, 3 Wall. 258, 18 L. Ed. 271; Fretz *v.* Bull, 12 How. 466, 13 L. Ed. 1068; Hall *v.* Railroad Company, 13 Wall. 367, 20 L. Ed. 594; Comegys *v.* Vasse, 1 Pet. 193, 7 L. Ed. 108; The Propeller Monticello *v.* Mollison, 17 How. 153, 15 L. Ed. 68; Garrison *v.* Memphis Ins. Co., 19 How. 312, 15 L. Ed. 656. The Potomas, 105 U. S. 630, 634, 26 L. Ed. 1190. See, generally, the title MARINE INSURANCE.

A person who is master and part owner of a vessel in which a cargo has been wrongfully sunk by collision from another vessel, may properly represent the insurer's claim for the loss of the cargo, and proceed to enforce it in rem and in personam through the admiralty. Newell *v.* Norton, 3 Wall. 257, 258, 18 L. Ed. 271.

Where the cargo of a boat was partly insured, but not the boat itself, and the insurance company paid for that part of the cargo which was insured, it was competent for the owners of the boat to file a libel for the use of the insurance company. Fretz *v.* Bull, 12 How. 466, 13 L. Ed. 1068.

In collision cases.—See the title COLLISION.

84. Joinder of libelants.—Fretz *v.* Bull, 12 How. 466, 13 L. Ed. 1068; The Commander in Chief, 1 Wall. 43, 51, 17 L. Ed. 609.

All persons interested in a cause of collision may be joined in the libel for the prosecution of their own claims and the protection of their own interests. Owners of the vessel and the shippers of the cargo, for example, and all other persons affected by the injury, may be made parties to the suit, or it may be prosecuted by the master as the agent of all concered. The Commander-in-Chief, 1 Wall. 43, 51, 17 L. Ed. 609. See, generally, the title COLLISION.

85. Joinder of several cargo owners.—Rich *v.* Lambert, 12 How. 353, 13 L. Ed. 1017.

The joining of several owners of cargo conveyed in the same ship in a libel in rem for damages done to the goods in the course of shipment, and the consolidation of libels filed separately by the respective owners for like damage, is allowed by the practice of the court for its convenience, and the saving of time and expense to the parties. It is a practice deserving commendation and encouragement in all cases where it can be adopted without complicating too much the proceedings, and thereby prejudicing the rights of the parties. Rich *v.* Lambert, 12 How. 353, 13 L. Ed. 1017.

86. Action by seamen for wages.—Acts of 1790, ch. 29, § 6; Oliver *v.* Alexander, 6 Pet. 143, 146, 8 L. Ed. 349. See, generally, the title SEAMEN.

This statute converts what, by the admiralty law was a privilege, into a positive obligation. Oliver *v.* Alexander, 6 Pet. 143, 146, 8 L. Ed. 349.

Although the libel is, in its form, joint, the contract is always treated in the admiralty according to the truth of the case, as a several distinct contract with each seaman; each is to stand or fall by the merits of his own claim, and is unaffected by that of his colibelants. Oliver *v.* Alexander, 6 Pet. 143, 8 L. Ed. 349.

they may be joined in the same libel.[87] A respondent sued in admiralty for repairs to a vessel cannot deny that he is sole owner, if the vessel has been sold by the order of another court, and he has claimed and received the proceeds as sole owner.[88]

3. Objections as to Parties—a. *Mode of Objecting.*—Parties improperly joined may, on motion, be stricken out.[89]

b. *Time of Objecting.*—Objections to parties, or for want of proper parties, should be made in the court below, where amendments may be granted in the discretion of the court.[90]

4. Adding New Parties by Supplemental Libel or Petition.—New parties may be added in admiralty by supplemental libel or petition.[91]

5. Effect of Death of Party.—See the title Abatement, Revival and Survival, ante, p. 12.

6. Substitution of Parties.—Where the owner of a vessel injured by collision files a libel against the other vessel on behalf of himself and the cargo owners, and the libel is dismissed as to the owners and he takes no appeal, the cargo owner may be substituted as libelant, and the failure of the owner of the vessel to appeal from the decree of dismissal will not prejudice the cargo owner.[92]

E. Appearance, Process and Attachment—1. Appearance.—An entry of appearance of record, and taking time to answer, followed by the execution of bonds, reciting the appearance of the respondent, constitutes an appearance in an admiralty proceeding.[93] An appearance is a waiver of an objection for want of a monition.[94]

2. Process—a. *In General.*—Under the process act of 1792, ch. 137, § 2, the proceedings in cases of admiralty and maritime jurisdiction, in the courts of the United States, are to be according to the modified admiralty practice in our own country, engrafted upon the British practice; and it is not a sufficient reason for rejecting a particular process, which has been constantly used in the

87. **Respondents.**—The Washington *v.* The Gregory, 9 Wall. 513, 19 L. Ed. 787; The Beaconsfield, 158 U. S. 303, 39 L. Ed. 993. As to joinder in collision cases, see, generally, the title COLLISION.

88. **Estoppel to deny sole ownership of vessel.**—Flanigan *v.* Turner, 1 Black 491, 17 L. Ed. 106.

89. **Striking out improper parties on motion.**—The Schooner Commander-in-Chief, 1 Wall. 43, 52, 17 L. Ed. 609.

90. **Necessity of objection in lower court.**—The Commander-in-Chief, 1 Wall. 43, 52, 17 L. Ed. 609. See the titles APPEAL AND ERROR; EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL.

Where it appears that the party or parties named as libelants are competent to prosecute the suit, the nonjoinder of others having an interest in the controversy must be shown by exception, and, if not made to appear in the court below, cannot be made available as an original objection in the appellate tribunal. The Commander-in-Chief, 1 Wall. 43, 51, 17 L. Ed. 609.

A party cannot, in an admiralty proceeding by the owners of a vessel, to recover damages for a cargo lost on their ship by collision, object in the supreme court for the first time, that the owners of the vessel were not the owners of the cargo, and therefore that they cannot sustain the libel. The Commander-in-Chief, 1 Wall. 43, 44, 17 Ed. 609.

91. **Adding new parties by supplemental libel or petition.**—The Commander-in-Chief, 1 Wall. 43, 52, 17 L. Ed. 609.

92. **Substitution.**—The Beaconsfeld, 158 U. S. 303, 39 L. Ed. 993.

Who may revive action on death of libelant in action by admiral for prize money, see the title ABATEMENT, REVIVAL AND SURVIVAL, ante, p. 12.

Substitution as avoiding stipulation.—See post, "Release of Property on Bond or Stipulation," III, J, 5.

93. **Appearance.**—An entry on the record of an admiralty case, that on the return of a process of attachment Mr. B. "appears for the respondent, and has a week to perfect an appearance and to answer," is an appearance, the entry being followed by the execution by the respondent or his agents of different bonds, reciting "that an appearance in the case had been enterred." Atkins *v.* Fiber Disintegrating Co., 18 Wall. 272, 21 L. Ed. 841. See the title APPEARANCES.

94. **Appearance as waiving want of monition.**—Penhallow *v.* Doane, 3 Dall. 54, 87, 1 L. Ed. 507. See, generally, the title APPEARANCES.

admiralty courts of this country, that it has fallen into desuetude in England.[95]

b. *Necessity of Service in Proceeding in Rem.*—A suit in rem cannot be maintained without service of process upon the property.[96]

c. *Effect of Service.*—Service of regular process is a warning to all parties who have any interest in the cause to come in and protect their interest; and unless they do so, if due notice was given, they are bound by the decree.[97]

3. ATTACHMENT—a. *Power to Issue Attachment.*—The courts of the United States, proceeding as courts of admiralty and maritime jurisdiction, may issue the process of attachment to compel appearance, both in cases of maritime torts and contracts.[98]

b. *Who May Attach.*—A creditor by judgment in a state court, of the owners of the vessel, even though he had a decree in personam also in the admiralty against them, cannot seize, or attach, on execution, proceeds of the vessel in the registry of the admiralty.[99]

c. *Grounds for Attachment.*—The process by attachment may issue, wherever the defendant has concealed himself or absconded from the country, and the goods to be attached are within the jurisdiction of the admiralty.[1]

d. *What May Be Attached.*—Attachment may issue against goods and chattels,[2] stocks and credits,[3] and credits and effects in the hands of third persons.[4]

e. *Necessity for Specification of Property in Libel.*—It is not necessary, that the property to be attached should be specified in the libel.[5]

f. *Issuance and Validity of Attachment.*—It seems, that an attachment can-

95. Kind of process.—Manro *v.* Almeida, 10 Wheat. 473, 6 L. Ed. 369. See, generally, the title SUMMONS AND PROCESS.

96. Necessity of service in proceeding in rem.—The Propeller Commerce, 1 Black 574, 581, 17 L. Ed. 107. See, generally, the title SUMMONS AND PROCESS.

Notice of the controversy is necessary, in order to become a party, and it is a principle of natural justice, of universal obligation, that before the rights of an individual be bound by a judicial sentence, he shall have notice, either actual or implied, of the proceedings against him. Where these proceedings are against the person, notice is served personally, or by publication; where they are in rem, notice is served upon the thing itself. This is necessarily notice to all those who have any interest in the thing, and is reasonable, because it is necessary, and because it is the part of common prudence for all those who have any interest in it, to guard that interest by persons who are in a situation to protect it. The Mary, 9 Cranch 126, 144, 3 L. Ed. 678.

97. Effect of service.—The Commander-in-Chief, 1 Wall. 43, 52, 17 L. Ed. 609. See, generally, the title SUMMONS AND PROCESS.

98. Power to issue attachment.—Manro *v.* Almeida, 10 Wheat. 73, 6 L. Ed. 369; Miller *v.* United States, 11 Wall. 296, 20 L. Ed. 142. See, generally, the title ATTACHMENT AND GARNISHMENT.

Stocks and credits are attachable in admiralty and revenue cases by means of the simple service of a notice, without the aid of any statute. Miller *v.* United States, 11 Wall. 268, 20 L. Ed. 135.

The remedy by attachment, in the admiralty, in maritime cases, applies even where the same goods are liable to the process of foreign attachment, issuing from the courts of common law. Manro *v.* Almeida, 10 Wheat. 473, 6 L. Ed. 369.

In a court of admiralty, as in a court of common law, the process of foreign attachment is auxiliary and incidental to the principal cause. Cushing *v.* Laird, 107 U. S. 67, 27 L. Ed. 391; Atkins *v.* Fiber Disintegrating Co., 18 Wall. 272, 21 L. Ed. 841.

99. Who may attach.—The Lottawanna, 20 Wall. 201, 22 L. Ed. 259.

1. Grounds for attachment.—Manro *v.* Almeida, 10 Wheat. 473, 6 L. Ed. 369.

Attachment of property of nonresident.—A district court of the United States, when acting as a court of admiralty, can obtain jurisdiction to proceed in personam against an inhabitant of the United States not residing within the district (within which terms a corporation incorporated by a state not within the district is meant to be included), by attachment of the goods or property of such inhabitant found within the district. Atkins *v.* Fiber Disintegrating Co., 18 Wall. 272, 21 L. Ed. 841.

2. Goods and chattels.—Manro *v.* Almeida, 10 Wheat. 473, 6 L. Ed. 369.

3. Stocks and credits.—Miller *v.* United States, 11 Wall. 268, 20 L. Ed. 135; Manro *v.* Almeida, 10 Wheat. 473, 6 L. Ed. 369.

4. Credits in hands of third persons.—Manro *v.* Almeida, 10 Wheat. 473, 6 L. Ed. 369.

5. Specification of property in libel.—Manro *v.* Almeida, 10 Wheat. 473, 6 L. Ed. 369.

not issue, without an express order of the judge, but it may be issued simultaneously with the monition; and where the attachment issued in this manner, and in pursuance of the prayer of the libel, the supreme court will presume that it was regularly issued.[1]

g. *Effect of Default of Respondent after Attachment.*—In case of default, the property attached may be condemned to answer the demand of the libelant.[6]

F. Pleadings—1. In General.—Pleadings in admiralty are not governed by the strict rule that prevails in regard to indictments or criminal informations at common law.[7]

2. Libel—a. *Definition and Nature.*—The libel in the admiralty court takes the place of the declaration in an action at law.[8] The word "libel" does not refer exclusively to admiralty proceedings, but may relate to seizures on land.[9]

b. *Form and Requisites*—(1) *Necessary Averments.*—If a libel is one in rem, it must state that the property is within the district,[10] it must state the nature of the cause, as, for example, that it is a cause civil and maritime, of contract, of tort or damage, of salvage, or possession, or otherwise, as the case may be,[11] the names and places of residence of the parties,[12] and if it is one in personam against the owners of the vessel, it must aver that the respondents were the owners of the vessel at the time of accident.[13] But it is not necessary to state any fact which constitutes the defense of the claimant,[14] nor to describe the property to be attached.[15]

(2) *Sufficiency of Averments and Accuracy of Statements.*—The rules of pleading in the admiralty are exceedingly simple and free from technical requirements. It is incumbent on the libelant to propound with distinctness the substantive facts on which he relies; to pray, either specifically or generally, for the relief appropriate to them; and to ask for such process of the court as is suited to the action, whether in rem or in personam.[16] While substantial accuracy in pleading should be observed by the libelant,[17] and a departure from this requirement, with intention to deceive, may constitute a bar to recovery, unless the faulty party is relieved from its consequences by leave of the court,[18] an omission to state facts which prove to be material but

1. Issuance and validity of attachment.—Manro *v.* Almeida, 10 Wheat. 473, 6 L. Ed. 369.

6. Effect of default of respondent after attachment.—Manro *v.* Almeida, 10 Wheat. 473, 6 L. Ed. 369.

7. Pleadings not governed by rule of common law.—Oakes *v.* United States, 174 U. S. 778, 43 L. Ed. 1169; Penhallow *v.* Doane, 3 Dall. 54, 79, 1 L. Ed. 507; The Ship Virgin, 8 Pet. 538, 549, 8 L. Ed. 1036; Dupont de Nemours *v.* Vance, 19 How. 162, 171, 15 L. Ed. 584; New Jersey Steam Nav. Co. *v.* Merchants' Bank, 6 How. 344, 434, 12 L. Ed. 465. See post, "Libel," II. F. 2.

8. Libel compared with declaration.—The Atlas, 93 U. S. 302, 316, 23 L. Ed. 863.

9. "Libel" as relating exclusively to pleading in admiralty.—The Betsey & Charlotte, 4 Cranch 413, 451, 2 L. Ed. 673.

10. Averment that property is within district.—The Propeller Commerce, 1 Black 574, 581, 17 L. Ed. 107.

11. Averment as to nature of cause of action.—The Propeller Commerce, 1 Black 574, 581, 17 L. Ed. 107; The Divina Pastora, 4 Wheat. 52, 64, 4 L. Ed. 512; United States *v.* Weed, 5 Wall. 65, 68, 18 L. Ed. 531.

The libel must inform the claimant of the specific act by which he or his property has violated the law. United States *v.* Weed, 5 Wall. 62, 68, 18 L. Ed. 531.

12. Averment as to names and residences of parties.—The Propeller Commerce, 1 Black 574, 581, 17 L. Ed. 107.

Where a prosecution is instituted by one or more parties for themselves and others not named, it would be more regular that it should be so averred in the libel; but as there can be only one prosecution for the same collision, it is not perceived that the omission of that averment can operate to the prejudice of the claimant. The Commander-in-Chief, 1 Wall. 43, 52, 17 L. Ed. 609.

13. Ownership of vessel.—The Corsair, 145 U. S. 335, 36 L. Ed. 727.

14. Matters of defense.—The Brig Aurora, 7 Cranch 382, 3 L. Ed. 378; The Margaret, 9 Wheat. 421, 6 L. Ed. 125.

15. Description of property to be attached.—Manro *v.* Almeida, 10 Wheat. 473, 6 L. Ed. 369.

16. Sufficiency of averments in general.—Dupont de Nemours *v.* Vance, 19 How. 162, 171, 15 L. Ed. 584.

In prize cases.—See the title PRIZE.

17. Substantial accuracy required.—The Stephen Morgan, 94 U. S. 599, 602, 24 L. Ed. 266.

18. Want of substantial accuracy in statements.—Defects of the kind, when discovered, should be cured by amend-

which cannot have occasioned any surprise to the opposite party, will not be allowed to work injury to the libelant, on appeal, if the court can see that there was no design on his part in omitting to state them.[19] Material errors occurring in the libel may be corrected or cured by the answer.[20]

(3) *Prayer for Relief.*—The libel must contain either a general or special prayer for appropriate relief,[21] but if a libel sets forth all the material facts ultimately found by the court, contains a prayer for general relief, damages may be awarded although not specifically prayed for.[22]

(4) *Informations for Forfeitures.*—A libel, on a seizure, in its terms and in its essence, is an information.[23] While an information in the admiralty for a forfeiture, must contain a substantial statement of the offense,[24] and show that the cause is one within the admiralty jurisdiction,[25] technical nicety is not

ment in all cases where the imperfection is calculated to deceive or mislead. The Stephen Morgan, 94 U. S. 599, 602, 24 L. Ed. 266.

19. Omission to state some material facts.—The Quickstep, 9 Wall. 665, 19 L. Ed. 767; The Syracuse, 12 Wall. 167, 173, 20 L. Ed. 382.

Inaccuracy in statement of subordinate facts.—If a libelant propounds with distinctness the substantive facts upon which he relies, and prays, either specially or generally, for appropriate relief, even if there is some inaccuracy in his statement of subordinate facts, or of the legal effect of the facts propounded, the court may award any relief which the law applicable to the case warrants. The Gazelle, 128 U. S. 474, 32 L. Ed. 496; Dupont de Nemours *v.* Vance, 19 How. 162, 15 L. Ed. 584; The Syracuse, 12 Wall. 167, 20 L. Ed. 382.

20. Omissions from libel cured by answer.—The Stephen Morgan, 94 U. S. 599, 603, 24 L. Ed. 266; The Syracuse, 12 Wall. 167, 173, 20 L. Ed. 382.

Where the libel alleged a shipment of cargo under a bill of lading, and its non-delivery, and prayed process against the vessel, and the answer set up a jettison rendered necessary by a peril of the sea, and this defensive allegation was sustained by the court, it was held, that the libelant was entitled to a decree for the contributory share of general average due from the vessel. Dupont de Nemours *v.* Vance, 19 How. 162, 15 L. Ed. 584.

Sufficiency of averments in collision cases.—See the title COLLISION.

21. Prayer for relief.—Dupont de Nemours *v.* Vance, 19 How. 162, 171, 15 L. Ed. 584.

22. Right to damages not prayed for in libel.—The Gazelle, 128 U. S. 474, 32 L. Ed. 496; Penhallow *v.* Doane, 3 Dall. 54, 1 L. Ed. 507.

23. Libel as information.—The Samuel, 1 Wheat. 9, 13, 4 L. Ed. 23.

24. Necessity for substantial statement of offense.—The Caroline, 7 Cranch 496, 3 L. Ed. 417; The Schooner Anne, 7 Cranch 570, 3 L. Ed. 442; The Schooner Hoppet, 7 Cranch 389, 3 L. Ed. 380.

A rule so essential to justice and fair proceeding, as that which requires a substantial statement of the offense upon which the prosecution is founded, must be the rule of every court where justice is its object, and cannot be satisfied by a general reference to the provisions of the statute. United States *v.* Weed, 5 Wall. 62, 68, 18 L. Ed. 531; The Schooner Hoppet, 7 Cranch 389, 3 L. Ed. 380; Freidenstein *v.* United States, 125 U. S. 224, 236, 30 L. Ed. 742.

Inasmuch as the information is in the nature of a criminal proceedings, the allegations must conform strictly to the statute upon which it is founded. United States *v.* Huckabee, 16 Wall. 414, 431, 21 L. Ed. 457; The Schooner Hoppet, 7 Cranch 389, 3 L. Ed. 380; The Caroline, 7 Cranch 496, 500, 3 L. Ed. 417; The Mary Ann, 8 Wheat. 380, 5 L. Ed. 641.

The right of the claimant to be informed by the libel of the specific act by which he or his property has violated the law, and to have an opportunity to produce witnesses, and to cross-examine those produced against him, are as fully recognized in the admiralty courts, in all except prize cases, as they are in the courts of common law. United States *v.* Weed, 5 Wall. 62, 68, 18 L. Ed. 531.

A libel for a forfeiture must be particular and certain in all the material circumstances which constitute the offense. The Caroline, 7 Cranch 496, 3 L. Ed. 417; The Schooner Anne, 7 Cranch 570, 3 L. Ed. 442.

If the information be defective in that respect, the defect is not cured, by evidence of the facts omitted to be averred in the information. The Schooner Hoppet, 7 Cranch 389, 3 L. Ed. 380.

Libel for forfeiture under slave trade act.—See the title SLAVES.

Libel for forfeiture for breach of revenue laws.—See the title REVENUE LAWS.

25. Showing as to admiralty jurisdiction.—La Vengeance, 3 Dall. 297, 1 L. Ed. 610.

Jurisdictional facts.—Where a libel for forfeiture of a vessel for illegal exportation of arms alleged that arms were exported from Sandy Hook in the state of New Jersey to a foreign country, etc., it was held, that it sufficiently appeared

required,[26] and, in general, it is sufficient, if the offense be described in the words of the law, and so set forth, that, if the allegation be true, the case must be within the statute.[27] But a general reference to the provisions of the statute is not sufficient.[28] Stating a charge in the alternative is good, if each alternative constitutes an offense for which the thing is forfeited.[29] It is not necessary that the libel should conclude contra formam statuti.[30]

c. *Waiver of Objections.*—Where exceptions of form are taken on a libel in admiralty in the district court, but are not found in the record of the appeals from the district to the circuit court, or from the circuit court to the supreme court, and do not appear to have been brought to the attention of the circuit court, or acted on in any manner by it, they must be held to have been waived.[31]

3. ANSWER—a. *Definition and Nature.*—The answer in admiralty proceedings is a substitute for the plea of the defendant in actions at law.[32]

that the offense was a water transaction, and within the admiralty jurisdiction. La Vengeance, 3 Dall. 297, 1 L. Ed. 610.

26. Technical nicety not required.—The Samuel, 1 Wheat. 9, 4 L. Ed. 23; The Merino, 9 Wheat. 391, 6 L. Ed. 118; The Emily, 9 Wheat. 381, 6 L. Ed. 116; The Schooner Hoppet, 7 Cranch 389, 3 L. Ed. 380; Coffey *v.* United States, 116 U. S. 427, 435, 29 L. Ed. 681; The Confiscation Cases, 20 Wall. 92, 110, 22 L. Ed. 320.

Compared with indictment.—A libel of information does not require all the technical precision of an indictment at common law; if the allegation describes the offense, it is all that is necessary. The Emily, 9 Wheat. 381, 382, 6 L. Ed. 116; The Palmyra, 12 Wheat. 1, 12, 6 L. Ed. 531; The Samuel, 1 Wheat. 9, 4 L. Ed. 23.

Certainly a libel for the forfeiture of a vessel need not be more technical or specific than an indictment at common law. The United States *v.* Brig Neurea, 19 How. 92, 94, 15 L. Ed. 531.

27. Description in words of statute.—The Samuel, 1 Wheat. 9, 4 L. Ed. 23; The Merino, 9 Wheat. 391, 6 L. Ed. 118; The Emily, 9 Wheat. 381, 6 L. Ed. 116; The Schooner Hoppet, 7 Cranch 389, 3 L. Ed. 380; Coffey *v.* United States, 116 U. S. 427, 435, 29 L. Ed. 681; The United States *v.* The Brig Neurea, 19 How. 92, 15 L. Ed. 531; The Palmyra, 12 Wheat. 1, 13, 6 L. Ed. 531; The Mary Ann, 8 Wheat. 380, 389, 5 L. Ed. 6417; United States *v.* Mann, 95 U. S. 580, 586, 24 L. Ed. 531.

Exceptions to the rule, exist where the terms of the statute are so general as naturally to call for more distinct specifications. The Palmyra, 12 Wheat. 1, 13, 6 L. Ed. 531; The Mary Ann, 8 Wheat. 380, 389, 5 L. Ed. 641.

"If the words which describe the subject of the law are general, embracing a whole class of individuals, but must necessarily be so construed, as to embrace only a subdivision of that class, we think the charge in the libel ought to conform to the true sense and meaning of those words as used by the legislature." The Mary Ann, 8 Wheat. 380, 389, 5 L. Ed. 641; United States *v.* Mann, 95 U. S. 580, 586, 24 L. Ed. 531; The Schooner Hoppet, 7 Cranch 389, 3 L. Ed. 380.

28. General reference to provisions of statute.—The Schooner Hoppet, 7 Cranch 389, 3 L. Ed. 380.

The rule of the common law, that in all proceedings either against the person or thing, for penalties or forfeitures, the allegation that the act charged was committed in violation of law, or of the provisions of a particular statute will not justify condemnation, unless, independently of this allegation, a case be stated, which shows that the law has been violated, applies to informations in a court of admiralty. The Schooner Hoppet, 7 Cranch 389, 393, 3 L. Ed. 380.

29. Stating charge in alternative.—The Emily, 9 Wheat. 381, 6 L. Ed. 116.

30. Conclusion.—The Merino, 9 Wheat. 391, 6 L. Ed. 118; The Confiscation Cases, 20 Wall. 92, 111, 22 L. Ed. 320.

The absence of any averment that the causes of forfeiture were contrary to the form of the statute or statutes of the United States in such case provided, is no sufficient reason for reversing the judgment of the district court. Such an averment is required by the twenty-second admiralty rule, but even in admiralty a failure to make it cannot be taken advantage of in a court of errors. The Merino, 9 Wheat. 391, 401, 6 L. Ed. 118. The defect is only formal. It is true the absence of such averment in indictments and criminal informations has been held to be a fatal fault, but for reasons inapplicable to civil proceedings, and we need not repeat that the present is a civil case. The Confiscation Cases, 20 Wall. 92, 111, 22 L. Ed. 320.

Libel for forfeiture of goods seized on land.—See the title REVENUE LAWS, and cross references there given.

31. Waiver of objections.—The Vaughan and Telegraph, 14 Wall. 258, 20 L. Ed. 807. See, also, The Emily, 9 Wheat. 381, 386, 6 L. Ed. 116.

32. Answer compared with plea in actions at law.—The Atlas, 93 U. S. 302, 316, 23 L. Ed. 863.

b. *Form and Requisites.*—It is incumbent on the respondent to answer distinctly each substantive fact alleged in the libel, either admitting or denying, or declaring his ignorance thereof, and to allege such other facts as he relies upon as a defense, either in part or in whole, to the case made by the libel.[33] The necessity for specification which is required with respect to exceptions to the report of commissioners in admiralty exists in a high degree with respect to answers in admiralty. The answer should be full, explicit and distinct.[34]

c. *Effect as Evidence.*—In the admiralty the same rule does not prevail as in equity, that the answer to matters directly responsive to the allegations of the bill, is to be treated as sufficient proof of the facts, in favor of the respondent, unless overcome by the testimony of two witnesses, or of one witness and other circumstances of equivalent force.[35]

4. Reply.—New matter in an answer is considered as denied by the libelant and no reply thereto is necessary.[36]

5. Cross Libel—a. *Definition.*—A cross libel is a libel brought by a defendant in the suit against the plaintiff in the same suit or against other defendants in the original suit or against both, touching the matters in question in the original libel.[37]

b. *Object and Purpose.*—A cross libel is brought in admiralty to obtain full and complete relief to all parties as to matters charged in the original libel.[38]

c. *Necessity.*—In admiralty, if the respondent desires to obtain entire damages against the libelant, or damages in excess of those claimed by libelant, a cross libel is necessary,[39] and an answer cannot, by agreement of the parties, be treated as a cross libel.[40]

d. *Mode of Proceeding.*—Respondents who desire to have affirmative relief against the libelants should file their libel, take out process, and have it served in the usual way; and when that is done, the libelants in the first suit regularly become respondents in the cross libel, and, as such, they must answer or stand the consequences of default.[41]

e. *Subject Matter.*—Matters auxiliary to the cause of action set forth in the original libel may be included in the cross suit, and no others, as the cross suit is, in general, incidental to, and dependent upon, the original suit.[42] New and distinct matters, not included in the original libel, should not be embraced in

33. Form and requisites.—Dupont de Nemours *v.* Vance, 19 How. 162, 172, 15 L. Ed. 584; Commander-in-Chief, 1 Wall. 43, 17 L. Ed. 609.

34. Answer should be full, explicit and distinct.—The Schooner Commander-in-Chief, 1 Wall. 43, 17 L. Ed. 609.

Form and sufficiency of answer in collision cases.—See the title COLLISION.

35. Effect as evidence.—Andrews *v.* Wall, 3 How. 568, 572, 11 L. Ed. 729.

36. Reply.—Admiralty Rule 51; Coffey *v.* United States, 116 U. S. 427, 435, 29 L. Ed. 681.

37. Definition of cross libel.—The Dove, 91 U. S. 381, 385, 23 L. Ed. 354; Bowker *v.* United States, 186 U. S. 135, 46 L. Ed. 1090.

"Generally speaking, the same principles apply to cross libels as to cross bills." Bowker *v.* United States, 186 U. S. 135, 139, 46 L. Ed. 1090. See the title CROSS BILLS.

38. Effect and purpose of cross libel.—The Dove, 91 U. S. 381, 385, 23 L. Ed. 354; Bowker *v.* United States, 186 U. S. 135, 46 L. Ed. 1090.

39. Necessity of cross libel.—Bowker *v.* United States, 186 U. S. 135, 46 L. Ed. 1090.

In collision cases.—See the title COLLISION.

40. Agreement of parties to treat answer as cross libel.—Where a libel was filed by the owners of a steamer against the owners of a propeller for a collision, and there was an agreement between the parties in the court below, that the answer of the respondents should operate as a cross libel, the mode of proceeding does not meet the approval of this court, and ought not to be drawn into precedent. The respondents should file their cross libel, take out process, and have it served in the usual way. Ward *v.* Chamberlain, 21 How. 572, 16 L. Ed. 219.

Set-off, recoupment or counterclaim.—See post, "Set-off, Recoupment and Counterclaim," III, I.

41. Mode of proceeding.—Ward *v.* Chamberlain, 21 How. 572, 574, 16 L. Ed. 219.

42. Matters auxiliary to original cause of action.—The Dove, 91 U. S. 381, 385,

the cross suit, as they cannot be properly examined in such a suit, for the reason that they constitute the proper subject matter of a new original libel.[43]

f. *Dismissal.*—The decree of a district court, dismissing a cross libel for want of merit, from which no appeal was taken, determines the questions raised by such cross libel, but does not dispose of the issues of law or of fact involved in the original suit.[44] Where the cross bill asks affirmative relief, and is therefore not a pure cross bill, the dismissal of the original bill may not dispose of the cross bill, which may be retained for a complete determination of the cause.[45]

6. AMENDMENTS—a. *Attitude of Admiralty toward Amendments.*—Amendments are readily granted in the admiralty court, as carrying out the maxim that all the world are parties to the proceeding; and if due notice be given, and any one interested fails to appear, he cannot thereafter have any ground of complaint.[46]

b. *Amendment of Libel*—(1) *In General.*—In all informations and libels, in causes of admiralty and maritime jurisdiction, new counts may be filed, and amendments, in matters of substance, may be made, upon motion, at any time before the final decree, upon such terms as the court shall impose.[47]

(2) *Amendment as to Parties.*—If the libelant originally proceeded against vessel, master, owners, and pilots, the libel may with leave of the court be amended so as to apply to the vessel and master only.[48]

(3) *Amendment on Appeal.*—In admiralty proceedings, amendments are made in the appellate court, not only as to form, but as to matter of substance, as, by filing a new count to the libel.[49] Such amendments are within the ad-

23 L. Ed. 354; Bowker *v.* United States, 186 U. S. 135, 46 L. Ed. 1090.

43. New matter not to be included in cross bill.—The Dove, 91 U. S. 381, 385, 23 L. Ed. 354; Bowker *v.* United States, 186 U. S. 135, 46 L. Ed. 1090.

44. Dismissal of cross libel.—The Dove, 91 U. S. 381, 23 L. Ed. 354. See, generally, the title DISMISSAL, DISCONTINUANCE AND NONSUIT.

By such dismissal, without appeal, both parties to the cross libel are remitted to the pleadings in the original suit; and every issue therein is open on appeal as fully as if no cross libel had ever been filed. The Dove, 91 U. S. 381, 23 L. Ed. 354.

45. Dismissal of original libel as dismissal of cross libel.—Bowker *v.* United States, 186 U. S. 135, 46 L. Ed. 1090. See the title DISMISSAL, DISCONTINUANCE AND NONSUIT.

46. Attitude of admiralty toward amendments.—The Schooner Commander in Chief, 1 Wall. 43, 52, 17 L. Ed. 609; The Schooner North Carolina, 15 Pet. 40, 10 L. Ed. 653; The Schooner Adeline, 9 Cranch 244, 284, 3 L. Ed. 719. See, generally, the title AMENDMENTS.

"Where merits clearly appear on the record, it is the settled practice, in admiralty proceedings, not to dismiss the libel, but to allow the party to assert his rights in a new allegation. This practice, so consonant with equity and sound principle, has been deliberately adopted by this court on former occasions." The Schooner Adeline, 9 Cranch 244, 3 L. Ed. 719.

In admiralty the most liberal principles prevail in regard to amendments. The Schooner North Carolina, 15 Pet. 40, 10 L. Ed. 653.

47. Amendment of libel.—Admiralty Rule 24; The Charles Morgan *v.* Kouns, 115 U. S. 69, 29 L. Ed. 316; The Stephen Morgan, 94 U. S. 599, 602, 24 L. Ed. 266.

A libel charging a seizure to have been made on water, when it was in fact made on land, will not support a verdict and judgment or sentence thereon, but must be amended or dismissed. The Sarah, 8 Wheat. 391, 5 L. Ed. 644.

An informal libel, or information in rem, may be amended, by leave of the court. The Caroline, 7 Cranch 496, 3 L. Ed. 417. See The Edward, 1 Wheat. 261, 4 L. Ed. 86; The Mabey, 10 Wall. 419, 420, 19 L. Ed. 963.

48. Amendment as to parties.—Newell *v.* Norton, 3 Wall. 257, 18 L. Ed. 271.

Such an amendment, neither increasing nor diminishing their liability, will not discharge the sureties to the usual bond given on release of a vessel seized by process of the admiralty. Newell *v.* Norton, 3 Wall. 257, 258, 18 L. Ed. 271.

49. Amendment on appeal—In general.—The Marianna Flora, 11 Wheat. 261, 6 L. Ed. 405; The Edward, 1 Wheat. 261, 4 L. Ed. 86; The Charles Morgan *v.* Kouns, 115 U. S. 69, 76, 29 L. Ed. 316.

In revenue or instance causes, the circuit court may, upon appeal, allow the introduction of a new allegation into the information, by way of amendment. The Edward, 1 Wheat. 261, 4 L. Ed. 86. See, also, Rice *v.* Minnesota, etc., R. Co., 21 How. 82, 84, 16 L. Ed. 31.

miralty rule permitting amendments before final decree.[50] While a new claim for damages may be added to the bill on appeal,[51] a new claim for interest cannot be added in order to bring the amount in controversy within the jurisdiction of the court.[52] If the amendment be made in the circuit court, the cause is heard and adjudicated by that court and upon appeal by the supreme court, on the new allegation.[53] But where the libel is so informal and defective, that the court cannot enter up a decree upon it, the supreme court will not amend the libel itself, but will remand the cause to the court below, with directions to permit it to be amended.[54]

(4) *Amendment after Reversal.*—A libel may be amended, after reversal, for want of substantial averments.[55]

c. *Amendment of Answer.*—It is within the discretion of the district court to refuse leave to amend the answer.[56]

G. Laches.—While courts of admiralty are not governed by any statute of limitations, they adopt the principle that laches or delay in the judicial enforcement of maritime liens, will, under proper circumstances, constitute a valid defense.[57] No arbitrary or fixed period of time has been, or will be established, as an inflexible rule; but the delay which will defeat such a suit must, in every case, depend on the peculiar equitable circumstances of that case.[58]

50. Application of admiralty rule permitting amendments before final decree.—A motion to amend the libel made while the case is pending in the circuit court for a new trial on its merits, after an appeal from the district court and the vacation of its decree, is made before final decree within the meaning of admiralty rule 24, providing that in all informations and libels in causes of admiralty or maritime jurisdiction "new counts may be filed, and amendments, in matter of substance, may be made, upon motion, at any time before the final decree, upon such terms as the court shall impose." The Charles Morgan *v.* Kouns, 115 U. S. 69, 29 L. Ed. 316, citing The Lucille, 19 Wall. 73, 74, 22 L. Ed. 64.

51. Adding new claim for damages.—Under admiralty rule 24, the circuit court may, in its discretion, permit an amendment of the libel, so as to include a claim for damages growing out of the original cause of action, and litigated in the court below, but rejected because not specified in the pleadings. The Charles Morgan *v.* Kouns, 115 U. S. 69, 29 L. Ed. 316, citing The Lucille, 19 Wall. 73, 74, 22 L. Ed. 64, distinguishing The Schooner North Carolina, 15 Pet. 40, 50, 10 L. Ed. 653.

But before the adoption of the admiralty rule 24, a libel could not be amended after an appeal, so as to bring in a new claim for damages. The Schooner North Carolina, 15 Pet. 40, 50, 10 L. Ed. 653.

52. Adding claim of interest in order to give jurisdiction.—It is too late, when the cause has reached the supreme court, to amend the libel by inserting a special claim for interest so as to bring the amount in controversy within the jurisdiction of the court. The 24th admiralty rule ought not to be construed to extend to cases where an amendment would give jurisdiction, which would not exist without such amendment. Udall *v.* The Steamship Ohio, 17 How. 17, 15 L. Ed. 42. Generally, as to amount in controversy, see the title APPEAL AND ERROR.

53. Hearing on new allegations.—The Marianna Flora, 11 Wheat. 1, 6 L. Ed. 405.

54. Remanding case for amendment.—The Mary Ann, 8 Wheat. 380, 5 L. Ed. 641; The Divina Pastora, 4 Wheat. 52, 4 L. Ed. 512; The Marianna Flora, 11 Wheat. 1, 6 L. Ed. 405; The Edward, 1 Wheat. 261, 4 L. Ed. 86; The Adeline, 9 Cranch 244, 3 L. Ed. 719; Brig Caroline, 7 Cranch 496, 3 L. Ed. 417; The Schooner Anne, 7 Cranch 570, 3 L. Ed. 442.

55. Amendment after reversal.—The Mary Ann, 8 Wheat. 380, 5 L. Ed. 641; The Schooner Anne, 7 Cranch 570, 3 L. Ed. 442.

56. Discretion as to refusal of leave to amend answer.—O'Brien *v.* Miller, 168 U. S. 104, 42 L. Ed. 398.

It has been held, that it is no abuse of the discretion for the court to refuse to permit an answer to a third amended libel to be amended so as to set up laches on the part of libelants in not sooner bringing the matter objected to before the court. O'Brien *v.* Miller, 168 U. S. 104, 42 L. Ed. 398.

Amended answer setting up improbable defense and departing from answer not favored.—The Mabey & Cooper, 14 Wall. 204, 20 L. Ed. 881.

57. Laches.—The Key City, 14 Wall. 653, 20 L. Ed. 896; Reed *v.* Merchant's Mut. Ins. Co., 95 U. S. 23, 33, 24 L. Ed. 348. See, generally, the title LACHES.

58. Laches dependent on circumstances of case.—The Key City, 14 Wall. 653, 20 L. Ed. 896.

When an admiralty lien is to be enforced to the detriment of a purchaser for value, without notice of the lien, the defense will be held valid under shorter

H. Intervention and Claim—1. INTERVENTION.—All parties who may have an interest in the subject matter of the suit may appear, and each may propound independently, his interests.[59] The insurer may at all times intervene in courts of admiralty, if he has the equitable right to the whole or any part of the damages.[60] So, also, the cargo owners may intervene for the protection of their interests, at any time before the distribution of the proceeds of sale.[61] In collision cases, the court may, under the 59th admiralty rule, order process to issue against all who have an interest in the case.[62] After the release of a vessel on bond, intervening petitions cannot be filed without a rearrest.[63] The demand of the ship owners for freight and general average is to be pursued against that portion of the proceeds of the cargo, which is adjudged to the owners of the goods, by a direct libel or petition, and not by a claim interposed in the salvage cause.[64]

2. CLAIM.—a. *In General.*—In suits in rem, and on the exchequer side of the district courts of the United States, the claimant is an actor, and is entitled to come before the court in that character only, in virtue of his proprietary interest in the thing in controversy; this alone gives him a persona standi in judicio.[65] It is necessary, that he should establish his right to that character, as a preliminary to his admission as a party ad litem, capable of sustaining the litigation.[66]

b. *Who May Claim.*—In case of a seizure, the owner may appear and file a claim,[67] or it may be made by another for him, as the master of the vessel or managing owner, or the consignee.[68] And a consul has a right to interpose a claim on behalf of the citizens or subjects or his country,[69] but coshippers have no authority to interpose any claim for other shippers with whom they have no privity of interest or consignment.[70] Allegations and pleadings to the merits

time, and a more rigid scrutiny of the delay than when the claimant is the party who owned the property when the lien accrued. The Key City, 14 Wall. 653, 20 L. Ed. 896.

Quære, can a demand arising out of contract be enforced by a libel in personam in admiralty when a suit to recover it, if brought in a state court of concurrent jurisdiction, would be barred by the statute of limitations? Reed *v.* Merchant's Mut. Ins. Co., 95 U. S. 23, 24 L. Ed. 348.

59. Intervention in general.—Taylor *v.* Carryl, 20 How. 583, 599, 15 L. Ed. 1028; The Lottawanna, 20 Wall. 201, 22 L. Ed. 259; The Lottawanna, 21 Wall. 558, 22 L. Ed. 654. See, also, The Mary, 9 Cranch 126, 144, 3 L. Ed. 678.

Intervention to claim proceeds of sale.—See post, "Disposition of Proceeds of Sale," III, P.

60. Intervention by insurer.—The Propeller Monticello *v.* Mollison, 17 How. 153, 155, 15 L. Ed. 68. See, generally, the titles INTERVENTION; MARINE INSURANCE.

Under the 34th rule in admiralty an insurer may be allowed to intervene, and become the dominus litis, where he can show an abandonment, which divests the original claimant of all interest. The Propeller Monticello *v.* Mollison, 17 How. 153, 155, 15 L. Ed. 68.

Under the 43d admiralty rule an insurer may intervene after decree, and claim the damages recovered, by showing that he is equitably entitled to them. The Propeller Monticello *v.* Mollison, 17 How. 153, 155, 15 L. Ed. 68.

61. Cargo owners.—The Commander-in-Chief, 1 Wall. 43, 17 L. Ed. 609.

62. Forced intervention in collision cases.—See the title COLLISION.

63. Rearrest as prerequisite to intervention.—The Oregon, 158 U. S. 186, 39 L. Ed. 943.

64. Intervention by ship owners in salvage case.—The Sybil, 4 Wheat. 98, 4 L. Ed. 522. See, generally, the title SALVAGE.

65. Claim—In general.—United States *v.* 422 Casks of Wine, 1 Pet. 547, 7 L. Ed. 257; Govenor *v.* Madrazo, 1 Pet. 110, 132, 7 L. Ed. 73.

One claimant is not to suffer for the contumacy of another. The Mary, 9 Cranch 126, 143, 3 L. Ed. 678.

66. Necessity for claimant to establish interest.—United States *v.* 422 Casks of Wine, 1 Pet. 547, 7 L. Ed. 257.

67. Owner.—United States *v.* Ames, 99 U. S. 35, 43, 25 L. Ed. 295.

68. Claim by agent, etc., of owner.—United States *v.* Ames, 99 U. S. 35, 43, 25 L. Ed. 295. See, generally, the title PRINCIPAL AND AGENT.

69. Right of consul to claim for subject of his country.—See the title AMBASSADORS AND CONSULS.

70. Coshippers.—Stratton *v.* Jarvis, 8 Pet. 4, 9, 8 L. Ed. 846.

are a waiver of the preliminary inquiry as to proprietary interest, and admission that the party is rightly in court, and capable of contesting the merits.[71]

c. *Verification or Affidavit.*—A test affidavit ought to state, that the property, at the time of the shipment, and also at the time of capture, did belong, and will, if restored, belong to the claimant,[72] but an irregularity in this respect is not fatal.[73] If the affidavit is made by an agent, he must make oath as to his belief of the verity of the claim, and if necessary, produce proof of his authority, before he can be admitted to put in the claim.[74] A test affidavit, by an agent, is not sufficient, if the principal be within the country, and within a reasonable distance from the court,[75] but an objection on this ground cannot be raised for the first time in the supreme court.[76]

d. *Effect of Fraudulent Claim.*—If a party attempts to impose upon the court, by knowingly or fraudulently claiming as his own, property belonging in part to others, he will not be entitled to restitution of that portion which he may ultimately establish as his own.[77]

e. *Separate Claims Treated as Separate Proceedings.*—When separate claims are interposed, although the libel is joint against the whole property, each claim is treated as a distinct and independent proceeding, in the nature of a several suit, upon which there may be a several independent hearing, decree and appeal. This is very familiar in practice, in prize causes, and seizures in rem for forfeitures; and it is equally applicable to all other proceedings in rem, whenever there are distinct and independent claimants.[78]

f. *Disposition of Unclaimed Property.*—See ante, "Disposition of Proceeds of Sale," III, P.

I. Set-Off, Recoupment and Counterclaim.—Recoupment or counterclaim may be asserted in the answer in a proceeding in admiralty.[79]

J. Custody and Control of Property—1. NECESSITY FOR SEIZURE OF PROPERTY.—To give jurisdiction in rem there must be a seizure and actual control of the property by the marshal of the court,[80] and the seizure by the marshal

71. Waiver of objection to claimant.—United States *v.* 422 Casks of Wine, 1 Pet. 547, 7 L. Ed. 257.

72. Form and contents of test affidavit.—The Schooner Adeline, 9 Cranch 244, 3 L. Ed. 719.

73. Effect of irregularity in affidavit.—The Schooner Adeline, 9 Cranch 244, 3 L. Ed. 719.

74. Sufficiency of oath and proof of agent's authority.—United States *v.* 422 Casks of Wine, 1 Pet. 547, 7 L. Ed. 257.

75. Right of agent to make affidavit.—The Schooner Adeline, 9 Cranch 244, 3 L. Ed. 719.

76. Waiver of objection to affidavit by agent.—The Schooner Adeline, 9 Cranch 244, 3 L. Ed. 719. See the titles APPEAL AND ERROR; EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL.

77. Effect of fraudulent claim.—The Dos Hermanos, 2 Wheat. 76, 4 L. Ed. 189.

78. Separate claims treated as separate proceedings.—Stratton *v.* Jarvis, 8 Pet. 4, 9, 8 L. Ed. 846.

79. Set-off, recoupment or counterclaim.—Bowker *v.* United States, 186 U. S. 135, 46 L. Ed. 1090. See the title SET-OFF, RECOUPMENT AND COUNTERCLAIM.

Recoupment or counterclaim in collision cases.—See the title COLLISION.

80. Necessity for seizure of property.—Taylor *v.* Carryl, 20 How. 583, 599, 15 L. Ed. 1028; The Rio Grande, 23 Wall. 458, 465, 23 L. Ed. 158; Miller *v.* United States, 11 Wall. 268, 294, 20 L. Ed. 135; Cushing *v.* Laird, 107 U. S. 69, 78, 27 L. Ed. 391; Jennings *v.* Carson, 4 Cranch 2, 2 L. Ed. 531; The Brig Ann, 9 Cranch 289, 3 L. Ed. 734; The Josefa Segunda, 10 Wheat. 312, 6 L. Ed. 329; Dobbins *v.* United States, 96 U. S. 395, 396, 24 L. Ed. 637.

In order to institute and perfect proceedings in rem, it is necessary that the thing should be actually or constructively within the reach of the court. It is actually within its possession, when it is submitted to the process of the court; it is constructively so, when, by a seizure, it is held, to ascertain and enforce a right or forfeiture which can alone be decided by a judicial decree in rem. The Brig Ann, 9 Cranch 289, 291, 3 L. Ed. 734.

Pending the proceedings the property is in the possession of the court, and not left in the possession of either party without security. Cushing *v.* Laird, 107 U. S. 69, 78, 27 L. Ed. 391; Jennings *v.* Carson, 4 Cranch 2, 2 L. Ed. 531.

Process in rem is founded on a right in the thing, and the object of the process is to obtain the thing itself, or a satisfaction out of it, for some claim resting on

must be valid.[81]

2. Control of Property by Court Pending Suit.—In all proceedings in rem, the court has a right to order the thing to be taken into custody of the law; and it is to be presumed to be in custody of the law, unless the contrary appears.[82] But vessels are frequently allowed to pursue their ordinary voyages while in custody pending suit, under proper restrictions and in order to prevent hardship.[83]

3. Wrongful Removal of Property from Custody of Court.—An accidental or fraudulent or improper removal of property from the custody of the court or marshal does not destroy jurisdiction.[84]

4. Abandonment of Seizure.—A seizure, once voluntarily abandoned, loses its validity.[85]

5. Release of Property on Bond or Stipulation—a. *Power to Take Stipulations and Release Property.*—(1) *In General.*—In general, when a warrant of arrest or other process in rem is issued in any cause of admiralty jurisdiction, the marshal may stay the execution of such process, or discharge the property arrested if the process has been levied, on receiving from the claimant of the property a bond or stipulation in double the amount claimed by the libelant, with sufficient surety, to be approved by the judge.[86]

a real or quasi proprietary right in it. Consequently, the court, through its process, arrests the thing, and holds possession of it by its officers, as the means of affording such satisfaction, and in contemplation of law it is in the possession of the court itself. The Propeller Commerce, 1 Black 574, 581, 17 L. Ed. 107.

81. Seizure must be valid.—Taylor *v.* Carryl, 20 How. 583, 584, 15 L. Ed. 1028; The Josefa Segunda, 10 Wheat. 312, 6 L. Ed. 329.

In order to constitute a valid seizure, so as to entitle the party to the proceeds of a forfeiture, there must be an open, visible possession claimed, and authority exercised, under the seizure. The Josefa Segunda, 10 Wheat. 312, 6 L. Ed. 329.

A seizure is not valid when the vessel was, at the time of seizure, in the actual and legal possession of the sheriff. Taylor *v.* Carryl, 20 How. 583, 584, 15 L. Ed. 1028.

If a merchant vessel of the United States be seized by the naval force of the United States, within the territorial jurisdiction of a foreign friendly power, for a violation of the laws of the United States, it is an offense against that power, which must be adjusted between the two governments; this court can take no cognizance of it. But the law does not connect that trespass with the subsequent seizure by the civil authority, under the process of the district court, so as to annul the proceedings of that court against the vessel. The Ship Richmond, 9 Cranch 102, 3 L. Ed. 670; The Merino, 9 Wheat. 391, 6 L. Ed. 118; Ex parte Johnson, 167 U. S. 120, 126, 42 L. Ed. 103.

82. Control of property pending suit.—Jennings *v.* Carson, 4 Cranch 2, 2 L. Ed. 531.

83. Release of vessels by court.—The Three Friends, 166 U. S. 1, 41 L. Ed. 897.

84. Wrongful removal of property from custody of court.—The Rio Grande, 23 Wall. 458, 465, 23 L. Ed. 158.

Hence, where, on a libel in rem in the admiralty for repairs, a vessel had been seized, and, on hearing, the libel was dismissed, but on the same day an appeal to the circuit court was moved and allowed, a motion made on the next day by the claimants, and improvidently granted, to restore the vessel to them, does not divest the circuit court of its jurisdiction to hear the appeal, if within due time the appeal is perfected by giving bonds in the way prescribed by statute. The Rio Grande, 23 Wall. 458, 23 L. Ed. 158.

85. Abandonment of seizure.—The Brig Ann, 9 Cranch 289, 291, 3 L. Ed. 734; The Josefa Segunda, 10 Wheat. 312, 6 L. Ed. 329.

If a seizure be completely and explicitly abandoned, and the property restored by the voluntary act of the party who has made the seizure, all rights under it are gone. Although judicial jurisdiction once attached, it is divested by the subsequent proceedings; and it can be revived only by a new seizure. It is, in this respect, like a case of capture, which, although well made, gives no authority to the prize court to proceed to adjudication, if it be voluntarily abandoned, before judicial proceedings are instituted. The Brig Ann, 9 Cranch 289, 291, 3 L. Ed. 734.

A seizure, not followed by an actual prosecution, or by a claim in the district court, before a hearing on the merits, insisting on the benefit of the seizure, becomes a nullity. The Josefa Segunda, 10 Wheat. 312, 6 L. Ed. 329.

86. Power to take stipulation and release property.—Rev. Stat., § 941; The Three Friends, 166 U. S. 1, 67, 41 L. Ed.

(2) *Seizures for Forfeiture.*—The statute makes an exception in cases of seizure for forfeiture under any law of the United States.[87]

b. *Form and Requisites.*—It matters not whether security in an admiralty and maritime cause be by bond, recognizance, or stipulation, as the court has an inherent authority to take it, and to proceed to award judgment or decree thereon according to the course of the admiralty, unless where some statute has prescribed a different course.[88] But if a vessel is in custody when intervening petitions are filed, the vessel cannot be released until a stipulation is given to answer all the libels on file.[89]

c. *Operation and Effect*—(1) *Substitute for Property.*—Whenever a stipulation is taken in the admiralty for the property subjected to legal process and condemnation, the stipulation is deemed a mere substitute for the thing itself, and the stipulators are held liable to the exercise of all those authorities on the part of the court which it could properly exercise if the thing itself were still in the custody of the court.[90]

(2) *Binding Effect on Appeal.*—A stipulation is binding on the appellate court, unless it appears that the property was released by misrepresentation and fraud.[91]

d. *Liability on Stipulations*—(1) *Liability of Stipulators to Subsequent Libelants or Intervenors.*—Where after a libel is filed for a collision, and the usual stipulation to answer judgment given, other libels for damages from the same collision are filed without a rearrest of the vessel, this is a new cause of action, and the court acquires no jurisdiction to render a judgment against the sureties.[92]

897; The Wanata, 95 U. S. 600, 616, 24 L. Ed. 461; The Oregon, 158 U. S. 186, 39 L. Ed. 943; The Schooner Anne Caroline, 2 Wall. 538, 548, 17 L. Ed. 833.

"Nothing can be better settled, said Judge Story, than that the admiralty may take a fidejussory caution or stipulation in cases in rem, and may in a summary manner award judgment and execution thereon. Jurisdiction to that effect is possessed by the district court; and, being fully authorized to adopt the process and modes of proceeding of the admiralty, they have an undoubted right to deliver the property on bail and to enforce conformity to the terms of the bailment. Authority to take such security is undoubted, and, whether it be by a sealed instrument or by a stipulation in the nature of a recognizance, cannot affect the jurisdiction of the court. Having jurisdiction of the principal cause, the court must possess jurisdiction over all the incidents, and may, by motion, attachment, or execution, enforce its decrees against all who become parties to the proceedings." The Wanata, 95 U. S. 600, 616, 24 L. Ed. 461.

87. Seizures for forfeiture.—Rev. Stat., § 941; The Three Friends, 166 U. S. 1, 67, 41 L. Ed. 897.

The release on bond of a vessel charged with liability to forfeiture under § 5283 of the Revised Statutes which forbids the fitting out or arming of vessels with intent that they shall be employed in the service of any foreign people or to cruise or commit hostilities against the subjects, citizens or property of any foreign people with whom the United States is at peace is unauthorized. The Three Friends, 166 U. S. 1, 41 L. Ed. 897.

88. Form and requisites.—The Wanata, 95 U. S. 600, 616, 24 L. Ed. 461; United States *v.* Ames, 99 U. S. 35, 41, 25 L. Ed. 295; The Schooner Ann Caroline, 2 Wall. 538, 549, 17 L. Ed. 833.

Bonds are to all intents and purposes stipulations. The Wanata, 95 U. S. 600, 616, 24 L. Ed. 461.

89. Necessity for bond to answer all petitions.—The Oregon, 158 U. S. 186, 39 L. Ed. 943.

90. The bond, a substitute for property released.—The Wanata, 95 U. S. 600, 611, 24 L. Ed. 461; The Palmyra, 12 Wheat. 1, 6 L. Ed. 531; United States *v.* Ames, 99 U. S. 35, 36, 25 L. Ed. 295; The Steamer Webb, 14 Wall. 406, 20 L. Ed. 774.

It is quite a different question, whether the court will, in particular cases, exercise its authority, where sureties on the stipulation may be affected injuriously; that is a subject addressed to its sound discretion. The Palmyra, 12 Wheat. 1, 10, 6 L. Ed. 531.

Under the New York act of April 24, 1862, purporting to give a lien upon a vessel for materials furnished and work done in repairing her at her home port, where a seizure has been seasonably made, a bond in conformity with the statute, accepted and delivered by the owner, is a substitute for the property and works a discharge of the vessel. The Edith, 94 U. S. 518, 24 L. Ed. 167.

91. Binding effect on appeal.—The Wanata, 95 U. S. 600, 611, 24 L. Ed. 461; Houseman *v.* The Schooner North Carolina, 15 Pet. 40, 10 L. Ed. 653.

92. Liability of stipulators to subsequent libelants or intervenors.—The Oregon, 158 U. S. 186, 39 L. Ed. 943.

A stipulation for the release of a suit

(2) *Nature and Extent of Liability*—(a) *Liability for Amount of Bond or Stipulation.*—Sureties in admiralty, like sureties at law, are only bound to the extent of the obligation expressed in their stipulation. The obligation of a stipulator is the same as that of a surety, and consequently his liability is limited by the terms of his contract.[93] The court cannot award any damages against the sureties beyond the amount of the stipulation, even if the amount of the stipulation is less than the decree.[94] Stipulations are taken for the property seized for the value of the same when delivered to the claimant, and the stipulation will not be reduced if the property when sold brings less than the appraised value.[95] The stipulator is estopped to deny that the vessel or property is worth less than the value fixed by the appraisers.[96]

(b) *Liability for Interest and Costs.*—If stipulators neglect to fulfill the terms of the instrument, and the suffering party is driven by their neglect to resort to legal measures to recover the amount to satisfy his loss, they are then, like the delinquent ship owner, liable for costs and interest occasioned by their neglect and contumacy.[97]

(3) *Amendment as Discharging Stipulators.*—An amendment, neither increasing nor diminishing the liability of stipulators, will not discharge the sureties to the usual bond given on release of a vessel seized by process of the admiralty.[98] But the introduction of a new cause of action is something which

for the benefit "of whom it may concern" obviously is for the benefit of the libelants whose claims have been filed, and does not apply to persons subsequently becoming parties by intervention. The Oregon, 158 U. S. 186, 39 L. Ed. 943.

93. Liability for amount of bond or stipulation.—The Schooner Ann Caroline, 2 Wall. 538, 548, 17 L. Ed. 833; The Wanata, 95 U. S. 600, 612, 24 L. Ed. 461; United States *v.* Ames, 99 U. S. 35, 41, 25 L. Ed. 295; The Ship Virgin, 8 Pet. 538, 539, 8 L. Ed. 1036; The Hypodame, 6 Wall. 216, 18 L. Ed. 794.

Whenever the obligation of the stipulator, as expresed in the stipulation, is for a definite sum, the surety stipulating to pay that sum cannot be compelled to pay more than that amount for any default of his principal. The Wanata, 95 U. S. 600, 605, 24 L. Ed. 461; The Steamer Webb, 14 Wall. 406, 20 L. Ed. 774.

94. Decree for larger amount than stipulation.—United States *v.* Ames, 99 U. S. 35, 41, 25 L. Ed. 295; The Wanata, 95 U. S. 600, 611, 24 L. Ed. 461.

95. Effect where property brings less than appraised value.—United States *v.* Ames, 99 U. S. 35, 41, 25 L. Ed. 295; The Wanata, 95 U. S. 600, 611, 24 L. Ed. 461.

96. Estoppel of stipulator to attack appraisement.—Where the owner had the ship delivered up to him upon an appraisement, at the value of $1800, and gave a stipulation, according to the course of admiralty proceedings, to refund that value, together with damages, interest and costs, to the court, it was held that he was not at liberty to insist, that the ship was of less value in his hands, or that he had discharged other liens, diminishing the value for which the owners were personally liable, in solido, in the first instance. The Ship Virgin, 8 Pet. 538, 8 L. Ed. 1036.

97. Liability for interest and costs.—The Wanata, 95 U. S. 600, 24 L. Ed. 461; The Schooner Ann Caroline, 2 Wall. 538, 17 L. Ed. 833; The Maggie J. Smith *v.* Walker, 123 U. S. 349, 356, 31 L. Ed. 175; The Steamer Webb, 14 Wall. 406, 20 L. Ed. 774.

The allowance of interest and costs rests in the discretion of the trial court and its action will not be disturbed on appeal. The Maggie J. Smith *v.* Walker, 123 U. S. 349, 356, 31 L. Ed. 175.

Stipulators for a definite sum as costs cannot be made liable for more than that amount, where they have not made defense, and have not been guilty of any default. The Wanata, 95 U. S. 600, 615, 24 L. Ed. 461; The Schooner Ann Caroline, 2 Wall. 538, 17 L. Ed. 833; The Steamer Webb, 14 Wall. 406, 20 L. Ed. 774.

98. Immaterial amendment.—Newell *v.* Norton, 3 Wall. 257, 258, 18 L. Ed. 271; The Beaconsfield, 158 U. S. 303, 39 L. Ed. 993.

Stipulations in admiralty are not subject to the rigid rules of the common law with respect to the liability of the surety, and, so long as the cause of action remains practically the same, a mere change in the name of the libelant, as by substituting the real party in interest for a nominal party, will not avoid the stipulation as against the sureties; or, as it is stated in some cases, stipulations are to be interpreted as to the extent and limitation of responsibility created by them by the intention of the court which required them, and not by the intention of the parties who are bound by them. The Beaconsfield, 158 U. S. 303, 39 L. Ed. 993.

the sureties are not bound to contemplate, and it necessarily follows that they cannot be held.[99]

(4) *Judgment against Stipulators*—(a) *Rendition.*—Judgment may be rendered against both principal and sureties at the time of rendering the decree in the original cause.[1]

(b) *Operation and Effect.*—A decree rendered on a bond given with sureties by the claimant at the request and for the benefit of his firm, to which the property so delivered to him belonged, bars a suit against the other partners.[2]

(c) *Reformation of Judgment.*—A decree in admiralty in the district and circuit courts for a greater amount than the sum for which sureties were bound, on stipulations for a discharge of the vessel from the marshal's custody, may be reformed by the supreme court so as not to exceed that sum.[3]

(d) *Enforcement of Judgment.*—Where a judgment is recovered on a stipulation in admiralty and execution returned unsatisfied, the persons in whose favor the judgment was rendered may pursue their remedy against the stipulators in other courts.[4] The persons recovering the judgment are only general creditors of the sureties, and the latter cannot be required to bring the specific property into court.[5] And mandamus will not issue to compel the circuit court to order the stipulators to appear for examination concerning their property, according to the state laws and practice.[6]

(e) *Relief from Lien of Judgment Pending Appeal.*—Where a decree against the respondent and his stipulators is appealed from, if the decree operates as a lien on the real estate of the stipulators, notwithstanding the appeal, it is an advantage the law gives the appellee for his security with which the supreme court will not interfere in advance of the hearing of the case on its merits.[7]

e. *Recall or Rearrest of Property or Vessel*—(1) *Grounds*—(a) *Filing New or Intervening Libel.*—If, after the stipulation is given, other libels are filed, a new warrant of arrest must be issued and the vessel again taken into custody.[8] So if an intervening libel is filed subsequent to the release of a vessel on a stipulation, the vessel must be recalled or rearrested.[9]

(b) *Fraud, Misrepresentation or Improper Release.*—In case of misrepresentation or fraud, or in case the order of release was improvidently given without any appraisement or any proper knowledge of the real value of the property, the vessel or property may be recalled before judgment where the ends of justice require the matter to be reconsidered.[10]

(2) *What Court May Recall Property.*—A bond accepted by the court upon ordering the delivery to the claimant of property seized in admiralty, is in the subsequent proceedings a substitute for the property; and the question whether a case is made for the recall of the property must be determined before a final

99. Amendment introducing new cause of action.—The Beaconsfield, 158 U. S. 303, 39 L. Ed. 993; The Oregon, 158 U. S. 186, 39 L. Ed. 943.

1. Rendition of judgment.—The Belgenland, 108 U. S. 153, 156, 27 L. Ed. 685.

2. Res judicata.—United States *v.* Ames, 99 U. S. 35, 25 L. Ed. 295. See the title FORMER ADJUDICATION OR RES ADJUDICATA.

3. Reformation of judgment.—The Steamer Webb, 14 Wall. 406, 20 L. Ed. 774.

4. Enforcement of judgment by proceedings in other courts.—Ex parte Phillips, 131 U. S. Appendix cxlvii, 25 L. Ed. 781.

5. Right to require sureties to bring specific property into court.—Ex parte Phillips, 131 U. S. Appendix cxlii, 25 L. Ed. 781.

6. Examination of stipulators on interrogatories.—Ex parte Phillips, 131 U. S. Appendix clxvii, 25 L. Ed. 781.

7. Relief from lien of judgment pending appeal.—The Steamship Belgenland *v.* Jansen, 108 U. S. 157, 27 L. Ed. 825.

8. Filing new libels.—The Oregon, 158 U. S. 186, 39 L. Ed. 943.

9. Filing intervening libel.—The Oregon, 158 U. S. 186, 39 L. Ed. 943.

10. Fraud, misrepresentation or improper release.—United States *v.* Ames, 99 U. S. 33, 42, 25 L. Ed. 295; United States *v.* Haytian Republic, 154 U. S. 118, 126, 38 L. Ed. 930; The Three Friends, 166 U. S. 1, 41 L. Ed. 897 (release of vessel seized for forfeiture).

decree on the bond is rendered in the district court, or in the circuit court on appeal. Action on that question cannot be reviewed in the supreme court.[11]

(3) *Mode of Making Recall or Rearrest.*—Where the court of admiralty has parted with the possession of the property, upon bail or stipulation, and it is necessary, for the purposes of justice, to retake the property into the custody of the court, the proper process against any person not a party to the stipulation, but who is alleged to have the actual or constructive possession, is a monition, and not an execution, in the first instance.[12]

(4) *Time of Recall.*—The question whether a case is made for the recall of the vessel or property must be determined before a final decree on the bond is rendered in the district court, or in the circuit court on appeal.[13]

K. Evidence—1. Mode of Proof.—The mode of proof in causes of admiralty and maritime jurisdiction is required to be according to the rules prescribed by the supreme court, except as otherwise specially provided.[14]

2. Burden of Proof.—The burden of proof is on the party having the affirmative.[15] If the suit is one in rem to enforce a lien, the burden of proof as to the existence of the lien is on the libelant.[16]

3. Witnesses.—A party in admiralty has a right to produce witnesses to establish his claim,[17] and to cross-examine those produced against him.[18] An objection to a witness, on the ground of incompetency from interest, must be made at the hearing, and comes too late if it be deferred until the argument.[19]

4. Depositions.—Depositions cannot be read in admiralty any more than at common law, without some sufficient reason being shown why the witness was not produced at the hearing,[20] and depositions taken in another action cannot be used in a suit in admiralty between different parties, although the subject matter of the two suits is the same.[21] Where a deposition is taken by a person who is both commissioner and clerk of the court, and the proctor of the opposing party knows that the deposition has been taken, it cannot be ruled out on the ground that it is not sealed up, that the preliminary proof of materiality was not made, or that notice of its being filed was not given.[22] If depositions are not objected to in the lower court, all objections thereto are waived.[23]

11. What court may recall property.—United States *v.* Ames, 99 U. S. 35, 25 L. Ed. 295.

Even if the power, in case of fraud, misrepresentation, or manifest error in the court, exists in the court of original jurisdiction, or even in the circuit, inasmuch as the stipulation for value follows the appeal into that court, still it is clear that no other court possesses any such jurisdiction nor any power to re-examine the discretionary ruling of the admiralty courts in that regard. United States *v.* Ames, 99, 35, 42, 25 L. Ed. 295, citing Houseman *v.* The Schooner North Carolina, 15 Pet. 40, 10 L. Ed. 653; The Wanata, 95 U. S. 600, 611, 24 L. Ed. 461.

12. Mode of making rearrest.—The Gran Para, 10 Wheat. 497, 6 L. Ed. 375.

13. Time of recall.—United States *v.* Ames, 99 U. S. 35, 25 L. Ed. 295.

14. Mode of proof.—Blease *v.* Garlington, 92 U. S. 1, 23 L. Ed. 521. See post, "Further Proof," III, R, 9, d.

15. Burden of proof.—The General Smith, 4 Wheat. 438, 4 L. Ed. 609. See, generally, the title PRESUMPTIONS AND BURDEN OF PROOF.

16. Burden of proof as to lien claimed by libelant.—The General Smith, 4 Wheat. 438, 4 L. Ed. 609. See the title MARITIME LIENS.

17. Right to produce witnesses.—United States *v.* Weed, 5 Wall. 62, 68; 18 L. Ed. 531; The Island City, 1 Black 121, 129, 17 L. Ed. 70. See, generally, the title WITNESSES.

18. Right to cross-examine opponents witnesses.—United States *v.* Weed, 5 Wall. 62, 68, 18 L. Ed. 531. See, generally, the title WITNESSES.

19. Objections for incompetency of witnesses.—Nelson *v.* Woodruff, 1 Black 156, 17 L. Ed. 97.

20. Showing as to reason for failure to produce witness on trial.—Rutherford *v.* Geddes, 4 Wall. 220, 18 L. Ed. 343. See, generally, the title DEPOSITIONS.

21. Depositions taken in another suit.—Rutherford *v.* Geddes, 4 Wall. 220, 18 L. Ed. 343.

Depositions cannot be used on the trial of a suit in admiralty, which were taken in another suit concerning the same subject matter, where the party against whom they are offered was not a party to the suit in which they were taken, nor privy to any such party, and had no right to cross-examine the witnesses. Rutherford *v.* Geddes, 4 Wall. 220, 18 L. Ed. 343.

22. Depositions taken by clerk.—Nelson *v.* Woodruff, 1 Black 156, 17 L. Ed. 97.

23. Objections to deposition to be

5. Weight and Sufficiency.—Evidence of shop books outweighs the ex parte opinion of experts to the contrary.[24]

L. Variance.—In courts of admiralty of the United States, although the proof of each party must substantially correspond with his allegations, so far as to prevent surprise,[25] there are no technical rules of variance or departure.[26]

M. Trial and Hearing—1. Mode of Proceeding.—Admiralty courts proceed according to the principles, rules and usages which belong to the admiralty as contradistinguished from the courts of common law.[27]

2. Jury Trial.—In the absence of statute, the parties to a civil proceeding in admiralty are not entitled to a jury trial.[28] Seizures for forfeiture upon waters for breach of the laws of the United States, are civil cases within the meaning of the above rule, and are to be tried without a jury.[29] But congress has power

taken in lower court.—By the rules of the supreme court in all cases of equity and admiralty jurisdiction, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant or other exhibit, found in the record, as evidence; unless objection was taken thereto in the court below; but the same shall otherwise be deemed to have been taken by consent. Mechanics' Bank *v.* Seton, 1 Pet. 299, 7 L. Ed. 152. See the titles APPEAL AND ERROR; EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL.

24. **Shop books as outweighing expert evidence.**—The Ship Potomac, 2 Black 581, 17 L. Ed. 263. See the title EXPERT AND OPINION EVIDENCE.

25. **Proof must correspond with pleadings so as to prevent surprise.**—The Gazelle, 128 U. S. 474, 32 L. Ed. 496; The Syracuse, 12 Wall. 167, 173, 20 L. Ed. 382; Dupont de Nemours *v.* Vance, 19 How. 162, 15 L. Ed. 584; Rich *v.* Lambert, 12 How. 353, 13 L. Ed. 1017; McKinlay *v.* Morrish, 21 How. 343, 16 L. Ed. 100; The Eddy, 5 Wall. 481, 482, 18 L. Ed. 486; The Sarah, 8 Wheat. 391, 5 L. Ed. 644.

The evidence must be confined to the points put in issue by the allegations of the libel and denial of the answer. McKinlay *v.* Morrish, 21 How. 343, 16 L. Ed. 100.

When litigants make their case in express allegations and by express denials of them, and then introduce testimony inapplicable to the issues they made, it is not a part of the case, unless as it shall inferentially bear upon other evidence properly in it, upon which the parties rely for the determination of their controversy. McKinlay *v.* Morrish, 21 How. 343, 346, 16 L. Ed. 100. See, also, Rich *v.* Lambert, 12 How. 353, 13 L. Ed. 1017.

On a libel by the consignee of goods against a vessel for nondelivery of the same—the defense being that the goods were subject to the lien of the vessel for freight and that the libelants improperly refused to pay it—any supposed misconduct of a bailee of the goods, not before the court, with whom the goods had been stored on the refusal of the consignee to pay freight and take them away, is a question not involved in the pleadings. And if on such a state of pleadings the defendants prove their defense, they are entitled to a decree in their favor irrespective of any such supposed misconduct of the bailee. The Eddy, 5 Wall. 481, 482, 18 L. Ed. 486.

A libel charging the seizure to have been on water, when in fact, it was made on land, will not support a verdict, and judgment or sentence thereon; but must be amended or dismissed. The two jurisdictions, and the proceedings under them, are to be kept entirely distinct. The Sarah, 8 Wheat. 391, 5 L. Ed. 644.

26. **No rules of variance or departure in admiralty.**—The Gazelle, 128 U. S. 474, 32 L. Ed. 496; The Syracuse, 12 Wall. 167, 173, 20 L. Ed. 382; Dupont de Nemours *v.* Vance, 19 How. 162, 15 L. Ed. 584. See, generally, the title VARIANCE.

27. **Mode of proceeding.**—United States *v.* Ames, 99 U. S. 35, 25 L. Ed. 295; Manro *v.* Almeida, 10 Wheat. 473, 6 L. Ed. 369; The Wanata, 95 U. S. 600, 611, 24 L. Ed. 461; The Eagle, 8 Wall. 15, 19 L. Ed. 365.

Following decisions of state courts.—As to when federal courts will follow decisions of state courts, see the title COURTS.

28. **Right to jury trial in civil cases.**—The Propeller Genesee Chief *v.* Fitzhugh, 12 How. 443, 459, 13 L. Ed. 1058; Whelan *v.* United States, 7 Cranch 112, 3 L. Ed. 286; United States *v.* La Vengeance, 3 Dall. 297, 1 L. Ed. 610; The Sarah, 8 Wheat. 391, 5 L. Ed. 644; The Betsey & Charlotte, 4 Cranch 443, 2 L. Ed. 673; Ramsay *v.* Allegre, 12 Wheat. 611, 640, 6 L. Ed. 746. See, generally, the title JURY.

"Every advance of the admiralty is a victory over the common law; a conquest gained upon the trial by jury." Ramsay *v.* Allegre, 12 Wheat. 611, 640, 6 L. Ed. 746.

29. **Seizures for forfeiture.**—Whelan *v.* United States, 7 Cranch 112, 3 L. Ed. 286; United States *v.* La Vengeance, 3 Dall. 297, 1 L. Ed. 610; The Sarah, 8 Wheat. 391, 5 L. Ed. 644; The Betsey & Charlotte,

to provide for jury trial in cases in admiralty,[30] and it has exercised the power as to certain cases upon the lakes and navigable waters connecting the same.[31]

3. Reference to Masters and Commissioners.—a. *Right to Refer Questions.*—Though reference of maritime causes to special masters of nautical experience, with power to examine witnesses, and report the facts to the court, is not specifically authorized by law or rules of court, it is not irregular, as the court still reserves the right of final decision.[32]

b. *Report*—(1) *Form and Requisites.*—The report of assessors appointed by a court of admiralty to assess damages ought to state the principles on which it is founded, and not a gross sum, without explanation.[33]

(2) *Exceptions*—(a) *Necessity of Exceptions.*—While as a general rule objections to the report of commissioners in admiralty will not be considered on appeal, where no exception to the report is made in the lower court,[34] it is not necessary to take exceptions to the report of auditors, if the errors appear upon the face of the report.[35]

(b) *Form and Requisites.*—Parties excepting to a report of a commissioner in admiralty proceedings, should state, with reasonable precision, the grounds of their exceptions, with the mention of such other particulars as will enable the court to ascertain, without unreasonable examination of the record, what the basis of the exception is.[36]

(3) *Setting Aside Report on Appeal.*—The report of commissioners to assess damages in a civil proceeding in admiralty, cannot be set aside on appeal, where the commissioner did not return the testimony or his finding of fact into court.[37]

4 Cranch 443, 2 L. Ed. 673. See, generally, the title REVENUE LAWS.

30. Power of congress to provide for jury trial in admiralty.—The Propeller Genesee Chief *v.* Fitzhugh, 12 How. 443, 13 L. Ed. 1058 (holding the act of February 26, 1845, giving the right to jury trial as to certain cases arising upon lakes and navigable waters connecting the same, to be constitutional).

31. Cases upon lakes and navigable waters connecting same.—Act of Feb. 26, 1845; United States Rev. Stat. (1878), § 566; The Propeller Genesee Chief *v.* Fitzhugh, 12 How. 443, 13 L. Ed. 1058.

32. Right to refer questions to master or commissioners.—The City of Washington, 92 U. S. 31, 39, 23 L. Ed. 600; The Hypodame, 6 Wall. 216, 18 L. Ed. 794. See, generally, the title REFERENCE.

The district court has a better opportunity in arriving at correct conclusions in cases depending on fact, where the evidence is conflicting, than the supreme court. It may examine witnesses ore tenus and summon, if it pleases, experienced masters of vessels to help it in cases dependent upon nautical experience. The Hypodame, 6 Wall. 216, 18 L. Ed. 794.

33. Form and requisites.—The Charming Betsey, 2 Cranch 64, 2 L. Ed. 208.

34. Necessity for exception in lower court.—Objections to the amount of damages, as reported by a commissioner and awarded by the admiralty court, will not be entertained in the supreme court in a case of collision where it appears that neither party excepted to the report of the commissioner. The Vanderbilt, 6 Wall. 225, 226, 18 L. Ed. 823.

35. Exception for error apparent on face of report.—Himely *v.* Rose, 5 Cranch 313, 3 L. Ed. 111.

36. Form and requisites.—The Schooner Commander-in-Chief, 1 Wall. 43, 17 L. Ed. 609.

If the exception be that the commissioner received "improper and immaterial evidence," the exception should show what the evidence was. If, that "he had no evidence to justify his report," it should set forth what evidence he did have. If, that "he admitted the evidence of witnesses who were not competent," it should give their names, and specify why they were incompetent, what they swore to, and why their evidence ought to have been rejected. The Schooner Commander-in-Chief, 1 Wall. 43, 17 L. Ed. 609.

Where a master found the amount due but stated no account, and his report was excepted to as being excessive, not sufficiently proved, erroneous under the pleadings, and founded on illegal evidence, such general objections may justly be treated as frivolous, and if overruled and the case brought here on appeal this court, cannot say that particular charges were wrongly admitted, or particular credits wrongly thrown out. The Ship Potomac, 2 Black 581, 17 L. Ed. 263.

37. Setting aside report on appeal.—Where, on a reference by a district court sitting in admiralty to assess the damages done by a collision, the master after taking depositions reports a certain sum as due, but is not requested by the respond-

N. Decree—1. What Constitutes Final Decree.—In admiralty causes, a decree is not final while it is depending in the supreme court.[38] The question as to what are final decrees in admiralty from which an appeal may be taken is treated elsewhere in this work.[39]

2. Form and Requisites.—The decree of a court of admiralty must conform to the pleadings and proof.[40] Although the language of a decree in admiralty may declare a decision which might not, if it were construed by its exact words, be capable of being supported, still, if it is obvious from subsequent parts of of the record that no error has been committed, the court will not reverse for this circumstance.[41]

3. Operation as a Lien on Real Estate.—Judgments and decrees rendered in the admiralty courts of the United States are liens upon real estate in all cases where similar judgments or decrees of the state courts are made liens by the law of the state.[42] The lien gives the libelant a right to levy on the lands to which it attaches, and consequently such an interest in the lands as will enable him to sustain a bill of discovery against the respondent and any third person who sets up an unfounded claim under a different lien.[43]

4. Conclusiveness.—The decree of a court of admiralty upon a question within its jurisdiction is conclusive upon the whole world.[44] The decisions of a court of admiralty are necessarily conclusive on all other courts, because the subject matter is not examinable in them. With respect to itself, no reason is

ents in the case to return the testimony or his finding of facts into court, and though returning certain parts of the testimony, does not return the whole, nor any finding of facts, and the court confirms his report and enters a decree accordingly—a decree affirmed by the circuit court—this court cannot, in the absence of the testimony and where the record does not afford any satisfactory statement of facts to enable it to determine that there is any error in the report of the commissioner, review that matter. The Cayuga, 16 Wall. 177, 21 L. Ed. 354.

38. What constitutes final decree.—United States *v.* Preston, 3 Pet. 57, 66, 7 L. Ed. 601; The Schooner General Pinkney, 5 Cranch 281, 286, 3 L. Ed. 101; The Lucille, 19 Wall. 73, 74, 22 L. Ed. 64; The Charles Morgan *v.* Kouns, 115 U. S. 69, 29 L. Ed. 316.

39. What decrees are final and appealable.—See the title APPEAL AND ERROR.

40. Conformity to pleadings and proof.—The Schooner Hoppet, 7 Cranch 389, 3 L. Ed. 380.

In case of an individual claiming for others in admiralty, the rights of each person or firm represented are supposed to be contained or covered in separate decrees, or separate portions of one decree, as each owns separately, and, if not thus considered, one may have to pay, or be made to suffer, for another. Spear *v.* Place, 11 How. 522, 527, 13 L. Ed. 796; Oliver *v.* Alexander, 6 Pet. 143, 8 L. Ed. 349; Stratton *v.* Jarvis, 8 Pet. 4, 11, 8 L. Ed. 846.

41. Sturgis *v.* Clough, 1 Wall. 269, 17 L. Ed. 580.

Thus, where a decree allowed a certain sum for repairs to a vessel, and rejected (improperly, perhaps), a claim for demurrage, the decree was not reversed on that account; it appearing from a subsequent part of the record that the judge had in fact considered the sum he allowed for repairs eo nomine was too large for repairs simply, but was "about just" for repairs and demurrage together. Sturgis *v.* Clough, 1 Wall. 269, 17 L. Ed. 580.

42. Operation as lien on realty.—Ward *v.* Chamberlain, 2 Black 430, 17 L. Ed. 319. See, generally, the title JUDGMENTS AND DECREES.

A decree for the payment of money in an admiralty suit in personam stands in this respect upon the same footing as a decree in equity. Ward *v.* Chamberlain, 2 Black 430, 17 L. Ed. 319.

Where one party filed his libel against another in the federal district court for Ohio, claiming damages by a collision of two vessels on the lake and got a decree in personam for money as compensation, the decree is a lien on the respondent's land. Ward *v.* Chamberlain, 2 Black 430, 17 L. Ed. 319.

43. Right of lienor to discovery against other claimants.—Ward *v.* Chamberlain, 2 Black 430, 17 L. Ed. 319. See, generally, the titles DISCOVERY; JUDGMENTS AND DECREES.

44. Conclusiveness. — Penhallow *v.* Doane, 3 Dall. 54, 85, 1 L. Ed. 507; The Mary, 9 Cranch 126, 144, 3 L. Ed. 678; Gelston *v.* Hoyt, 3 Wheat. 246, 4 L. Ed. 381; Slocum *v.* Mayberry, 2 Wheat. 1, 4 L. Ed. 169; Govenor *v.* Madrazo, 1 Pet. 110, 133, 7 L. Ed. 73. See, generally, the title FORMER ADJUDICATION OR RES ADJUDICATA.

The sentence of a court of admiralty binds all the world, as to everything con-

perceived for yielding to them a further conclusiveness than is allowed to the judgments and decrees of courts of common law and equity. They bind the subject matter as between parties and privies.[45]

5. COLLATERAL ATTACK.—United States district courts sitting in admiralty are courts of superior jurisdiction, and every intendment is made in favor of their decrees, so that where it appears that the court has jurisdiction of the subject matter, and that the defendant was duly served with process or voluntarily appeared and made defense, the decree is not open to attack collaterally.[46]

6. DEFAULTS.—In admiralty and revenue cases when a default has been duly entered to a monition founded on an information averring all the facts necessary to a condemnation, it has substantially the effect of a default to a summons in a court of common law. It establishes the fact pleaded, and justifies a decree of condemnation.[47] A decree by default against one of several defendants, does not estop the others from contesting the facts admitted by the default of the absent party.[48]

7. PERSONAL JUDGMENT AGAINST OWNER FOR DEFICIENCY.—In a proceeding in rem against a vessel, the decree does not render the owner of the vessel liable for any greater amount than the value of the vessel and her freight then pending.[49]

tained in it, because all the world are parties to it. The sentence, so far as it goes, is conclusive to all persons. Penhallow *v.* Doane, 3 Dall. 54, 85, 1 L. Ed. 507; Williams *v.* Armroyd, 7 Cranch 424, 3 L. Ed. 392. See, also, Maley *v.* Shattuck, 3 Cranch 458, 488, 2 L. Ed. 498; The Mary, 9 Cranch 126, 144, 3 L. Ed. 678.

An admiralty judgment upon point in issue is conclusive at common law. Cupisino *v.* Perez, 2 Dall. 194, 1 L. Ed. 345.

Foreign decree in admiralty.—The sentence of a foreign court of admiralty, condemning a vessel for breach of blockage, is conclusive evidence of that fact in an action on the policy of insurance. Croudson *v.* Leonard, 4 Cranch 434, 2 L. Ed. 670.

The sentence of a foreign tribunal, condemning neutral property, under an edict, unjust in itself, contrary to the law of nations, and in violation of neutral rights, and which has been so declared by the legislative and executive departments of the government of the United States, changes the property of the thing condemned. The American owner cannot reclaim, in the courts of this country, his property which has been seized and condemned in a French court under the Milan decree. Williams *v.* Armroyd, 7 Cranch 424, 3 L. Ed. 392. See, generally, the title FOREIGN JUDGMENTS.

45. Entitled to same respect as judgments at law and decrees in equity.—The Mary, 9 Cranch 126, 143, 3 L. Ed. 678. See the titles FORMER ADJUDICATION OR RES ADJUDICATA; JUDGMENTS AND DECREES.

If a claim be set up under the sentence of condemnation of a foreign court, this court will examine into the jurisdiction of such court; and if that court cannot, consistently with the law of nations, exercise the jurisdiction which it has assumed, its sentence will be disregarded. Rose *v.* Mimely, 4 Cranch 241, 2 L. Ed. 608.

Every sentence of condemnation by a competent court, having jurisdiction over the subject matter of its judgment, is conclusive as to the title to the thing claimed under it. Rose *v.* Himely, 4 Cranch 241, 2 L. Ed. 608.

46. Collateral attack.—Ex parte Cooper, 143 U. S. 472, 36 L. Ed. 232; Miller *v.* United States, 11 Wall. 268, 20 L. Ed. 135; McCormick *v.* Sullivant, 10 Wheat. 192, 6 L. Ed. 300; Des Moines, etc., R. Co. *v.* Iowa Homestead Co., 123 U. S. 552, 31 L. Ed. 202; Cuddy *v.* Petitioner, 131 U. S. 280, 33 L. Ed. 154. See, generally, the title JUDGMENTS AND DECREES.

47. Defaults.—Miller *v.* United States, 11 Wall. 268, 20 L. Ed. 135.

48. Effect of default of one of several defendants.—The Mary, 9 Cranch 126, 143, 3 L. Ed. 678.

A judgment against one defendant for the want of a plea, or a decree against one defendant for want of an answer, does not prevent any other defendant from contesting, so far as respects himself, the very fact which is admitted by the absent party. No reason is perceived why a different rule should prevail in a court of admiralty, nor is the court informed of any case in which a different rule has been established. The Mary, 9 Cranch 126, 143, 3 L. Ed. 678.

49. Personal judgment against owner for deficiency.—The City of Hartford, 97 U. S. 323, 330, 24 L. Ed. 930; The Schooner Ann Caroline, 2 Wall. 538, 549, 17 L. Ed. 833. Generally, as to the limitation of liability of ship owners, see the title SHIPS AND SHIPPING.

A decree in a proceeding in rem against a vessel is merely the ascertainment of damage, interest and costs which the libelant has sustained, and which he is en-

8. Enforcement of Decrees.—A court of admiralty in one nation can carry into effect the determination of the court of admiralty of another.[50] And it was held, that the district court could enforce a decree of the court of appeals under the confederation of 1781 after the dissolution of the latter court.[51]

O. Sale of Property—1. Order of Sale.—An order of sale is for the benefit of all parties, and the right to order a sale exists only where the property is in the custody of the court and the property may perish while in its custody.[52] If the property is delivered on security to either party, an order of sale pending the cause is unheard of in admiralty proceedings.[53] An interlocutory order of sale is not a condemnation.[54]

2. Effect of Defect in Title on Sale of Property.—Upon an admiralty proceeding in rem, where the proceeds of the sale are brought into court, they are not liable to make good a loss, sustained by the purchaser, in consequence of a defect being discovered in the article sold.[55]

P. Disposition of Proceeds of Sale—1. Right to Share in Proceeds of Sale.—Any person having a specific lien on, or a vested right in, a surplus fund in court, may apply by petition for the protection of his interest under the forty-third admiralty rule,[56] but a distribution cannot be claimed except by those who have a maritime lien.[57] Where, in case of a collision, one of two parties injured institutes proceedings against the vessel in fault, and at his own expense prosecutes his suit to condemnation of the vessel, or of the proceeds of her sale in the registry, another party injured by the same collision, who has contributed nothing to the litigation to establish the vessel's liability, but has stood by during that contest, and taken no part in it, cannot share in the proceeds of the sale of the vessel, until the claim of the first party is satisfied in full.[58]

2. Mode of Subjecting Proceeds.—A person claiming a lien on the proceeds of a sale cannot file a libel directly against the proceeds of the sale,[59] but

titled to recover, provided the interest of the owners is sufficient to pay it and not otherwise. The City of Hartford, 97 U. S. 323, 330, 24 L. Ed. 930; The Schooner Ann Caroline, 2 Wall. 538, 549, 17 L. Ed. 823.

50. Enforcement of foreign decree.—Penhallow *v.* Doane, 3 Dall. 54, 97, 1 L. Ed. 507. See, generally, the title FOREIGN JUDGMENTS.

51. Power of district court to enforce decree of dissolved court.—Penhallow *v.* Doane, 3 Dall. 54, 1 L. Ed. 507; Jennings *v.* Carson, 4 Cranch 2, 2 L. Ed. 531.

52. Right to order sale.—Jennings *v.* Carson, 4 Cranch 2, 26, 2 L. Ed. 531; The Schooner Squirrel, 2 Dall. 40, 1 L. Ed. 280.

The sale may be before appearance of parties, where property is in perishing condition. The Schooner Squirrel, 2 Dall. 40, 1 L. Ed. 280.

53. Order of sale not necessary where parties have possession of property.—Jennings *v.* Carson, 4 Cranch 2, 26, 2 L. Ed. 531.

54. Effect of order of sale as final condemnation.—Vessels are seldom if ever condemned but by a final sentence. United States *v.* Schooner Peggy, 1 Cranch 103, 109, 2 L. Ed. 49.

55. Effect of defect in title on sale of property.—The Monte Allegre, 9 Wheat. 616, 6 L. Ed. 174.

56. Who may apply for distribution or protection of proceeds.—The Lottawanna, 21 Wall. 558, 559, 22 L. Ed. 654; The Lottawanna, 20 Wall. 201, 22 L. Ed. 259.

57. Necessity for maritime lien.—Grant *v.* Poillon, 20 How. 162, 169, 15 L. Ed. 873; The Lottawanna, 20 Wall. 201, 22 L. Ed. 259.

Where claims on the proceeds in the registry of a vessel sold are not maritime liens, the district court cannot distribute those proceeds in payment of the claims if the owners of the vessel oppose such distribution. The Lottawanna, 20 Wall. 201, 22 L. Ed. 259.

A creditor by judgment in a state court, of the owners of the vessel, even though he have a decree in personam also in the admiralty against them, cannot seize, or attach, on execution, proceeds of the vessel in the registry of the admiralty. The Lottawanna, 20 Wall. 201, 22 L. Ed. 259.

58. Right of party not participating in suit to share.—Woodworth *v.* Insurance Co., 5 Wall. 87, 18 L. Ed. 517.

59. Right to libel proceeds of sale.—Where a mortgage existed upon the moiety of a vessel which was afterwards libelled, condemned, and sold by process in admiralty, and the proceeds brought into the registry of the court, the mortgagee could not file a libel against a moiety of those proceeds. His proper

it is in an inherent incident to the jurisdiction of the admiralty to entertain supplemental suits or petitions by the parties in interest to ascertain to whom the proceeds rightfully belong, and to deliver them over to the parties who establish the lawful ownership thereof.[60]

3. Power of Marshal to Control or Distribute Proceeds without Order of Court.—It is a great irregularity for the marshal to keep the property, or the proceeds thereof, in his own hands, or to distribute the same among the parties entitled, without a special order from the court; but such an irregularity may be cured, by the assent and ratification of all the parties interested, if there be no mala fides.[61]

4. Disposition of Unclaimed Property.—If any owner should not appear to claim any particular parcel of the property, the habit of courts of admiralty is to retain such property, or its proceeds, after deducting the salvage, until a claim is made, or a year and a day have elapsed from the time of the institution of the proceedings.[62]

Q. **Costs, Counsel Fees, Interests and Damages**—1. Costs.—In admiralty costs and expenses are not matters positively limited by law, but are allowed in the exercise of a sound discretion of the court.[63] Costs may be awarded against the owner beyond the stipulation, if he appears and makes defense.[64]

2. Counsel Fees.—Courts of admiralty cannot properly allow counsel fees

course would have been, either to have appeared as a claimant when the first libel was filed, or to have applied to the court, by petition, for a distributive share of the proceeds. Schuchardt *v.* Baggage, 19 How. 239, 15 L. Ed. 625.

60. Supplemental proceedings to subject proceeds of sale.—Andrews *v.* Wall, 3 How. 568, 11 L. Ed. 729; The Lottawanna, 21 Wall. 558, 559, 22 L. Ed. 654; Schuchardt *v.* Baggage, 19 How. 239, 15 L. Ed. 625; J. E. Rumbell, 148 U. S. 1, 15, 37 L. Ed. 345.

This principle is familiarly known and exercised in cases of the sales of ships to satisfy claims for seamen's wages, for bottomry bonds, for salvage services, and for supplies of materialmen, where, after satisfaction thereof, there remain what are technically called "remnants and surpluses," in the registry of the admiralty. A more striking example is that of supplemental libels and petitions, by persons asserting themselves to be joint captors, and entitled to share in prize proceeds, and of customhouse officers, for their distributive shares of the proceeds of property seized and condemned for breaches of the revenue laws, where the jurisdiction is habitually acted upon in all cases of difficulty or controversy. Andrews *v.* Wall, 3 How. 568, 572, 11 L. Ed. 729.

61. Distribution by marshal without order of court.—The Collector, 6 Wheat. 194, 5 L. Ed. 239.

62. Disposition of unclaimed property.—Stratton *v.* Jarvis, 8 Pet. 4, 9, 8 L. Ed. 846; United States *v.* 422 Casks of Wine, 1 Pet. 547, 7 L. Ed. 257.

If, after proceeding in a cause, the court finds the claimant has no property, or that it is in another, not represented, the court will retain the res, until the real owner shall appear, and claim and receive it from the court. United States *v.* 422 Casks of Wine, 1 Pet. 547, 7 L. Ed. 257.

63. Discretion of court as to costs.—Canter *v.* American Ins. Co., 3 Pet. 307, 7 L. Ed. 689; The Scotland, 118 U. S. 507, 30 L. Ed. 153; The Sapphire, 18 Wall. 51, 57, 21 L. Ed. 814; The Schooner Maggie J. Smith *v.* Walker, 123 U. S. 349, 31 L. Ed. 175; Harmony *v.* United States, 2 How. 210, 11 L. Ed. 239. See, generally, the title COSTS.

Costs in admiralty are entirely under the control of the court. They are sometimes, from equitable considerations, denied to the party who recovers his demand, and they are sometimes given to a libelant who fails to recover anything, when he was misled to commence the suit by the act of the other party. Doubtless they generally follow the decree, but circumstances of equity, of hardship, of oppression, or of negligence induce the court to depart from that rule in a great variety of cases. The Sapphire, 18 Wall. 51, 57, 21 L. Ed. 814.

No appeal lies from a decree respecting costs and expenses, since costs are wholly in the discretion of the court. Canter *v.* American Ins. Co., 3 Pet. 307, 7 L. Ed. 689; The Scotland, 118 U. S. 507, 30 L. Ed. 153; Harmony *v.* United States, 2 How. 210, 11 L. Ed. 239.

But they can be taken notice of incidentally, as connected with the principal decree. Harmony *v.* United States, 2 How. 210, 11 L. Ed. 239. See the title APPEAL AND ERROR.

64. Costs beyond stipulation.—The Wanata, 95 U. S. 600, 618, 24 L. Ed. 461.

to the counsel of a gaining side in admiralty, as an incident to the judgment, beyond the costs and fees allowed by statute.[65]

3. INTEREST.—The allowance of interest on damages is not an absolute right. Whether it ought or ought not to be allowed depends upon the circumstances of each case, and rests very much in the discretion of the tribunal which has to pass upon the subject, whether it be a court or a jury.[66]

4. DAMAGES—a. *General Rules as to Damages in Admiralty.*—In affording redress for torts upon the high seas, admiralty acts upon the principle of compensation, and not upon that of forfeiture.[67] As to the allowance of exemplary damages, as well as damages by way of compensation or remuneration for expenses incurred, or injuries or losses sustained, by misconduct, admiralty courts proceed, in cases of tort, upon the same principles as courts of common law.[68] When damages are claimed in the original proceedings, if a decree of restitution and costs only passes, it is a virtual denial of damages.[69]

b. *Award of Damages to Prevailing Party.*—When there is probable ground for a suit or defense, the court considers the only compensation which the successful party is entitled to, is a compensation in costs and expenses.[70]

R. Review—1. MODE OF REVIEW.—A supposed error in a judgment of an

65. Allowance of counsel fees.—The Baltimore, 8 Wall. 377, 378, 19 L. Ed. 463.

In Canter *v.* American Ins. Co., 3 Pet. 307, 7 L. Ed. 688, counsel fees were allowed as expenses attending the prosecution of an appeal to the circuit court and to the supreme court, in an admiralty case.

Under the statute regulating the fees of attorneys, solicitors, and proctors (the statute, namely, of February 26th, 1853, 10 Stat. at Large, 161), a docket fee of twenty dollars may be taxed, on a final hearing in admiralty, if the libelant recover fifty dolars, but, if he recovers less than fifty dollars, only ten. The Baltimore, 8 Wall. 377, 378, 19 L. Ed. 463.

66. Allowance of interest on damages.—The Scotland, 118 U. S. 507, 518, 30 L. Ed. 153; The Albert Dumois, 177 U. S. 240, 44 L. Ed. 751; Hemmingway *v.* Fisher, 20 How. 255, 15 L. Ed. 799. See, generally, the title INTEREST.

The allowance of interest is not reviewable by the supreme court except in a very clear case. The Scotland, 118 U. S. 507, 30 L. Ed. 153; The Albert Dumois, 177 U. S. 240, 44 L. Ed. 751.

As to allowance of interest by way of damages upon wrongful seizure under revenue laws, see the title REVENUE LAWS.

Where a judgment is affirmed by a divided court, interest is not to be calculated upon the judgment. The eighteenth rule of this court never applied to cases in admiralty which are brought up by appeal, and the rule itself is repealed by the sixty-second rule. Hemmingway *v.* Fisher, 20 How. 255, 15 L. Ed. 799.

67. Compensation, not forfeiture, the rule in admiralty.—Harmony *v.* United States, 2 How. 210, 235, 11 L. Ed. 238. See, generally, the title DAMAGES.

So far as the general maritime law applies to torts or injuries committed on the high seas and within the admiralty jurisdiction, the general rule is, nor forfeiture of the offending property; but compensation to the full extent of all damages sustained or reasonably allowable to be enforced by a proceeding therefor in rem or in personam. It is true that the law of nations goes in many cases much farther, and inflicts the penalty of confiscation for very gross and wanton violations of duty. But then, it limits the penalty to cases of extraordinary turpitude or violence. For petty misconduct, or petty plunderage, or petty neglect of duty, it contents itself with the mitigated rule of compensation in damages. Harmony *v.* United States, 2 How. 210, 234, 11 L. Ed. 238; The Marianna Flora, 11 Wheat. 1, 40, 6 L. Ed. 405.

68. Rule as to allowance of compensatory and exemplary damages.—Lake Shore, etc., R. Co. *v.* Prentice, 147 U. S. 101, 108, 37 L. Ed. 97. See, generally, the titles DAMAGES; EXEMPLARY DAMAGES.

69. Effect of decree without mentioning damages.—Canter *v.* American Ins. Co., 3 Pet. 307, 7 L. Ed. 688.

The party will be deemed to have waived the claim for damages unless he then interposes an appeal or cross appeal to sustain his claim. Canter *v.* American Ins. Co., 3 Pet. 307, 7 L. Ed. 688.

70. Damages.—Canter *v.* American Insurance Co., 3 Pet. 307, 7 L. Ed. 688; Hemmingway *v.* Fisher, 20 How. 255, 15 L. Ed. 799.

In The Diana, 3 Wheat. 58, a decree, in an instance cause was affirmed, with damages at the rate of six per cent. per annum, on the amount of the appraised value of the cargo (the same having been delivered to the claimant on bail), including interest from the date of the decree of condemnation in the district court.

admiralty court on the merits of an action, cannot be corrected by prohibition.[71] The method of reviewing a decree of the district court in admiralty is by appeal to the circuit court.[72] While under the judiciary act an admiralty cause could not be brought to the supreme court from the circuit court in any other mode than by writ of error,[73] this rule was changed by the act of March 3, 1803, providing for appeal in such cases.[74] Since the act of March 3, 1891, establishing the circuit court of appeals, decisions of the circuit court in admiralty are reviewed by appeal to the circuit court of appeals,[75] and the decision of the circuit court of appeals is final, except as to questions which may be certified to the supreme court,[76] or where the whole case is required by the supreme court to be sent up, on certiorari issued for that purpose, or otherwise.[77]

2. JURISDICTION—a. *Courts*—(1) *In General.*—The court of appeals, erected by the continental congress, had power to revise and correct the sentences of the state courts of admiralty.[78] And it was held, that an appeal lay to the high court of errors and appeals of Pennsylvania from a decision of the state court in an admiralty cause.[79]

(2) *Circuit Court.*—Under the judiciary act,[80] and under the act of March 3, 1803,[81] appeals from the district to the circuit court were permitted from all

71. Prohibition.—Ex parte Pennsylvania, 109 U. S. 174, 27 L. Ed. 894. See, generally, the title PROHIBITION.

72. Review of decision of district court.—Rev. Stat., § 631; Ward *v.* Chamberlain, 2 Black 430, 443, 17 L. Ed. 319; The Admiral, 3 Wall. 603, 612, 18 L. Ed. 58; The Protector, 11 Wall. 82, 86, 20 L. Ed. 47.

When the judicial system of the United States was organized, exclusive original cognizance of all civil cases of admiralty and maritime jurisdiction was conferred upon the district courts, and appeals in certain cases were allowed to the circuit court. Ward *v.* Chamberlain, 2 Black 430, 443, 17 L. Ed. 319; The Admiral, 3 Wall. 603, 612, 18 L. Ed. 58; The Protector, 11 Wall. 82, 86, 20 L. Ed. 47.

73. Mode of review of decision of circuit court under judiciary act.—Ward *v.* Chamberlain, 2 Black 430, 443, 17 L. Ed. 319; The Admiral, 3 Wall. 603, 612, 18 L. Ed. 58; The Protector, 11 Wall. 82, 86, 20 L. Ed. 47.

74. Mode of review of decision of circuit court under act of 1803.—The San Pedro, 2 Wheat. 132, 4 L. Ed. 202; The Baltimore, 8 Wall. 377, 382, 19 L. Ed. 463; Dower *v.* Richards, 151 U. S. 658, 664, 38 L. Ed. 305.

The rules, regulations and restrictions contained in the 22d and 23d sections of the judiciary act, respecting the time within which a writ of error shall be brought, and in what instances it shall operate as a supersedeas; the citation to the adverse party, the security to be given by the plaintiffs in error for prosecuting his suit, and the restrictions upon the appellate court as to reversals in certain enumerated cases, are applicable to appeals under the act of 1803, and are to be substantially observed; except that where the appeal is prayed at the same term when the decree or sentence is pronounced, a citation is not necessary. The San Pedro, 2 Wheat. 132, 4 L. Ed. 202.

75. Mode of review of decision of circuit court under act of 1891.—Act of March 3, 1891, § 6.

76. Certifying questions to supreme court.—Act of March 3, 1891, § 6. See, generally, the title APPEAL AND ERROR.

77. Certiorari.—Act of March 3, 1891, § 6; The Paquete Habana, 175 U. S. 677, 680, 44 L. Ed. 320; Oregon Railway, etc., Co. *v.* Balfour, 179 U. S. 55, 45 L. Ed. 82; The Three Friends, 166 U. S. 1, 41 L. Ed. 897.

78. Power of courts established by congress to review decisions of state court of admiralty.—Penhallow *v.* Doane, 3 Dall. 54, 108, 1 L. Ed. 507; United States *v.* Peters, 3 Dall. 121, 1 L. Ed. 535.

79. Appeal from state court in admiralty cause.—Talbot *v.* Three Brigs, 1 Dall. 95, 96, 1 L. Ed. 52.

80. Under judiciary act.—As to cases of admiralty and maritime jurisdiction, including prize causes, the judiciary act of 1789, in § 21, permitted an appeal from them to the circuit court where the matter in dispute exceeded the sum or value of $300. The Paquete Habana, 175 U. S. 677, 680, 44 L. Ed. 320; The Admiral, 3 Wall. 603, 612, 18 L. Ed. 58.

In an early case, it was held, that an appeal from the district court of the district of Maine, in a case of admiralty jurisdiction, did not lie directly to the supreme court of the United States, but to the circuit court for the district of Massachusetts. The Schooner Sally, 5 Cranch 406, 2 L. Ed. 320.

81. Under act of March 3, 1803.—By the act of March 3, 1803, c. 40, appeals to the circuit court were permitted from all final decrees of a district court where the matter in dispute exceeded the sum or value of $50. The Paquete Habana, 175 U. S. 680, 44 L. Ed. 320; United States *v.* Nourse, 6 Pet. 470, 495, 8 L. Ed. 467.

final decrees in cases of admiralty and maritime jurisdiction where the amount in controversy was sufficient to give jurisdiction to the circuit court.[82] But since the act of 1891, creating the circuit court of appeals, the circuit courts of the United States have no appellate jurisdiction over the district courts.[83]

(3) *Circuit Court of Appeals.*—Under the act of 1891, creating the circuit court of appeals, appeal, in admiralty and maritime cases, lies directly from the district court to the circuit court of appeals, and its decision in such cases is final, except that that court may certify to the supreme court questions of law, and that the supreme court may order up the whole case by certiorari, or otherwise.[84]

(4) *Supreme Court.*—Under the judiciary act, decrees of the circuit court in cases of admiralty and maritime jurisdiction could be reviewed in the supreme court upon writ of error.[85] Under act of March 3, 1803,[86] and under the act of congress relating to judicial proceedings in the territory of Florida,[87] the decision of the circuit court was reviewable by appeal to the supreme court, where the amount in controversy was sufficient to give the supreme court jurisdiction. But since the act of March 3, 1891, establishing the circuit court of appeals, the supreme court has no jurisdiction to review the judgment of the circuit court in admiralty causes, either by appeal or upon a writ of error, although questions may be certified from the circuit court of appeals to the supreme court in the manner provided for by statute, or the whole case may be required by the supreme court to be sent up by certiorari issued for that purpose, or otherwise.[88]

82. Amount in controversy.—Generally, as to amount in controversy, see the title APPEAL AND ERROR.

83. Under act of 1891.—U. S. Rev. Stat. (Suppl. 1891), p. 559, c. 356; The Paquete Habana, 175 U. S. 677, 680, 44 L. Ed. 320.

84. Circuit court of appeals.—The Paquete Habana, 175 U. S. 677, 680, 44 L. Ed. 320; Oregon, etc., Navigation Co. *v.* Balfour, 179 U. S. 55, 45 L. Ed. 82; The Three Friends, 166 U. S. 1, 41 L. Ed. 897.

Proceedings under the act of congress to limit the liability of ship owners, and the rules of court passed in pursuance of that act, are admiralty cases within the meaning of § 6 of the judiciary act of March 3, 1891, providing that the judgments and decrees of circuit courts of appeals in admiralty cases shall be final, and no appeal lies to the supreme court therefrom. Oregon, etc., Navigation Co. *v.* Balfour, 179 U. S. 55, 45 L. Ed. 82.

Appeal from territorial court of Hawaii.—The United States circuit court of appeals has no jurisdiction of an appeal from a decree in admiralty made by the circuit court of the territory of Hawaii, in a case pending in the courts of Hawaii at the time of its annexation to the United States. Ex parte Wilders Steamship Co., 183 U. S. 545, 46 L. Ed. 321.

85. Under judiciary act.—Under the judiciary act admiralty and maritime causes, where the matter in dispute exceeded the sum or value of three hundred dollars, could be transferred from the circuit court to the supreme court by writ of error. The Admiral, 3 Wall. 603, 612, 18 L. Ed. 58; The Protector, 11 Wall. 82, 86, 20 L. Ed. 47.

86. Under act of March 3, 1803.—By the act of March 3, 1803, c. 40, appeals were permitted from the circuit court to the supreme court in all cases of admiralty and maritime jurisdiction, in which the matter in dispute exceeded the sum or value of $2,000. The Protector, 11 Wall. 82, 86, 20 L. Ed. 47; The Lady Pike, 21 Wall. 1, 8, 22 L. Ed. 499; The Paquete Habana, 175 U. S. 677, 680, 44 L. Ed. 320; Sarchet *v.* United States, 12 Pet. 143, 9 L. Ed. 1033.

At the time when the district court for the southern district of Florida was established, the act of 1803 governed appeals from the district to the circuit courts, and from the circuit courts to this court. No appeal in admiralty could be taken directly from the district court, except when, as in the case of the southern district of Florida, the district court exercised the jurisdiction of the circuit court as well as that of the district court. The Lucy, 8 Wall. 307, 309, 19 L. Ed. 394.

87. Act relating to Florida.—Under act of congress relating to judicial proceedings in the territory of Florida, appeal lies to supreme court in all admiralty cases. Parish *v.* Ellis, 16 Pet. 451, 10 L. Ed. 1028.

88. Under act of March 3, 1891.—Act of March 3, 1891, § 6; The Paquete Habana, 175 U. S. 677, 680, 44 L. Ed. 320; Oregon Railway, etc., Co. *v.* Balfour, 179 U. S. 55, 45 L. Ed. 82; The Three Friends, 166 U. S. 1, 41 L. Ed. 897. Generally, as to the certification of cases to the supreme court by the circuit court of appeals, see the title APPEAL AND ERROR.

When power to require certification of case to be exercised.—The power of the supreme court to require a case to be certified up for decision is not ordinarily

b. *Amount in Controversy.*—The question of jurisdiction on appeal in admiralty cases as dependent on the amount in controversy is treated in another title.[89]

c. *Appealable Decisions.*—The question as to the appealability of a decree in admiralty as dependent upon its finality is treated in another title.[90]

3. Who May Appeal.—One seaman suing in admiralty cannot appeal from a decree made in regard to another,[91] and an appeal in the name of the vessel libelled is improper.[92]

4. Time of Appeal.—An appeal in admiralty from the district to the circuit court must be to the term of the circuit court held next after the decree, and it must be made while the district court is sitting, or within the time required by the general rules or a special order.[93] But a provision in a rule of the district court that the clerk should prepare and deliver to the circuit court the appeal and record within twenty days, cannot prevent the circuit court from entertaining the cause, if for any reason this is not done.[94]

5. Cross Appeal.—Where one of the parties to an admiralty case perfects an appeal from a decree and the other does not perfect a cross appeal, the latter is not entitled to relief beyond that given by the court below.[95]

6. Perfecting Appeal—a. *Necessity of Writing.*—A rule of the district court requiring an appeal in admiralty to be in writing, and filed with the clerk, may be dispensed with by that court, and if the court allows an appeal without

to be exercised. The Three Friends, 166 U. S. 1, 41 L. Ed. 897, citing American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 37 L. Ed. 486. See, generally, the title APPEAL AND ERROR.

The power has been exercised in an action for forfeiture for breach of the neutrality laws. The Three Friends, 166 U. S. 1, 41 L. Ed. 897.

89. Amount in controversey.—As to jurisdiction on appeal as dependent on amount in controversy, see the title APPEAL AND ERROR.

90. Appealable decisions.—As to appealability as dependent on finality of judgment or decree, see the title APPEAL AND ERROR.

As to appeals from causes in provisional court transferred to circuit court of United States by act of congress, see the title APPEAL AND ERROR.

91. Right of one seaman to appeal for another.—Oliver *v.* Alexander, 6 Pet. 143, 144, 8 L. Ed. 349.

92. Appeal in name of vessel.—A writ of error or appeal to this court cannot be sustained in the name of a steamboat, or any other than a human being, or some corporate or associated aggregation of persons. Steamboat Burns, 9 Wall. 237, 19 L. Ed. 620.

Whenever the res is seized in admiralty proceedings proper, or in revenue or other proceedings partaking of that character, the property is condemned and sold, and with the distribution of the proceeds the case ends, unless some one appears in court as claimant either of the res or its proceeds. When a claimant appears he becomes a party to the proceedings, and may defend, take an appeal, or writ of error, or adopt any other proceeding that a party properly before the court may be entitled to. Steamboat Burns, 9 Wall. 237, 239, 19 L. Ed. 620.

93. Time of appeal.—The S. S. Osborne, 105 U. S. 447, 450, 26 L. Ed. 1065.

94. Failure to file appeal within time prescribed by rule of district court.—The appeal, where once made, continues during the whole of the next term of the circuit court, unless sooner dismissed by that court for want of prosecution or otherwise, in accordance with its own practice. The S. S. Osborne, 105 U. S. 447, 450, 26 L. Ed. 1065.

95. Cross appeal.—Stratton *v.* Jarvis, 8 Pet. 4, 8 L. Ed. 846; Canter *v.* American Ins. Co., 3 Pet. 307, 7 L. Ed. 688; The Maria Martin, 12 Wall. 31, 40, 20 L. Ed. 251.

Where the district court in a libel in admiralty for collision, adjudged both vessels to be in fault, and only one appealed, it was held, that the only question here on appeal was as to the fault of the appealing vessel. The Des Moines, 154 U. S. 584, 20 L. Ed. 821.

The libelants, in their original libel, in the district court of the United States for the district of South Carolina, prayed that certain bales of cotton might be decreed to them, with damages and costs; Canter, who also claimed the cotton, prayed the court for restitution, with damages and costs; the district court decreed restitution of part of the cotton to the libelants, and dismissed the libel, without any award of damages on either side; both parties appealed from this decree to the circuit court, where the decree of the district court was reversed, and restitution of all the cotton was decreed to Canter, with costs, without any award of damages, or any express reservation of that question in the decree; from this

writing, the appellee cannot object to the jurisdiction of the circuit court on that ground.[96]

b. *Record.*—Upon appeals in admiralty, a transcript of the record must be transmitted to the appellate court.[97] In general, only the process, pleadings, and decree, and such orders and memorandums as may be necessary to show the jurisdiction of the court and regularity of the proceedings, shall be entered upon the final record.[98] Where, under the requirements of law, the facts have been found in the court below, and the power to review is limited to the determination of questions of law arising on the record, the record must be confined to the pleadings, the findings of fact and conclusions of law thereon, the bills of exceptions, the final judgment or decree, and such interlocutory orders and decrees as may be necessary to a proper review of the case.[99]

7. Effect of Appeal—a. *As Suspending Decree of Lower Court.*—In admiralty cases, an appeal suspends the sentence altogether; and the cause is to be heard in the appellate court, as if no sentence had been pronounced.[1]

b. *As Carrying Up Property or Stipulation*—(1) *Appeal from District to Circuit Court.*—The rule is universal that an appeal in admiralty from the district court to the circuit court carries up the whole fund.[2] And after an appeal

decree, the libelants in the district court appealed to this court; no appeal was entered by Canter. Held, that the question of a claim of damages by Canter was not open before this court; the decree of restitution, without any allowance of damages, was a virtual denial of them, and a final decree upon Canter's claim of damages; it was his duty, at that time, to have filed a cross appeal, if he meant to rely on a claim to damages; and not having done so, it was a submission to the decree of restitution and costs only. Canter *v.* American Ins. Co., 3 Pet. 307, 7 L. Ed. 688.

Although the general rule is that a party who does not appeal cannot be heard in opposition to the decree, still where it appeared the suit below being a libel for collision against a tug and her tow—that an appeal from the district court to the circuit court had been taken from the entire decree by the owners of the tow who had ordered the tug, and who had undertaken her defense as well as their own, and thus represented the entire interest of the losing party in the suit, an appeal by the tug from the circuit court to this court was entertained here, though the court observes that doubt might perhaps exist as to the regularity of the proceeding. The Mabey & Cooper, 14 Wall. 204, 20 L. Ed. 881.

96. Necessity of writing.—The S. S. Osborne, 105 U. S. 447, 450, 26 L. Ed. 1065.

97. Necessity for transcript of record.—"Upon the appeal of any cause in equity, or of admiralty and maritime jurisdiction, of prize or no prize, a transcript of the record, as directed by law to be made and copies of the proofs, and of such entries and papers on file as may be necessary on the hearing of the appeal, shall be transmitted to the supreme court; provided, that either the court below or the supreme court may order any original document or other evidence to be sent up, in addition to the copy of the record, or in lieu of a copy of a part thereof." Rev. Stat., § 698; Ex parte Cooper, 143 U. S. 472, 36 L. Ed. 232. See, also, The Baltimore, 8 Wall. 377, 383, 19 L. Ed. 463.

98. What to be entered on record.—Rev. Stat., § 750; Ex parte Cooper, 143 U. S. 472, 36 L. Ed. 232.

99. Where finding of law and fact are certified.—Admiralty Rule 8, paragraph 6; Marshall *v.* The Adriatic, 103 U. S. 730, 26 L. Ed. 605.

1. Effect of appeal as suspending decree.—The Schooner General Pinkney, 5 Cranch 281, 3 L. Ed. 101; The Hesper, 122 U. S. 256, 30 L. Ed. 1175; United States *v.* Preston, 5 Pet. 57, 66 L. Ed. 601; The Steamboat Louisville, 154 U. S. 657, 25 L. Ed. 771; The Lucille, 19 Wall. 73, 74, 22 L. Ed. 64; The Benefactor, 103 U. S. 239, 247, 26 L. Ed. 351. See post, "Trial and Hearing," III, R. 9.

An appeal in admiralty has the effect to supersede and vacate the decree from which it is taken. A new trial, completely and entirely new, with other testimony and other pleadings, if necessary, or, if asked for, is contemplated—a trial in which the judgment of the court below is regarded as though it had never been rendered. A new decree is to be made in the circuit court. This decree is to be enforced by the order of that court, and the record remains there. The case is not sent back to the district court for executing the decree, or for any other proceeding whatever, and that court has nothing further to do with it. The decree should, therefore, be complete within itself. The Lucille, 19 Wall. 73, 74, 22 L. Ed. 64. See post, "Rule under Act of 1875," III, R. 9, b, (1), (c).

2. Appeal as carrying up fund.—The Wanata, 95 U. S. 600, 24 L. Ed. 461; The Lady Pike, 96 U. S. 461, 24 L. Ed. 672; The Lottawanna, 20 Wall. 201, 22 L. Ed.

from the district to the circuit court, the former court can make no order respecting the property, whether it has been sold, and the proceeds paid into court, or whether it remains specifically, or its proceeds remain, in the hands of the marshal.[3] Admiralty bonds and stipulations taken in the district court, inasmuch as they constitute the fund out of which compensation is to be decreed to the libelants, also follow the appeal into the circuit court.[4]

(2) *Appeal from Circuit to Supreme Court.*—Where the appeal is from the circuit court to the supreme court, the funds remains in the custody of the circuit court.[5]

8. DISMISSAL OF APPEAL.—As to dismissal of appeal, see the title APPEAL AND ERROR.

9. TRIAL AND HEARING—a. *Appeal from District to Circuit Court.*—Upon an appeal in admiralty from the district to the circuit court, the case is proceeded with substantially in the same way as if it had been originally begun in that court. The appeal vacates the decree of the district court, the case is heard de novo, without any regard to what was done below, and an entirely new decree is entered which the circuit court carries into execution, without remanding the case to the lower court.[6] The fact that the claimant does not appeal from the decree of the district court does not alter the rule, as, by appealing, the libelant takes the risk of the result of a trial of the case de novo.[7]

259; The Collector, 6 Wheat. 194, 5 L. Ed. 239.

Where an appeal is taken to the circuit court from the decree of the district court in a proceeding in rem, the property or its proceeds follows the cause into the former court. The Lottawanna, 20 Wall. 201, 22 L. Ed. 259; The Collector, 6 Wheat. 194, 5 L. Ed. 239.

3. Power of district court with respect to property.—The Collector, 6 Wheat. 194, 5 L. Ed. 239.

It is a great irregularity, for the marshal to keep the property, or the proceeds thereof, in his own hands, or to distribute the same among the parties entitled, without a special order from the court; but such an irregularity may be cured, by the assent and ratification of all the parties interested, if there be no mala fides. The Collector, 6 Wheat. 194, 5 L. Ed. 239.

4. As carrying up bond or stipulation.—The Wanata, 95 U. S. 600, 618, 24 L. Ed. 461; Montgomery *v.* Anderson, 21 How. 386, 16 L. Ed. 160; The Lady Pike, 96 U. S. 461, 24 L. Ed. 672.

Where the claimant appeals from the decree of the district court, the bond and other stipulations follow the cause into the circuit court; and, upon the affirmation of the decree, the fruits of the appeal bond and other stipulations may be obtained in the same manner as in the court below, they being in fact nothing more than a security taken to enforce the original decree, and are in the nature of the stipulation in the admiralty. The Wanata, 95 U. S. 600, 616, 24 L. Ed. 461; Montgomery *v.* Anderson, 21 How. 386, 16 L. Ed. 160.

Where a stipulation to abide and answer the decree of a district court in a case of admiralty is, with the consent of the parties, substituted for the stipulation previously filed by a claimant, it thereby becomes the stipulation for value, and does not become inoperative upon an appeal to the circuit court. The appeal carries up the whole fund. The Lady Pike, 96 U. S. 461, 24 L. Ed. 672.

5. Effect of appeal from circuit to supreme court as carrying up property.—The Lady Pike, 96 U. S. 461, 465, 24 L. Ed. 672; The Collector, 6 Wheat. 194, 5 L. Ed. 239; Jennings *v.* Carson, 4 Cranch 2, 2 L. Ed. 531.

In such case the mandate of the supreme court is sent down, and there operates upon the fund sent up from the district court, just the same as if the execution had been issued there without any appeal to this court. The Lady Pike, 96 U. S. 461, 465, 24 L. Ed. 672.

6. Trial on appeal from district to circuit court.—The Steamboat Louisville, 154 U. S. 657, 25 L. Ed. 771; The Lucille, 19 Wall. 73, 74, 22 L. Ed. 64; Montgomery *v.* Anderson, 21 How. 388, 16 L. Ed. 160; The Schooner General Pinkney, 5 Cranch 281, 283; 3 L. Ed. 101; The Charles Morgan *v.* Kouns, 115 U. S. 69, 29 L. Ed. 316; The Hesper, 122 U. S. 256, 30 L. Ed. 1175; United States *v.* Preston, 3 Pet. 57, 66, 7 L. Ed. 601.

Power of circuit court to execute its own decree.—On appeal from the district to the circuit court the latter must execute its own decree, and the district court has nothing more to do with the case. The Lucille, 19 Wall. 73, 22 L. Ed. 64.

7. Effect of failure of claimant to file appeal where libelant appeals.—The fact that the claimants did not appeal from the decree of the district court does not alter the rule. When the libelant appeals, he does so in view of the rule, and takes the risk of the result of a trial of the case

b. *Appeal from Circuit to Supreme Court*—(1) *Retrial as to Facts*—(a) *Rule under Judiciary Act.*—Under the provisions of the judiciary act, there could be no reversal for error of fact.[8] If causes of admiralty jurisdiction were removed to the supreme court accompanied with a statement of facts, but without the evidence, the statement was conclusive as to all the facts which it contained.[9]

(b) *Rule under Act of 1803.*—Under the act of March 3, 1803, the supreme court could re-examine the whole testimony in the case, the express requirement of the act of congress being that the supreme court should hear and determine such appeals, and it was as much the duty of the court to reverse the decree from which the appeal was taken for error of fact, if clearly established, as for error of law.[10]

(c) *Rule under Act of 1875*—aa. *In General.*—By the act of February 16, 1875, the circuit court of the United States in deciding causes of admiralty or maritime jurisdiction on the instance side of the court, were required to find the facts and conclusions of law upon which they rendered their judgments or decrees, and state them separately, and, upon review, the jurisdiction of the supreme court was limited to the determination of questions of law arising upon the record and to such rulings of the circuit court excepted to at the time, as might be presented by bills of exceptions; and the findings of fact were conclusive upon the supreme court.[11]

de novo. The whole case is opened by his appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants. The Hesper, 122 U. S. 256, 30 L. Ed. 1175.

8. **Rule under judiciary act.**—The Baltimore, 8 Wall. 377, 381, 19 L. Ed. 463.

9. **Conclusiveness of findings of fact under judiciary act.**—Wiscart *v.* D'Auchy, 3 Dall. 321, 324, 1 L. Ed. 619; The Baltimore, 8 Wall. 377, 382, 19 L. Ed. 463.

Power to reverse for error, in fact, any judgment or decree of a circuit court brought here for revision, being absolutely prohibited, it became necessary to prescribe some mode by which the facts in equity suits and in cases of admiralty and maritime jurisdiction should be ascertained and embodied in the record, and it was accordingly provided in the 19th section of the judiciary act, that it should be the duty of the circuit courts in such cases to cause the facts on which they founded their sentence or decree fully to appear upon the record in some one of the modes therein described, and while that provision remained in force this court had no more right to re-examine the facts found in such a case than the court possesses in a common-law suit where the facts are found by the verdict of a jury. The Baltimore, 8 Wall. 377, 382, 19 L. Ed. 463.

10. **Rule under act of 1803.**—The Baltimore, 8 Wall. 377, 19 L. Ed. 463; The Lucille, 19 Wall. 73, 74, 22 L. Ed. 64; The City of Hartford, 97 U. S. 323, 328, 24 L. Ed. 950; The Maria Martin, 12 Wall. 31, 20 L. Ed. 251; The Lady Pike, 21 Wall. 1, 22 L. Ed. 499; The Sabine, 26 L. Ed. 450, 103 U. S. 540; Connemara, 108 U. S. 352, 359, 27 L. Ed. 751; Post *v.* Jones, 19 How. 150, 15 L. Ed. 618; The Hesper, 122 U. S. 256, 30 L. Ed. 1175; The Tornado, 109 U. S. 110, 27 L. Ed. 874; Dower *v.* Richards, 151 U. S. 658, 664, 38 L. Ed. 305. See ante, "As Suspending Decree of Lower Court," III. R. 7, a.

It is undoubtedly the general rule that an appeal in admiralty, like all appeals derived from the practice of the civil law, carries the whole cause to the appellate court, in which it is to be tried anew upon the same and such additional proofs as the parties may propound. Whilst this is the general rule, there is also no doubt that the legislature may authorize the appellate court, after hearing the cause, and determining the questions raised therein, to remand it to the court a quo for further proceedings. The Benefactor, 103 U. S. 239, 247, 26 L. Ed. 351.

Before the act of 1875, this court, upon an appeal in a case of salvage, gave the same weight, and no more, to the decree of the court below, that a court of common law would allow to the verdict of a jury; and might revise that decree for manifest error in matter of fact, even if no violation of the just principles which should govern the subject was shown. The Connemara, 108 U. S. 352, 359, 27 L. Ed. 751; Post *v.* Jones, 19 How. 150, 15 L. Ed. 618; The Hesper, 122 U. S. 256, 30 L. Ed. 1175; The Tornado, 109 U. S. 110, 27 L. Ed. 874.

The amount of salvage decreed below was never reduced, unless for some violation of just principles, or for clear and palpable mistake or gross over-allowance. The Connemara, 108 U. S. 359, 27 L. Ed. 751; Hobart *v.* Drogan, 10 Pet. 108, 9 L. Ed. 363; The Comanche, 8 Wall. 448, 19 L. Ed. 397. See the title SALVAGE.

11. **Rule under act of 1875—In general.**—Ralli *v.* Troop, 157 U. S. 386, 39 L. Ed.

bb. *To What Cases Statute Applies.*—The act of 1875 applies to appeals from a circuit court of a territory in admiralty cases.[12]

cc. *What Rulings May Be Reviewed.*—(aa) *In General.*—Under the act of 1875, the only rulings, upon which the supreme court was authorized to pass are such as might be presented by a bill of exceptions prepared as in actions at law.[13]

(bb) *What Are Conclusions of Law Which May Be Reviewed.*—Conclusions arising upon the facts as found are conclusions of law open to review, although treated by the circuit court as findings of fact.[14]

dd. *Of What Facts Findings Required.*—It is only the ultimate facts which the court is bound to find; and the supreme court will not take notice of a refusal to find the mere incidental facts, which only amount to evidence from

742; The City of New York, 147 U. S. 72, 37 L. Ed. 84; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788; The Nacoochee, 137 U. S. 330, 341, 34 L. Ed. 687; The Steamer Eclipse, 135 U. S. 599, 606, 34 L. Ed. 269; The Gazelle, 128 U. S. 474, 32 L. Ed. 496; Sun Mutual Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485, 27 L. Ed. 337; The Annie Lindsley, 104 U. S. 185, 26 L. Ed. 716; The Abbotsford, 98 U. S. 440, 25 L. Ed. 168; The Connemara, 108 U. S. 352, 359, 27 L. Ed. 751; The Tornado, 109 U. S. 110, 27 L. Ed. 874; The Hesper, 122 U. S. 256, 30 L. Ed. 1175; The Steamboat Sabine, 103 U. S. 540, 26 L. Ed. 450; The City of New York, 147 U. S. 72, 37 L. Ed. 84; The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100; The Louisville, 154 U. S. 657, 25 L. Ed. 771; Nickerson *v.* Merchants' Steamship Co., 105 U. S. 267, 26 L. Ed. 1026; Winslow *v.* Wilcox, 104 U. S. 183, 26 L. Ed. 693; Ex parte Cooper, 143 U. S. 472, 36 L. Ed. 232; The Sylvia Handy, 143 U. S. 513, 36 L. Ed. 246; Steam Tug E. A. Packer *v.* New Jersey Lighterage Company, 140 U. S. 360, 35 L. Ed. 453; Dower *v.* Richards, 151 U. S. 658, 664, 38 L. Ed. 305.

Constitutionality of act.—It has been held, that the act of 1875 is constitutional. The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100.

12. Appeals from territorial courts.—Ex parte Cooper, 143 U. S. 472, 36 L. Ed. 232; The Sylvia Handy, 143 U. S. 513, 36 L. Ed. 246.

The act of February 16, 1875, applies to the district court of Alaska. Ex parte Cooper, 143 U. S. 472, 36 L. Ed. 232; The Sylvia Handy, 143 U. S. 513, 36 L. Ed. 246.

13. What rulings may be reviewed under act of 1875.—The City of New York, 147 U. S. 72, 76, 37 L. Ed. 84; The Abbotsford, 98 U. S. 440, 25 L. Ed. 168; The Clara, 102 U. S. 200, 26 L. Ed. 145; The Benefactor, 102 U. S. 214, 26 L. Ed. 157; The Annie Lindsley, 104 U. S. 185, 26 L. Ed. 716; Collins *v.* Riley, 104 U. S. 322; 26 L. Ed. 752; Sun Mut. Ins. Co. *v.* Ocean Ins. Co. 107 U. S. 485, 27 L. Ed. 337; Watts *v.* Camors, 115 U. S. 353, 29 L. Ed. 406; The Schooner Maggie J. Smith *v.* Walker, 123 U. S. 349, 31 L. Ed. 175; The Gazelle, 128 U. S. 474, 32 L. Ed. 496; The Connemara, 108 U. S. 352, 27 L. Ed. 751; The Adriatic, 103 U. S. 730, 26 L. Ed. 605; The Hesper, 122 U. S. 256, 266, 30 L. Ed. 1175. The Tornado, 109 U. S. 110, 115, 27 L. Ed. 874; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 32 L. Ed. 788; The Steamer Eclipse, 135 U. S. 599, 607, 34 L. Ed. 269.

In cases of salvage, as in other admiralty cases, the supreme court may revise the decree appealed from for matter of law, but for matter of law only; and should not alter the decree for the reason that the amount awarded appears to be too large, unless the excess is so great that, upon any reasonable view of the facts found, the award cannot be justified by the rules of law applicable to the case. The Connemara, 108 U. S. 352, 360, 27 L. Ed. 751. The Tornado, 109 U. S. 110, 27 L. Ed. 874; The Hesper, 122 U. S. 256, 30 L. Ed. 1175. See the title SALVAGE.

14. What are conclusions of law.—The Edwin I. Morrison, 153 U. S. 199, 38 L. Ed. 688; The Britannia, 153 U. S. 130, 38 L. Ed. 660.

In an action to recover damages done to a cargo by sea water findings of the circuit court that "at the time of the contract and loading of cargo and commencement of voyage the vessel was tight, staunch and strong and in every way fit for the contemplated voyage;" that "there was no latent defect in the vessel which contributed to the injury to the cargo;" and that "the whole of said damage to cargo was caused by dangers of the sea and was within the exception in charter parties and bills of lading," were held to be findings determined by the interpretation which the law put upon the circumstances of the transaction and as such open to revision by the supreme court. The Edwin I. Morrison, 153 U. S. 199, 38 L. Ed. 688, citing Sun Mutual Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485, 27 L. Ed. 337; United States *v.* Pugh, 99 U. S. 265, 25 L. Ed. 322; The Britannia, 153 U. S. 130, 38 L. Ed. 660.

In an action for collision, the findings that "the conduct of those in charge of the Beaconsfield, as specifically set forth in the foregoing findings, does not warrant the inference that there was, on their part, negligence contributory to produce

which the ultimate fact is to be obtained.[15] Wherever the trial court finds the facts and the conclusions of law therefrom, it is bound to find every fact material to its conclusion, and a refusal to do so, if properly excepted to, is a ground for reversal.[16]

ee. *Conclusiveness of Findings.*—The facts found by the court below are conclusive,[17] and have practically the same effect as the special verdict of a jury.[18] A bill of exceptions cannot be used to bring up the evidence for a review of these findings.[19]

ff. *Effect of Refusal to Make Findings.*—If the court below neglects or refuses to make a finding one way or the other, as to the existence of a material fact, which has been established by uncontradicted evidence, and an exception

the collision," is a conclusion of law open to revision on appeal. The Britannia, 153 U. S. 130, 38 L. Ed. 660.

15. Of what facts findings required.—The City of New York, 147 U. S. 72, 76, 37 L. Ed. 84; The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100; Merchants' Mut. Ins. Co. *v.* Allen, 121 U. S. 67, 30 L. Ed. 859; The John H. Pearson, 121 U. S. 469, 30 L. Ed. 979.

16. Necessity for finding as to every material fact.—Steam Tug E. A. Packer *v.* New Jersey Lighterage Company, 140 U. S. 360, 365, 35 L. Ed. 453.

In The John H. Pearson, 121 U. S. 469, 30 L. Ed. 979, the question arose as to what was meant by the term "Northern Passage" from Gibraltar to New York, and it was held, that the court below should have ascertained from the evidence what passages there were which vessels were accustomed to take, and then determine which of them the vessel was allowed by its contract to choose as the northern, and the decree was reversed and the case remanded for further proceedings upon this ground. Steam Tug E. A. Packer *v.* New Jersey Lighterage Company, 140 U. S. 360, 365, 35 L. Ed. 453.

If the report of a master is excepted to, there must be findings of fact by the circuit court, in order for the supreme court to review the case, where the appellant insists on pressing his exceptions. The Steamboat Sabine, 103 U. S. 540, 26 L. Ed. 450.

17. Conclusiveness of findings.—The City of New York, 147 U. S. 72, 76, 37 L. Ed. 84; The Abbotsford, 98 U. S. 440, 25 L. Ed. 168; The Clara, 102 U. S. 200, 26 L. Ed. 145; The Benefactor, 102 U. S. 214, 26 L. Ed. 157; The Annie Lindsley, 104 U. S. 185, 26 L. Ed. 716; Collins *v.* Riley, 104 U. S. 322, 26 L. Ed. 752; Sun Mut. Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485, 27 L. Ed. 337; Watts *v.* Camors, 115 U. S. 353, 29 L. Ed. 406; The Schooner Maggie J. Smith *v.* Walker, 123 U. S. 349, 31 L. Ed. 175; The Gazelle, 128 U. S. 474, 32 L. Ed. 496; The Connemara, 108 U. S. 352, 27 L. Ed. 751; The Adriatic, 103 U. S. 730, 26 L. Ed. 605; The Potomac, 105 U. S. 630, 26 L. Ed. 1194.

Where the circuit court found that a harbor was in a fiord or inlet having a bar across its mouth, which it was impossible for a ship to pass, either in ballast or with cargo; and that the only anchorage outside the bar was not a reasonably safe anchorage, nor a place where it is reasonably safe for a vessel to lie and discharge, these positive findings of essential facts are in no way controlled or overcome by the other statements (rather recitals of portions of the evidence than findings of fact) that large English steamers habitually, and thirty one American vessels in the course of several years, had in fact discharged the whole or part of their cargoes at that anchorage, without accident or disaster. The Gazelle, 128 U. S. 474, 485, 32 L. Ed. 496.

18. Findings have same effect as special verdict.—The City of New York, 147 U. S. 72, 76, 37 L. Ed. 84; The Abbotsford, 98 U. S. 440, 25 L. Ed. 168; The Clara, 102 U. S. 200, 26 L. Ed. 145; The Benefactor, 102 U. S. 214, 26 L. Ed. 157; The Annie Lindsley, 104 U. S. 185, 26 L. Ed. 716; Collins *v.* Riley, 104 U. S. 322, 26 L. Ed. 752; Sun Mutual Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485, 27 L. Ed. 337; Watts *v.* Camors, 115 U. S. 353, 29 L. Ed. 406; The Schooner Maggie J. Smith *v.* Walker, 123 U. S. 349, 31 L. Ed. 175; The Gazelle, 128 U. S. 474, 32 L. Ed. 496; The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100; The Connemara, 108 U. S. 352, 27 L. Ed. 751; The Adriatic, 103 U. S. 730, 26 L. Ed. 605; The S. C. Tryon, 105 U. S. 267, 26 L. Ed. 1026. See, generally, the title VERDICT.

19. Bill of exceptions to review findings.—The City of New York, 147 U. S. 72, 76, 37 L. Ed. 84; The Abbotsford, 98 U. S. 440, 25 L. Ed. 168; The Clara, 102 U. S. 200, 26 L. Ed. 145; The Benefactor, 102 U. S. 214, 26 L. Ed. 157; The Annie Lindsley, 104 U. S. 185, 26 L. Ed. 716; Collins *v.* Riley, 104 U. S. 322, 26 L. Ed. 752; Sun Mut. Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485, 27 L. Ed. 337; The Gazelle, 128 U. S. 474, 32 L. Ed. 496; The Connemara, 108 U. S. 352, 27 L. Ed. 751; The Adriatic, 103 U. S. 730, 26 L. Ed. 605; The Schooner Maggie J. Smith *v.* Walker, 123 U. S. 349, 352, 31 L. Ed. 175; Watts *v.* Camors, 115 U. S. 353, 29 L. Ed. 406.

be taken, the question may be brought up for review in that particular. The refusal to find is equivalent to finding that the fact was immaterial, and is a question of law, and properly reviewable in an appellate court.[20] But to justify the supreme court in returning a cause to certify the findings, it must clearly appear that the omission was attributable to the fault or neglect of the court and not to the parties.[21]

gg. *Effect of Findings Not Supported by Evidence.*—If the court below makes a finding of fact which is not supported by any evidence whatever, and an exception be taken, the question is reviewable in that particular.[22]

hh. *Bill of Exceptions*—(aa) *Necessity of Bill.*—A bill of exceptions is not necessary to give the supreme court jurisdiction of an appeal in admiralty under the provisions of the act of February 16, 1875.[23] But if the circuit court fails to make findings, when it should do so, or makes a finding which is not supported by the evidence, a bill of exceptions is necessary in order to make the objection available.[24]

(bb) *Form of Bill.*—Where an exception is on the ground that the court failed to find facts which it should have found, the bill of exceptions ought to show the grounds relied on to sustain the objections, so that it will appear that the court below was properly informed as to the point to be decided, and that the facts sought to be incorporated are conclusively proven by uncontradicted evidence; and if the exception is as to facts found, it should be stated that it was because there was no evidence to support them, and then so much of the testimony as is necessary to establish this ground of complaint, which might under some circumstances include the whole, should be incorporated in the bill of exceptions.[25]

ii. *Hearing and Determination on Findings.*—When the testimony has been

20. Effect of refusal to make findings.—The City of New York, 147 U. S. 72, 77, 37 L. Ed. 84; The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100; Steam Tug E. A. Packer *v.* New Jersey Lighterage Company, 140 U. S. 360, 35 L. Ed. 453.

21. Return of a cause for certificate of findings.—Winslow *v.* Wilcox, 104 U. S. 183, 26 L. Ed. 693; The Abbotsford, 98 U. S. 440, 25 L. Ed. 168.

Where the circuit court refused to find a specific fact which the supreme court thought to be material, and to have been proven by uncontradicted testimony, the case was remanded for a further finding in regard to this point. Steam Tug E. A. Packer *v.* New Jersey Lighterage Company, 140 U. S. 360, 35 L. Ed. 453; The City of New York, 147 U. S. 72, 77, 37 L. Ed. 84.

Where, the circuit court has passed on all the issues the supreme court cannot listen to complaints that it has refused to find certain other facts which the weight of the testimony did not warrant. Steam Tug E. A. Packer *v.* New Jersey Lighterage Company, 140 U. S. 360, 363, 35 L. Ed. 453; The Annie Lindsley, 104 U. S. 185, 26 L. Ed. 716, 717.

22. Finding not supported by evidence.—The City of New York, 147 U. S. 72, 77, 37 L. Ed. 84; The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100; Steam Tug E. A. Packer *v.* New Jersey Lighterage Company, 140 U. S. 360, 35 L. Ed. 453.

23. Necessity for bill of exception to make findings part of record.—Nickerson *v.* Merchants' Steamship Co., 105 U. S. 267, 26 L. Ed. 1026; The Adriatic, 107 U. S. 512, 27 L. Ed. 497; The Potomac, 105 U. S. 630, 26 L. Ed. 1194. See, generally, the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL.

The findings which the statute requires must be stated by the court. These, therefore, become part of the record without any action of the parties, and errors of law arising on them need not be presented by exceptions. They are in the nature of a special verdict, as to which the inquiry is always open in the reviewing court, whether taken in connection with everything else that appears, it is sufficient to support the judgment. Nickerson *v.* Merchants' Steamship Co., 105 U. S. 267, 26 L. Ed. 1026.

24. Necessity of exception for refusal to make findings or where findings not supported by evidence.—The Gazelle, 128 U. S. 474, 481, 32 L. Ed. 496; The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100.

25. Form of bill.—The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100; The City of New York, 147 U. S. 72, 77, 37 L. Ed. 84.

Exceptions to the refusals of the circuit court to find certain facts cannot be considered by the supreme court where the testimony is not before it. The Nacoochee, 137 U. S. 330, 341, 34 L. Ed. 687; The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100.

sifted and weighed, and the actual circumstances of the transaction stated in a connected form, the law, by means of its presumptions, determines whether they establish such a relation between the parties as to give rise to reciprocal rights and obligations, and if so, what legal consequences have followed. The issue to be determined may be one, in form, merely of fact, as whether a particular contract was made, or whether one or both of the parties have been guilty of negligence. The circumstances of the entire transaction having been ascertained and stated, the issue is determined by the interpretation which the law puts upon them. This is an office quite distinct from ascertaining the circumstances themselves by the process of reduction from the original mass of evidence. It involves only a consideration of the facts as found, in their relation to each other, in view of fixed presumptions, in order to determine and declare the effect to be given to them as a connected whole.[26]

c. *Effect Where Evidence Is Conflicting*—(1) *In General.*—When the evidence is conflicting and there is evidence to sustain the decree, the supreme court will not ordinarily interfere.[27]

. (2) *Effect of Concurring Decisions of District and Circuit Courts on Questions of Fact.*—Successive decisions of two courts in the same case, on questions of fact, are not to be reversed, unless clearly shown to be erroneous.[28] But in

26. Hearing and determination of cause on findings.—Sun Mutual Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485, 502, 27 L. Ed. 337.

"This rule was, after much consideration, established in United States *v.* Pugh, 99 U. S. 265, 25 L. Ed. 322, in reference to the examination of the judgments of the court of claims, and we reiterate it here, as equally applicable to appeals from the decrees in admiralty of the circuit courts of the United States under the act of 1875." Sun Mutual Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485, 502, 27 L. Ed. 337.

27. Evidence conflicting.—Smith *v.* Burnett, 173 U. S. 430, 43 L. Ed 756; Philadelphia, etc., R. Co. *v.* Philadelphia, etc., Steamboat Co., 23 How. 209, 16 L. Ed. 433; The Grace Girdler, 7 Wall. 196, 19 L. Ed. 113; The Juniata, 93 U. S. 337, 23 L. Ed. 930; Morewood *v.* Enequist, 23 How. 491, 16 L. Ed. 516; The Ludwig Holberg, 157 U. S. 60, 39 L. Ed. 620; The Lady Pike, 21 Wall. 1, 22 L. Ed. 499; Walsh *v.* Rogers, 13 How. 283, 14 L. Ed. 147.

28. Effect of concurring decisions of district and circuit court on questions of fact.—Towson *v.* Moore, 173 U. S. 17, 43 L. Ed. 597; The Baltimore, 8 Wall. 377, 382, 19 L. Ed. 463; The Schooner S. B. Wheeler, 20 Wall. 385, 386, 22 L. Ed. 385; The Richmond, 103 U. S. 541, 26 L. Ed. 313; Smith *v.* Burnett, 173 U. S. 430, 43 L. Ed. 756; The Quickstep, 9 Wall. 665, 19 L. Ed. 767; The Lady Pike, 21 Wall. 18, 22 L. Ed. 499; Campania de Navigacion La Flecha *v.* Brauer, 168 U. S. 104, 42 L. Ed. 398; Morewood *v.* Enequist, 23 How. 491, 16 L. Ed. 516; The Conqueror, 166 U. S. 110, 41 L. Ed. 937; The Steamboat Eliza Hancock, 91 U. S. 618, 23 L. Ed. 214; The Steamboat Sabine, 103 U. S. 540, 26 L. Ed. 450; International Nav. Co. *v.* Farr, 181 U. S. 218, 45 L. Ed. 830; The Carib Prince, 170 U. S. 655, 42 L. Ed. 1181; The Grace Girdler, 7 Wall. 196, 19 L. Ed. 113; The Juniata, 93 U. S. 337, 23 L. Ed. 930; The Commerce, 16 Wall. 33, 21 L. Ed. 465; The Germanic, 196 U. S. 589, 49 L. Ed. 610; The Steamship Wildcroft, 201 U. S. 378, 50 L. Ed. 465; The Germanic, 196 U. S. 589, 49 L. Ed. 610; The Steamship Wildcroft, 201 U. S. 378, 50 L. Ed. 794. (Finding as to seaworthiness of vessel.) See, generally, the title APPEAL AND ERROR.

Appeals in admiralty, it may be admitted, are not favored where it appears that the subordinate courts have both concurred in the same view of the merits of the controversy. The Lady Pike, 21 Wall. 1, 8, 22 L. Ed. 499.

Where a cause in admiralty turns on a question of fact, and the evidence is conflicting, and both the courts below decide the same way, it is not for this court to hear arguments whether eleven deponents ought to be believed on one side rather than ten on the other, for the weight of testimony is not always with numbers. The Water Witch, 1 Black 494, 17 L. Ed. 155.

Suits for collision.—Where the district and the circuit court concur in their view of facts in a collision case in admiralty, the case will come before the supreme court with every presumption in favor of the correctness of the decision appealed from. The Quickstep, 9 Wall. 665, 19 L. Ed. 767; The Sabine, 103 U. S. 541, 26 L. Ed. 314; The Schooner S. B. Wheeler, 20 Wall. 385, 386, 22 L. Ed. 385.

The supreme court will not, in a case of collision, reverse the concurrent decrees of the courts below, upon a mere difference of opinion as to the weight and effect of conflicting testimony. To warrant a reversal, it must be clear that the lower courts have committed an error.

a clear case, the supreme court will reverse even though the district and circuit court agreed in their conclusion.[29]

d. *Further Proof.*—Upon an appeal in admiralty, where a party makes a proper showing of an excuse for failure to introduce evidence in the lower court,[30] the court may order further proof to be given.[31] Further proof may be ordered whenever public justice and the substantial merits require it,[32] where the evidence is so contradictory and ambiguous as to render a decision difficult,[33] or where there is newly-discovered evidence which is material to the question in issue,[34] but further proof, inconsistent with that already in the case, will be re-

and that a wrong has been done to the appellant. The Juniata, 93 U. S. 337, 23 L. Ed. 930.

In cases of collision depending on fact, where the evidence is conflicting, the supreme court will not readily reverse a decree made by the district, and affirmed by the circuit court. It declares that the district court, which can examine witnesses ore tenus, and summon, if it pleases, experienced masters of vessels to help them, as Trinity masters do the English courts in cases depending on nautical experience, has better opportunities than any other courts can have for examining such cases, and for forming correct conclusions on them. The Hypodame, 6 Wall. 216, 18 L. Ed. 794.

In a case of collision between two seagoing vessels, where the only question proposed by the pleadings is one of fact, where there is much discrepancy between the witnesses as to every averment, and where both the courts below have concurred in their decision, it is not to be expected that the supreme court will reverse the decree upon a mere doubt founded on the number or credibility of the witnesses. The Ship Marcellus, 1 Black 414, 17 L. Ed. 217.

In such a case the appellant has all presumptions against him, and the burden of proof is thrown on him to show affirmatively that an error has been committed, and if there be sufficient evidence on the record to support the decree which was made, the appellant cannot get it reversed by establishing a theory, supported by some of the witnesses, on which a different decree might have been rendered. The Ship Marcellus, 1 Black 414, 17 L. Ed. 217.

29. Supreme court will reverse in clear case.—The Lady Pike, 21 Wall. 1, 22 L. Ed. 499.

30. Showing of excuse for failure to introduce evidence in lower court.—The Juniata, 91 U. S. 366, 23 L. Ed. 208; The Mabey, 10 Wall. 419, 19 L. Ed. 963.

Upon a motion to examine witnesses in the supreme court, in an appeal in admiralty, the party should show some excuse satisfactory to this court, for the failure to examine them in the courts below, such as that the evidence was discovered when it was too late to procure such examination, or that the witnesses had been subpœnaed and failed to appear, and could not be reached by attachments, and the like. The Mabey, 10 Wall. 419, 19 L. Ed. 963.

Hence, where, on such a motion, his affidavit stated only that the witnesses were material ones, without whose testimony he could not safely proceed to the hearing, as he was informed and believed, and as he was advised by his counsel after a full statement to him of the facts which he expected to prove by the persons whom it was proposed to examine, the motion was denied. The Mabey, 10 Wall. 419, 19 L. Ed. 963.

Depositions taken under a commission from a circuit court in an admiralty case, after an appeal to this court, will not be made a part of the record, unles a sufficient excuse be shown for not taking the evidence in the usual way before the courts below. The Juniata, 91 U. S. 366, 23 L. Ed. 208.

31. Further proof on appeal.—The Marianna Flora, 11 Wheat. 1, 6 L. Ed. 405; Rice *v.* Minnesota, etc., R. Co., 21 How. 82, 85, 16 L. Ed. 31; The Brig James Wells, 7 Cranch 22, 3 L. Ed. 256; The Brig Clarissa Claiborne, 7 Cranch 107, 3 L. Ed. 284; The Pizarro, 2 Wheat. 227, 4 L. Ed. 226; Hemmingway *v.* Fisher, 20 How. 255, 260, 15 L. Ed. 799.

Effect of act of 1875.—Quære, whether, since the act of February 16, 1875, "to facilitate the disposition of cases in the supreme court, and for other purposes," (c. 77, 18 Stat. 315), new testimony can, under any circumstances, be taken after an appeal in admiralty to the supreme court, or amendments to the pleadings allowed. Merchants' Mut. Ins. Co. *v.* Allen, 121 U. S. 67, 73, 30 L. Ed. 859.

Further proof in prize cases.—See the title PRIZE.

32. To promote justice and ascertain merits.—The Marianna Flora, 11 Wheat. 1, 6 L. Ed. 405; Rice *v.* Minnesota, etc., R. Co., 21 How. 82, 85, 16 L. Ed. 31.

"The order is always made with extreme caution and only when the ends of justice clearly require it." The Grey Jacket, 5 Wall. 70, 18 L. Ed. 646.

33. Evidence contradictory and ambiguous.—The Samuel, 1 Wheat. 9, 4 L. Ed. 23.

34. Newly-discovered evidence.—The Western Metropolis, 12 Wall. 389, 20 L. Ed. 394.

Where it appeared by affidavits filed by

fused.[35] A commission may,[36] and probably must,[37] issue for the purpose of taking further proof.[38] If further proof is taken, it will be presumed that an order for that purpose was made by the court, in the absence of any objection appearing on the record.[39] While the decision of the circuit court granting or denying further proof is subject to review,[40] if properly objected to in the lower court,[41] mandamus will not lie to compel the court to receive and consider it.[42]

ADMISSIONS IN EVIDENCE.—See the title DECLARATIONS AND ADMISSIONS, and references given.

ADOPTION OF CHILDREN.—See the title PARENT AND CHILD.

ADULTERATION.—See the title FOOD.

the appellant, who was claimant below, in a collision case, that it was probable that two witnesses for the libellant received, before testifying, a promise from him for the payment of a sum of money in the event that the case should be decided in his favor, and that the appellant ascertained the fact after the appeal, the court ordered a commission, under the 12th rule, to take the testimony of such witnesses relative to said agreement. The Western Metropolis, 12 Wall. 389, 20 L. Ed. 394.

35. Further proof inconsistent with evidence already in case.—The Euphrates, 8 Cranch 385, 3 L. Ed. 598.

36. Commission to take new evidence.—The Brig James Wells, 7 Cranch 22, 3 L. Ed. 256; The Brig Clarissa Claiborne, 7 Cranch 107, 3 L. Ed. 284.

Refusal of allowance on appeal of commission to take testimony.—A commission from the supreme court to take testimony will be refused, on an appeal in a collision case in admiralty, where the party moving had in the district court the same witnesses whom he proposed to examine on appeal, and did not examine them only because he had agreed with a codefendant (who was apparently as between themselves alone liable, he, the codefendant, having led the other defendant into the fault for which the libel had been filed) that he, the codefendant, would manage the whole case and pay the sums awarded by any decree (the purpose of this agreement having apparently been to keep from the court below a full knowledge of the case), and where especially the party now moving did not appeal from the decree of the district court. The Mabey, 13 Wall. 738, 20 L. Ed. 473.

37. Affidavits must be taken by commission.—The London Packet, 2 Wheat. 371, 4 L. Ed. 264; The Samuel, 3 Wheat. 77, 4 L. Ed. 338.

38. Witnesses not to be examined in court.—The Samuel, 3 Wheat. 77, 4 L. Ed. 3381.

39. Presumption as to order for further proof.—Where further evidence was taken after the appeal to this court was entered, under the authority of an act of congress passed in 1803 (2 Stat. at L., 244), the issuing of the commission by the clerk of the circuit court, and the uniting by both parties in its execution, furnish a presumption that the proper order was given. If not, the parties have waived all objection. Rich *v.* Lambert, 12 How. 353, 13 L. Ed. 1017.

40. Review of decision allowing or refusing further proof.—If the court below deny any order for further proof when it ought to be granted, or allow it when it ought to be denied, and the objection is taken by the party, and appears on the record, the appellate court can administer the proper relief. The Pizarro, 2 Wheat. 227, 4 L. Ed. 226.

41. Necessity for objection to order allowing or refusing further proof.—But, if evidence in the nature of further proof be introduced, and no formal order or objection appear on the record, it must be presumed to have been done by consent, and the irregularity is waived. The Pizarro, 2 Wheat. 227, 4 L. Ed. 226.

42. Compelling allowance of further proof by mandamus.—Mandamus will not lie to the circuit court of appeals and to the judges thereof, commanding them to receive and duly consider certain depositions or further proofs taken by petitioner on appeal in an action pending in that court. In re Hawkins, 147 U. S. 486, 37 L. Ed. 251; In re Morrison, 147 U. S. 14, 37 L. Ed. 60; Ex parte Morgan, 114 U. S. 174, 175, 29 L. Ed. 135; Ex parte Burtis, 103 U. S. 238, 26 L. Ed. 392; Ex parte Schwab, 98 U. S. 240, 25 L. Ed. 105. See the title MANDAMUS.

ADULTERY, FORNICATION AND LEWDNESS.

BY CLAUDE R. YARDLEY.

I. **Definitions,** 195.

II. **Nature and Elements of Adultery,** 195.
- A. Private Offense under the Philippine Code, 195.
- B. Marriage as Essential to Constitute the Offense, 196.
  1. Effect of Statutory Enactment on Former Holding, 196.
  2. Knowledge of Woman's Marriage Necessary under Philippine Code, 196.

III. **Unlawful Cohabitation,** 196.
- A. An Offense Created by Statute, 196.
- B. What Constitutes Cohabitation, 196.
- C. An Offense of Continuing Character, 197.

IV. **Ordinance Regulating Residence of Lewd Women,** 197.

V. **Prosecution and Punishment,** 197.
- A. Prosecution under Penal Code of Philippine Islands, 197.
  1. By Whom Brought, 197.
  2. Complaint, 197.
- B. Jurisdiction of Adultery Committed by Citizen of Cherokee Nation, 197.
- C. Conviction of Fornication under Indictment for Adultery, 197.
- D. Punishment, 198.
  1. Adultery Committed between White Person and Negro, 198.
  2. Punished by Federal Statutes, 198.

CROSS REFERENCES.

See the titles BIGAMY AND POLYGAMY; CONSTITUTIONAL LAW; DIVORCE; DOWER; HUSBAND AND WIFE; INCEST; INDIANS; OBSCENITY; SEDUCTION.

As to the offense of sending lewd and lascivious matter through the mails, see the title POSTAL LAWS. As to prosecution under United States statutes prohibiting the practice of polygamy, see the title BIGAMY AND POLYGAMY.

I. Definitions.

Adultery is defined by the Penal Code of the Philippine Islands as follows: "Adultery is committed by the married woman who lies with a man not her husband, and by him who lies with her knowing that she is married, although the marriage be afterwards declared void."[1]

Obscene, Lewd and Lascivious.—The words "obscene," "lewd" and "lascivious," as used in § 3893 of the Revised Statutes of the United States, signify that form of immorality which has relation to sexual impurity, and have the same meaning as is given them at common law in prosecutions for obscene libel. As the statute is highly penal, it should not be held to embrace language unless it is fairly within its letter and spirit.[2]

II. Nature and Elements of Adultery.

A. Private Offense under the Philippine Code.—Under the Penal Code

1. **Defined by Philippine Code.**—Art. 433, ch. 1, title 9, Penal Code of Philippine Islands; Serra *v.* Mortiga, 204 U. S. 470, 51 L. Ed. 571.

2. **Obscene, lewd and lascivious.**—Swearingen *v.* United States, 161 U. S. 446, 451, 40 L. Ed. 765.

of the Philippine Islands, the offense of adultery is classed as a private offense.[3]

B. Marriage as Essential to Constitute the Offense—1. EFFECT OF STATUTORY ENACTMENT ON FORMER HOLDING.—It was formerly held, that to constitute the crime of adultery, it was necessary that the accused be married to a person other than the one with whom the offense was committed at the time it is alleged to have taken place. Thus, a man who was single could not be found guilty of adultery with a married woman. But this has been changed by statute which provides that when the act shall be committed between a married woman and a man who is unmarried, both parties to such act shall be deemed guilty of adultery.[4]

2. KNOWLEDGE OF WOMAN'S MARRIAGE NECESSARY UNDER PHILIPPINE CODE. —Under the Penal Code of the Philippine Islands, it is an essential ingredient of the crime of adultery, that the male participant should have knowledge that the woman with whom the adultery was committed was a married woman.[5]

III. Unlawful Cohabitation.

A. An Offense Created by Statute.—The cohabitation of a male person with more than one woman, in a territory or other place over which the United States have exclusive jurisdiction, is made an offense by statute.[6]

Statutory Provision.—The statute provides, that if any male person hereafter cohabits with more than one woman he shall be deemed guilty of a misdemeanor. And under these statutes it has been held, that the offense of cohabiting with more than one woman is a different offense from bigamy or polygamy, in that it declares the offense to be a misdemeanor and the punishment being less severe than that for bigamy or polygamy.[7]

B. What Constitutes Cohabitation.—The offense of cohabiting with more than one woman, under the act of March 22, 1882, may be committed by a man living in the same house with two women whom he had theretofore acknowledged as his wives, and eating at their respective tables, and holding them out to the world by his language or conduct, or both, as his wives, though he may not occupy the same bed or sleep in the same room with them, or either of them, or have sexual intercourse with either of them. The offense of co-

3. Private offense.—Serra *v.* Mortiga, 204 U. S. 470, 51 L. Ed. 571.

4. Necessity for marriage.—Respublica *v.* Roberts, 2 Dall. 124, 1 L. Ed. 316.

Statutory enactment.—24 Stat. L. 635. Petitioner was indicted for a violation of the third section of the act of March 3, 1887, 24 Stat. 635, c. 397, entitled "An act to amend an act entitled 'An act to amend section fifty-three hundred and fifty-two of the Revised Statutes of the United States, in reference to bigamy, and for other purposes,' approved March twenty-second, eighteen hundred and eighty-two." The section reads as follows: "That whoever commits adultery shall be punished by imprisonment in the penitentiary not exceeding three years; and when the act is committed between a married woman and a man who is unmarried, both parties to such act shall be deemed guilty of adultery, and when such act is committed between a married man and a woman who is unmarried, the man shall be deemed guilty of adultery." Ex parte Mayfield, 141 U. S. 107, 108, 111, 35 L. Ed. 635.

5. Under Philippine Code.—Serra *v.* Mortiga, 204 U. S. 470, 51 L. Ed. 571.

6. Statutory offense.—22 Stat. L. 31; Snow *v.* United States, 118 U. S. 346, 30 L. Ed. 207; Cannon *v.* United States, 118 U. S. 355, 30 L. Ed. 207.

7. Statutory provisions cited and construed.—Snow *v.* United States, 118 U. S. 346, 30 L. Ed. 207; Cannon *v.* United States, 116 U. S. 55, 29 L. Ed. 561. But see Cannon *v.* United States, 118 U. S. 355, 30 L. Ed. 207, vacating the judgment in 116 U. S. 55, and dismissing the case for want of jurisdiction.

Section 3 of the act of 1882 is in these words: "If any male person, in a Territory or other place over which the United States have exclusive jurisdiction, hereafter cohabits with more than one woman, he shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine of not more than three hundred dollars, or by imprisonment for not more than six months, or by both said punishments, in the discretion of the court." This section creates a new and distinct offense from bigamy or polygamy, one which is declared to be a misdemeanor (there having been and being no such declaration as to bigamy or polygamy), and the punishment for which is much less than

habitation, in the sense of this statute, is committed if there is a living or dwelling together as husband and wife.[8]

C. An Offense of Continuing Character.—Unlawful cohabitation is an offense of a continuing character having duration, and not an offense consisting of an isolated act.[9]

IV. Ordinance Regulating Residence of Lewd Women.

A city may by ordinance forbid any woman of lewd character from dwelling within certain limits, and such ordinance will not be in conflict with the constitution of the United States.[10]

V. Prosecution and Punishment.

A. Prosecution under Penal Code of Philippine Islands—1. By Whom Brought.—*Complaint of Injured Party.*—Under the Penal Code of the Philippine Islands, the offense of adultery being classed as a private offense is not prosecuted upon information by the public prosecutor, but by complaint on behalf of the injured party.[11]

2. Complaint.—A complaint under the Penal Code of the Philippine Islands charging a person with adultery, is deficient which does not specify the place where the crime was committed. And it is necessary that the complaint, charging two persons with adultery, should expressly state that the accused man knew that the woman with whom the offense was alleged to have been committed was married.[12]

B. Jurisdiction of Adultery Committed by Citizen of Cherokee Nation.—Federal courts had no jurisdiction to punish a member of the Cherokee nation for the offense of adultery committed in the territory of the nation, as such an offense was exclusively within the jurisdiction of the courts of the Cherokee nation. And being a crime punishable by imprisonment in the penitentiary, as such punishment can be executed in a penitentiary where hard labor was exacted, it has been held, that the offense of adultery is not within the jurisdiction of the courts established by act of March 1, 1889, establishing courts for the Indian Territory.[13]

C. Conviction of Fornication under Indictment for Adultery.—A person who is charged in an indictment with adultery, may be acquitted of the charge of adultery but found guilty of fornication. And an acquittal of adultery is a bar to a prosecution for fornication.[14]

the punishment for bigamy or polygamy. Snow *v.* United States, 118 U. S. 346, 350, 30 L. Ed. 207, reaffirmed in Cannon *v.* United States, 118 U. S. 355, 29 L. Ed. 561.

8. Cohabitation.—Ex parte Snow, 120 U. S. 274, 30 L. Ed. 658; Cannon *v.* United States, 116 U. S. 55, 29 L. Ed. 561.

9. Continuing character.—Ex parte Nielson, 131 U. S. 176, 185, 33 L. Ed. 118; Ex parte Snow, 120 U. S. 274, 281, 30 L. Ed. 658.

10. Residence of lewd women.—L'Hote *v.* New Orleans, 177 U. S. 587, 44 L. Ed. 899.

"The regulation of houses of ill-fame, legislation in respect to women of loose character, may involve one of three possibilities: First, absolute prohibition; second, full freedom in respect to place, coupled with rules of conduct; or, third, a restriction of the location of such houses to certain defined limits. Whatever course of conduct the legislature may adopt is in a general way conclusive upon all courts, state and Federal. It is no part of the judicial function to determine the wisdom or folly of a regulation by the legislative body in respect to matters of a police nature." L'Hote *v.* New Orleans, 177 U. S. 587, 597, 44 L. Ed. 899. See the title DISORDERLY HOUSES.

11. Injured party.—Serra *v.* Mortiga, 204 U. S. 470, 51 L. Ed. 571.

"It is conceded at bar that, under the Philippine law, the offense of adultery, as defined by the articles in question, is classed as a private offense, and must be prosecuted, not on information by the public prosecutor, but by complaint on behalf of an injured party." Serra *v.* Mortiga, 204 U. S. 470, 51 L. Ed. 571.

12. Complaint under Philippine Code.—Serra *v.* Mortiga, 204 U. S. 470, 51 L. Ed. 571.

13. Ex parte Mayfield, 141 U. S. 107, 35 L. Ed. 635. See, generally, the title WIDOWS.

14. Respublica *v.* Roberts, 2 Dall. 124,

D. Punishment—1. Adultery Committed between White Person and Negro—A state may prescribe a more severe punishment for the offense of adultery and fornication where committed between a negro and a white person, than when both parties to the offense are of the same race or color.[15]

2. Punished by Federal Statutes.—The punishment for adultery is prescribed by statutes of the United States.[16]

ADVANCE.—"To advance is to 'supply beforehand,' 'to loan before the work is done or the goods made.' This is the popular understanding of the language, as well as the accurate definition."[17]

ADVANCEMENTS.

CROSS REFERENCES.

See the title Descent and Distribution; Estates; Executors and Administrators; Gifts; Parent and Child; Trusts and Trustees; Wills.

Definition.—Money or property given by a father to his child or presumptive heir, or expended by the former for the latter's benefit, by way of anticipation of the share which the child will inherit in the father's estate and intended to be deducted therefrom. It is the latter circumstance which differentiates an advancement from a gift or a loan.[1]

Between Whom Advancements May Be Made.—The doctrine of advancement has a common application between husband and wife and parent and child.[2]

Presumption of Advancement.—Where an obligation exists, legal or moral, to provide for the grantee, as in the case of a husband for his wife, or a father for his child, the circumstance that the grantee stands in one of these relations to the party is of itself sufficient evidence to create a presumption of an advancement for the grantee's benefit.[3]

Presumption where Parent Debtor of Child.—Where a parent, being a debtor to his child, makes an advancement to such child, it is presumed to be a satisfaction pro tanto of the debt.[4]

Whether Intended as Advancement Determined from Recitals in Will.—Under a will reciting that advancements have been made to children which are charged to them, but that an equal provision shall be made for each in addition to the advances made or that may hereafter be made, and that such advances be treated not as advances but as gifts, the amount advanced to one of the children cannot be deducted from his equal share under the will.[5]

1 L. Ed. 316, Ex parte *v.* Neilsen, 131 U. S. 176, 186. See, generally, the title AUTREFOIS, ACQUIT AND CONVICT.

15. Persons of different race.—Pace *v.* Alabama, 106 U. S. 583, 27 L. Ed. 207.

16. Statutory enactment.—The present statute provides that whoever commits adultery shall be punished by imprisonment in the penitentiary not exceeding three years. Act of Mar. 3, 1877, 24 Stat. 635, c. 397. Ex parte Mayfield, 141 U. S. 107, 108, 111, 35 L. Ed. 635.

17. Advance.—Laflin, etc., Powder Co. *v.* Burkhardt, 97 U. S. 110, 117, 24 L. Ed. 973.

In Selden *v.* Equitable Trust Co., 94 U. S. 419, 421, 24 L. Ed. 249, it is said: "The words used are not technical. They are, therefore, to be understood in their common and popular sense. Dwarris on Statutes, 573. And that, in common understanding, an **advance** or loan of money on stocks, bonds, bullion, bills of exchange, or promissory notes is an **advance** or loan where those species of property are pledged as collaterals, or are hypothecated to secure the return of the **advance** or the payment of the sum lent, is unquestionably true."

1. Bouvier's Law Dict., vol. 1, p. 106; Black's Law Dict., vol. 1, p. 43.

2. Jackson *v.* Jackson, 91 U. S. 122, 125, 23 L. Ed. 258; Glover *v.* Patten, 165 U. S. 394, 406, 41 L. Ed. 760.

3. Jackson *v.* Jackson, 91 U. S. 122, 123, 125, 23 L. Ed. 258.

4. Glover *v.* Patten, 165 U. S. 394, 406, 41 L. Ed. 760; 1 Pomeroy's Eq. Juris., § 540. See the title PARENT AND CHILD.

5. Adams *v.* Cowan, 174 U. S. 800; Adams *v.* Cowen, 177 U. S. 471, 44 L. Ed. 851.

ADVERSE INTEREST.—See note 1.

ADVERSE PARTY.—See note 2.

ADVERSE POSSESSION.—See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

ADVERTISEMENTS.—See the titles JUDICIAL SALES; NEWSPAPERS; SHERIFFS' SALES; TAXATION. As to service of process by publication in newspaper, see the title SUMMONS AND PROCESS. As to copyrighting advertisements, see the title COPYRIGHT. As to use of flag for advertising purposes, see references under FLAG.

ADVICE OF COUNSEL.—See the titles CONTEMPT; FALSE IMPRISONMENT; LIBEL AND SLANDER; MALICIOUS PROSECUTION; PATENTS; WITNESSES.

AFFECT.—See note 3. **Affecting ambassadors.**—See the title AMBASSADORS AND CONSULS.

AFFECTION.—See note 4.

AFFIDAVIT OF MERITS.—See the title PLEADING.

1. Adverse interest.—See Jenkins *v.* International Bank, 106 U. S. 571, 574, 575, 27 L. Ed. 304. And see the title BANKRUPTCY.

2. Adverse party.—In Poydras de la Lande *v.* The Treasurer of Louisiana, 17 How. 1, 2, 15 L. Ed. 93, it is said: "The practice is founded upon the language of the act of 1789, c. 20, which directs the **adverse party** to be cited, on a writ of error or appeal. The **adverse party** is the one which appeared in the suit, and who prosecuted or defended it, and in whose favor the judgment was rendered, which the plaintiff in the writ of error seeks to reverse." See, also, the title APPEAL AND ERROR.

3. Affect.—In Ryan *v.* Carter, 93 U. S. 78, 84, 23 L. Ed. 807, it is said: "It is unnecessary to give the various definitions of the word **affect.** It is enough to say, that it is often used in the sense of acting injuriously upon persons and things; and in this sense, we are all of opinion, it was used in this proviso."

4. Affection.—In Connecticut Mut. Life Ins. Co. *v.* Union Trust Co., 112 U. S. 250, 257, 28 L. Ed. 708, it is said: "The insured was directed to answer Yes or No, as to whether he had ever had certain diseases, among which was included '**affection** of liver.' It is difficult to define precisely what was meant by '**affection** of liver,' as a disease, and the difficulty is not removed by the evidence of the only physician who testified upon the subject. While he would ordinarily understand **affection** of the liver to mean some chronic disease of that organ, yet it is not, he says, strictly a medical term, but a general expression, which, by itself, may include acute as well as chronic disease of the liver. He describes it as 'a big bag to put many diseases in,' and observes that it 'would cover anything in the world the matter with the liver.'" See, also, the title INSURANCE.

AFFIDAVITS.

BY JAMES F. MINOR.

I. **Scope of Title,** 200.
II. **Authority to Administer,** 200.
III. **Who May Make and How Made,** 201.
IV. **Amendment,** 202.
V. **Affidavit of Merits or Defense,** 202.
VI. **Fee for Administration and Record,** 202.
VII. **Use in Evidence,** 202.
A. Admissibility, 202.
B. Weight, 202.

CROSS REFERENCES.

See the titles DEPOSITIONS AND INTERROGATORIES; EVIDENCE; NOTARY PUBLIC; OATH; PERJURY; PLEADING; WITNESSES.

Affidavits in particular proceedings, see the titles APPEAL AND ERROR; ATTACHMENT AND GARNISHMENT; and other specific titles. Affidavits as to handwriting, see the title HANDWRITING. Affidavits as to value in controversy, see the title APPEAL AND ERROR. Affidavits as evidence on appeal, see the title APPEAL AND ERROR. Affidavit for commitment, see the titles COMMITMENT AND PRELIMINARY EXAMINATION OF ACCUSED; CRIMINAL LAW; WARRANTS. Affidavit for continuance, see the title CONTINUANCES. Affidavit for new trial, see the title NEW TRIALS. Affidavits for removal of cause, see the title REMOVAL OF CAUSES. Affidavit of loss of written instrument, see the title LOST INSTRUMENTS AND RECORDS. Affidavits in forma pauperis, see the titles APPEAL AND ERROR; COSTS. In taking and perfecting appellate proceedings, see the title APPEAL AND ERROR. Proof of property in prize cases, see the title PRIZE. Verification of pleadings, see the title PLEADING.

I. Scope of Title.

This title is intended to include formal requirements in regard to the making and taking of affidavits, ex parte, for use in legal proceedings, their amendment and use in evidence generally. It excludes the consideration of affidavits, as to substance and contents, for the purposes of particular proceedings, such as arrest or warrant, attachment, continuance, appeals, chattel mortgages, to secure exemption from costs, verification of pleadings, etc., for which see the specific titles.

II. Authority to Administer.

An affidavit to hold to bail has been held sufficient where sworn to before the Lord Mayor of London.[1] Affidavits to be used as further proof, in causes of admiralty and maritime jurisdiction, in this court, must be taken by a commission.[2] A commissioner of the United States circuit court could not, in 1876,

1. **Lord Mayor of London.**—Taylor *v.* Knox, 1 Dall. 158, 1 L. Ed. 80.

As it appears by the case in 8 Mod. 323 (Walrond *v.* Van Moses), that an affidavit of a plaintiff, before a notary public in Holland, was deemed sufficient to hold the defendant to bail, the like affidavit, sworn to before the Lord Mayor of London, should be sufficient for the same purpose. Taylor *v.* Knox, 1 Dall. 158, 1 L. Ed. 80. See, generally, the title BAIL AND RECOGNIZANCE.

2. **Commission.**—The London Packet, 2 Wheat. 372, 4 L. Ed. 264; The Frances, 8 Cranch 348, 3 L. Ed. 585.

Where the affidavits produced on the order for further proof are positive, but their credibility impaired by the non-

take the affidavit to the report of an officer of a national bank, and hence a state notary could not do so, being given the same authority under act of Aug. 15, 1876, c. 304.[3] If a state magistrate should take an affidavit, under an act of congress expressly giving him the power to do so, it would be a lawful affidavit, by one having competent authority; and as much so as if he had been specially appointed a commissioner, under the law of the United States for that purpose.[4]

III. Who May Make and How Made.

The making of an affidavit by an agent or attorney necessarily implies that he may not be able to make it on positive knowledge, where the statute does not require it.[5]

production of letters mentioned in the affidavits, a second order for further proof will be allowed, in the appellate court. The Frances, 8 Cranch 348, 3 L. Ed. 585. See the title ADMIRALTY, ante, p. 117.

3. Commissioners of United States circuit courts, notaries and justices.—United States *v.* Curtis, 107 U. S. 671, 674, 27 L. Ed. 534.

The power of commissioners of the United States circuit courts did not in 1876, extend to the taking of oaths to reports by officers of national banks. They could take affidavits when required, or allowed in any civil cause in a circuit or district court, Rev. Stat., § 945; Act of Feb. 20, 1812, c. 25, Act of March 1, 1817, c. 30; or administer oaths where, in the same state, under the laws of the United States, oaths, in like cases, could be administered by justices of the peace, Rev. Stat., § 1778; or they could take evidence, affidavits, and proof of debts in proceedings in bankruptcy, Rev. Stat., §§ 5003, 5076; Act of March 2, 1867, c. 176; § 3 of the Act of July 27, 1868, c. 258; § 20 of the Act of June 22, 1874, c. 390. United States *v.* Curtis, 107 U. S. 671, 674, 27 L. Ed. 534.

A notary public appointed by a state had no authority to administer an affidavit under a law of the United States prior to the act of Feb. 26, 1881, c. 82, declaring "that the oath or affirmation required by § 5211 of the Revised Statutes, verifying the returns made by national banks to the comptroller of the currency, when taken before a notary public properly authorized and commissioned by the state in which such notary resides and the bank is located, or any other officer having an official seal, authorized in such state to administer oaths, shall be a sufficient verification, as contemplated by said § 5211: Provided, that the officer administering the oath is not an officer of the bank." United States *v.* Curtis, 107 U. S. 671, 676, 27 L. Ed. 534.

Congress intended by § 1778, Rev. Stat., to give notaries public in their respective states the same authority, in the administration of oaths, as is given, under the laws of the United States, to justices of the peace in the same states; and to notaries public in the District of Columbia the same authority, in administering oaths, which, under the laws of the United States, might be exercised by justices of the peace in this district. But to justices of the peace, in the several states, such authority had not been given by any provision in the Revised Statutes, or by any act of Congress prior to their adoption. United States *v.* Curtis, 107 U. S. 671, 674, 27 L. Ed. 534.

4. State officer authorized by federal statute.—United States *v.* Bailey, 9 Pet. 238, 9 L. Ed. 113.

There was no statute of the United States, in 1835, which expressly authorized any justice of the peace of a state, or any officer of the national government, judicial or otherwise, to administer an oath in support of any claim against the United States, under the act of 1823. The secretary of the treasury, in order to carry into effect the authority given to him to liquidate and pay the claims referred to in the act of 1832, had established a regulation, authorizing affidavits made before any justice of the peace of a state, to be received and considered in proof of claims under the act. By implication, he possessed the power to make such a regulation; and to allow such affidavits in proof of claims under the act of 1832; it was incident to his duty and authority in settling claims under that act. United States *v.* Bailey, 9 Pet. 238, 9 L. Ed. 113.

5. Agent.—Chicago, etc., R. Co. *v.* Ohle, 117 U. S. 123, 129, 29 L. Ed. 837; United States *v.* Bryant, 111 U. S. 499, 503, 28 L. Ed. 496.

As the United States can act only by agents, where the language of a statute does not require that such an agent as the special agent of the General Land Office should swear in any stronger form that the property belongs to the United States, or should set forth the grounds of his knowledge, information, or belief, it is sufficient if he swears "to the best of his knowledge, information, and belief." United States *v.* Bryant, 111 U. S. 499, 503, 28 L. Ed. 496. See post, "Weight," VII, B.

IV. Amendment.

Where a statute (§ 1483 of the Code of Mississippi of 1871) expressly authorizes amendments to defective affidavits, there is no objection on principle, under such a provision, to an amendment adding a new ground for the attachment. Where defendant was not prejudiced, the allowance of such amendment is no ground of exception.[6]

V. Affidavit of Merits or Defense.

See the title PLEADING.

VI. Fee for Administration and Record.

The clerk of a circuit court is entitled to a fee of ten cents for administering affidavits to witnesses respecting their mileage and attendance, but that is no reason for preserving the affidavit as a part of the records of the court.[7]

VII. Use in Evidence.

A. Admissibility.—An affidavit filed in a cause to obtain an order of court in affiant's favor on a certain point, is competent evidence against him on the trial of another issue.[8] While the rule that interest disqualified a witness prevailed, still, on incidental questions, which did not affect the issue to be tried by the jury, such as a continuance or the introduction of secondary evidence of a lost paper, the affidavit of a party was received as now.[9]

B. Weight.—Of affidavit of merits or defense, see the title PLEADING.

An affidavit filed under a statute is properly rejected when not filed within the time prescribed by the act.[10]

A single affidavit is insufficient to contradict a recital in a record of court. An affidavit of a witness does not import absolute verity, as the record does.[11] An affidavit having been filed in a cause by a corporation defendant as a ground for obtaining an order of the court in its favor, was competent evidence against it on the trial of another issue; and the fact that it was sworn on information and belief by an officer, affected only its weight and not its competency.[12]

6. Amendment adding substantial averment.—Fitz Patrick *v.* Flannagan, 106 U. S. 648, 650, 27 L. Ed. 211. See, generally, the titles AMENDMENTS; ATTACHMENT AND GARNISHMENT.

7. Fee for administration, and record.—United States *v.* Taylor, 147 U. S. 695, 697, 37 L. Ed. 335. See the titles APPEAL AND ERROR; CLERKS OF COURT; OATH; RECORDS; WITNESSES.

8. Affidavit made for trial of another issue.—Chicago, etc., R. Co. *v.* Ohle, 117 U. S. 123, 129, 29 L. Ed. 837. See post, "Weight," VII, B.

9. When interest was disqualification, affidavit on collateral point competent. Tayloe *v.* Riggs, 1 Pet. 591, 7 L. Ed. 275.

"The objection to receiving the affidavit of the party is, that no man can be a witness in his own cause. This is, undoubtedly, a sound rule, which ought never to be violated. But many collateral questions arise in the progress of a cause, to which the rule does not apply. Questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, which facilitate the preparation for it, often depend on the oath of the party. An affidavit to the materiality of a witness for the purpose of obtaining a continuance; or a commission to take his deposition, or an affidavit of his inability to attend; is usually made by the party, and received without objection. So, affidavits to support a motion for a new trial are often received. These cases, and others of the same character which might be adduced, show, that on many incidental questions which are addressed to the court, and do not affect the issue to be tried by the jury, the affidavit of the party is received." Tayloe *v.* Riggs, 1 Pet. 591, 596, 7 L. Ed. 275. See the title WITNESS.

10. When not filed in time rejected.—McPhoul *v.* Lapsley, 20 Wall. 264, 22 L. Ed. 344.

11. Absolute verity not imported.—Evans *v.* Stettnisch, 149 U. S. 605, 37 L. Ed. 866.

12. Affidavit upon another issue, on information and belief.—Chicago, etc., R. Co. *v.* Ohle, 117 U. S. 123, 129, 29 L. Ed. 837; Pope *v.* Allis, 115 U. S. 363, 29 L. Ed. 393.

AFFINITY.—See the titles DESCENT AND DISTRIBUTION; INCEST; MARRIAGE; WILLS. As a disqualification, see the titles JUDGES; JURY.

AFFIRMANCE.—See the title APPEAL AND ERROR.

AFFIRMATION.—See the titles OATH; WITNESSES.

AFFRAY.—See the title ASSAULT AND BATTERY.

AFFREIGHTMENT.—See the titles CARRIERS; SHIPS AND SHIPPING.

AFORESAID.—See, also, SAID. See note 1.

AFTER.—See the title TIME. "The general current of the modern authorities on the interpretation of contracts, and also of statutes, where time is to be computed from a particular day or a particular event, as when an act is to be performed within a specified period from or after a day named, is to exclude the day thus designated, and t oinclude the last day of the specified period.[2]

AFTER-ACQUIRED PROPERTY.—See the titles ASSIGNMENTS; CHATTEL MORTGAGES AND CONDITIONAL SALES; EXECUTIONS; JUDGMENTS AND DECREES; MORTGAGES AND DEEDS OF TRUST; PLEDGE AND COLLATERAL SECURITY; PUBLIC LANDS; SALES.

AFTER-ACQUIRED TITLE.—See the title ESTOPPEL.

AFTERBORN CHILDREN.—See the titles DESCENT AND DISTRIBUTION; WILLS.

1. Aforesaid.—In United States *v.* Reese, 92 U. S. 214, 242, 23 L. Ed. 563, the court said: "To illustrate: Section 4 enacts, that if any person by unlawful means shall hinder or prevent any citizen from voting at any election 'as **aforesaid,**' he shall be subject to fine and imprisonment. What do the words, 'as **aforesaid,**' mean? They mean, for the causes and pretenses or upon the grounds in the first and second sections mentioned; that is, on account of the race or color of the person so prevented. All those necessary words are by this expression incorporated into the fourth section. The same is true of the words 'the wrongful act or omission as **aforesaid,**' and 'the person so offering and failing as **aforesaid,**' in the third section. By this application of the words 'as **aforesaid**' they become pertinent and pointed. Unless so construed, they are wholly and absolutely without meaning. No other meaning can possibly be given to them."

The United States chartered a vessel for a voyage **aforesaid,** at a stipulated price per diem for every day when so employed. It was held, that the contract only embraced the employment of the vessel when on such voyage, and did not extend to demurrage. Mitchell *v.* United States, 96 U. S. 162, 24 L. Ed. 702.

2. Sheets *v.* Selden, 2 Wall. 177, 190, 17 L. Ed. 822. See, also, Arnold *v.* United States, 9 Cranch 104, 119, 3 L. Ed. 671.

A statute was as follows: "Be it enacted, etc., that every last will and testament executed in due form of law, **after** the first day of June next, shall be construed with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed on the day of the death of the testator or testatrix, unless a contrary intention shall appear by the will." In construing this statute, the court said: "The words **'after** the first day of June next' refer to and qualify the words 'executed in due form of law,' which they follow, just as in the same section the words 'on the day of the death of the testator' refer to and qualify the word 'executed.'" Carroll *v.* Carroll, 16 How. 275, 281, 14 L. Ed. 936. See, also, the title WILLS.

After my debts are paid.—The words in a will, **"after** my debts and funeral charges are paid, I devise and bequeath as follows," amount to a charge upon the real estate for the payment of debts. In Fenwick *v.* Chapman, 9 Pet. 461, 469, 9 L. Ed. 193, the court said: "In the case before us, the word **'after'** implies, as strongly as any word in the English language can do, that the payment of debts is a condition precedent to the absoluteness of any entire devise in the will." See, also, the title WILLS.

After completion.—A railroad company was exempt from taxation "for ten years **after** completion of said road within the limits of this state." It was held, that the company was not exempt until the completion of the road. The court said: "In their natural and their legal meaning, the words 'for ten years **after** the completion of said road' as distinctly exclude the time preceding the completion of the road, as the time succeeding the ten years **after** its completion. If the legislature had intended to limit the end only, and not the beginning, of the exemption, its purpose could have been easily expressed by saying 'until' instead of 'for,' so as to read 'until ten years **after** the completion,' leaving the exemption to begin immediately upon the granting of the charter." Vicksburg, etc., R. Co. *v.* Dennis, 116 U. S. 665, 669, 29 L. Ed. 770.

After the date of appointment.—See the title ARMY AND NAVY. And see United States *v.* Moore, 95 U. S. 760, 24 L. Ed. 588.

AGE.—As to proof of age, see the titles HEARSAY EVIDENCE; INFANTS; PEDIGREE.

AGENCY.—See the title PRINCIPAL AND AGENT.

AGGRAVATION.—See the titles ASSAULT AND BATTERY; EXEMPLARY DAMAGES.

AGGREGATION.—See the title PATENTS. As to whether aggregation of several claims is permissible to make up jurisdictional amount, see the titles APPEAL AND ERROR; COURTS.

AGGRIEVED PARTY.—See the title APPEAL AND ERROR.

AGISTMENT.—See the title ANIMALS.

AGREED.—See note 1.

AGREED CASE.

BY R. C. WALKER.

I. **Definition, Nature and Object,** 204.
II. **Right of Parties to Submit Agreed Case,** 205.
III. **Nature of Controversy,** 205.
IV. **Consent of Parties,** 205.
V. **Contents,** 205.
VI. **Operation and Effect,** 206.
A. As Waiver of Jury, 206.
B. As Waiver of Questions of Pleading or Form of Action, 206.
C. As Enabling Court of Law to Assume Equity Jurisdiction, 207.
D. Court Not Concluded by Statement of Legal Conclusions, 207.
VII. **Submission of Controversy,** 207.
A. Definition and What Constitutes, 207.
B. Right to Submit—Waiver of Jury, 208.
C. Submission Must Be in Writing, 208.
D. Court Assumes Character of Arbitrator, 208.

CROSS REFERENCES.

See the titles APPEAL AND ERROR; EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL; FINDINGS OF COURTS; JURY; STIPULATIONS; VERDICT.

As to substitution of agreed case for bill of exceptions, see the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL; FINDINGS OF COURTS; JURY; STIPULATIONS; VERDICT. As to substitution of agreed case for bill of exceptions, see the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL. As to submission to arbitration, see the title ARBITRATION AND AWARD. As to review of agreed case, see the title APPEAL AND ERROR.

I. Definition, Nature and Object.

An agreed statement of facts is a statement of facts agreed on by the parties as true and correct, and submitted to a court for a ruling on the law of the case.[2]

Analogous to Special Verdict.—An agreed case upon which the judgment is founded is considered as analogous to a special verdict.[3]

Object.—See post, "Operation and Effect," VI.

1. **Dismissed agreed.**—The words **dismissed agreed,** entered as the judgment of a court, do not themselves import an agreement to terminate the controversy, nor imply an intention to merge the cause of action in the judgment. Haldeman *v.* United States, 91 U. S. 584, 23 L. Ed. 433.

2. Black's Law Dictionary, p. 55.

3. **Analogous to special verdict.**—Raimond *v.* Terrebonne Parish, 132 U. S. 192, 33 L. Ed. 309; Burr *v.* Des Moines,

II. Right of Parties to Submit Agreed Case.

Parties have the right to submit their case to the court upon an agreed statement of facts, independent of any legislative provision on the subject.[3] Where the facts are without dispute, and agreed between the parties, a statement of the same may be drawn up and entered on the record, and submitted directly to the court, for its decision, without the intervention of a jury.[4]

III. Nature of Controversy.

The controversy submitted upon an agreed case must be real.[5]

IV. Consent of Parties.

Agreed statements rest upon the consent of the parties.[6] And under certain circumstances, the court will decline to accept the submission of the cause against the wishes of parties collaterally interested in the decision.[7]

V. Contents.

An agreed case must state ultimate facts, presenting questions of law only. It must not be a recital of evidence or circumstances which may tend to prove the facts stated or from which they may be inferred.[8] An agreed case should

etc., R. Co., 1 Wall. 99, 17 L. Ed. 561; Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Martinton *v.* Fairbanks, 112 U. S. 670, 28 L. Ed. 862; Glenn *v.* Fant, 134 U. S. 398, 33 L. Ed. 969; Davenport *v.* Paris, 136 U. S. 580, 34 L. Ed. 548; United States, etc., Co. *v.* New Mexico, 183 U. S. 535, 46 L. Ed. 315; Wilson *v.* Merchants' Loan, etc., Co., 183 U. S. 121, 46 L. Ed. 113; Supervisors *v.* Kennicott, 103 U. S. 554, 26 L. Ed. 486.

3. Right of parties.—"In the district court, in a suit otherwise triable by a jury, the parties may, by stipulation, waive a jury and agree on a statement of facts, and submit the case to the court thereon, for its decision as to the law. Henderson's Distilled Spirits, 14 Wall. 44, 53, 20 L. Ed. 815. That might have been done also in the circuit court, without any statute to that effect. Campbell *v.* Boyreau, 21 How. 223, 226, 227, 16 L. Ed. 96." Rogers *v.* United States, 141 U. S. 548, 554, 35 L. Ed. 853.

4. Suydam *v.* Williamson, 20 How. 427, 434, 15 L. Ed. 978; United States *v.* Eliason, 16 Pet. 291, 10 L. Ed. 968; Stimpson *v.* Railroad Co., 10 How. 329, 13 L. Ed. 441; Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 265; Faw *v.* Roberdeau, 3 Cranch 174, 2 L. Ed. 402; Brent *v.* Chapman, 5 Cranch 358, 3 L. Ed. 125; Insurance Co. *v.* Tweed, 7 Wall. 44, 19 L. Ed. 65.

As to right of parties to submit the trial of both facts and law to the court, see post, "Right to Submit—Waiver of Jury," VII, B.

5. Moot case.—The court cannot consent to determine a controversy in which the plaintiff in error has become the dominus litis on both sides. South Spring Gold Co. *v.* Amador Gold Co., 145 U. S. 300. See the titles ACTIONS, ante, p. 96; APPEAL AND ERROR.

6. Pomeroy *v.* Bank, 1 Wall. 592, 17 L. Ed. 638.

"The facts cannot be said to be agreed while the parties are at issue as to the admissibility or competency of the evidence." Pomeroy *v.* Bank, 1 Wall. 592, 603, 17 L. Ed. 638.

7. Parties collaterally interested.—"The showing made on this motion satisfies us that this case, and the one which follows it on the docket, were brought here for a determination of the questions on which depends the title of the St. Louis Smelting and Refining Company to its addition to Leadville; 'that the decision of these suits will dispose of a large number of others now pending in the court below; that when the suits were begun below all the defendants united in the employment of counsel to present their defense, and contributed to a common fund for the payment of the expenses of the litigation; that since these cases have been docketed here the parties to this have come to an amicable understanding in respect to the subject matter of their particular litigation, under which this submission has been made, through new counsel employed in behalf of the defendants in error and without the concurrence of those interested in the other case and the suits still pending below. The questions involved are important. Under these circumstances we think we ought not to accept the submission of the cause against the wishes of those collaterally interested in the decision that may be made.'" Smelting Co. *v.* Kemp, 103 U. S. 666, 26 L. Ed. 313.

8. Contents.—Raimond *v.* Terrebonne Parish, 132 U. S. 192, 33 L. Ed. 309; Burr *v.* Des Moines, etc., R. Co., 1 Wall. 99, 17 L. Ed. 561; Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Martinton *v.* Fairbanks, 112 U. S. 670, 28 L. Ed. 862; Glenn

state every fact material to a determination of the rights of the parties.[9]

VI. Operation and Effect.

A. As Waiver of Jury.—The submission of a civil cause for trial on an agreed statement of facts operates to waive a jury trial.[10]

B. As Waiver of Questions of Pleading or Form of Action.—A case stated, in an action at law, doubtless waives all questions of pleading[11] or of

v. Fant, 134 U. S. 398, 33 L. Ed. 969; Davenport *v.* Paris, 136 U. S. 580, 34 L. Ed. 548; Wilson *v.* Merchants' Loan, etc., Co., 183 U. S. 121, 46 L. Ed. 113; Lehnen *v.* Dickson, 148 U. S. 71, 77, 37 L. Ed. 873; St. Louis *v.* Western, etc., Tel. Co., 166 U. S. 388, 41 L. Ed. 1044; United States, etc., Co. *v.* New Mexico, 183 U. S. 535, 46 L. Ed. 315; United States *v.* Eliason, 16 Pet. 291, 10 L. Ed. 968; Pennock *v.* Dialogue, 2 Pet. 1, 7 L. Ed. 327; United States *v.* King, 7 How. 833, 844, 12 L. Ed. 934; Bond *v.* Brown, 12 How. 254, 256, 13 L. Ed. 977; Weems *v.* George, 13 How. 190, 14 L. Ed. 108; Arthurs *v.* Hart, 17 How. 6, 7, 15 L. Ed. 30; Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 265; Pomeroy *v.* Bank, 1 Wall. 592, 17 L. Ed. 638; Guild *v.* Frontin, 18 How. 135, 15 L. Ed. 290; Hackfeld Co. *v.* United States, 197 U. S. 442, 49 L. Ed 826; Binney *v.* Chesapeake & Ohio Canal Co., 8 Pet. 214, 216, 8 L. Ed. 921.

In Glenn *v.* Fant, 134 U. S. 398, 400, 33 L. Ed. 969, the court say: "What is styled here an 'agreed statement of facts' is an agreement as to certain matters, and that the parties might refer to and rely upon any and all grounds of action or defense to be found in two voluminous exhibits, marked X and Y, being the records of two equity causes in other courts, including all the pleadings and evidence, as well as the orders and decrees therein. The effect of some of that evidence and of the conclusions of fact to be drawn from it is controverted. It is impossible for us to regard this stipulation as taking the place of a special verdict of a jury, or a special finding of facts by the court, upon which our jurisdiction could properly be invoked to determine the questions of law thereon arising. And while the case is governed by the rule laid down in Campbell *v.* Boyreau, 21 How. 223, 16 L. Ed. 96, yet, even if the statutory provisions in relation to the trial of causes without the intervention of a jury by the circuit courts of the United States were applicable, the result upon this record would be the same. Raimond *v.* Terrebonne Parish, 132 U. S. 192, 33 L. Ed. 309; Andes *v.* Slauson, 130 U. S. 435, 32 L. Ed. 989; Bond *v.* Dustin, 112 U. S. 604, 28 L. Ed. 835; Lyons *v.* Lyons Bank, 19 Blatchford 279." See to the same effect Wilson *v.* Merchants' Loan, etc., Co., 183 U. S. 121, 46 L. Ed. 113.

This court cannot give judgment as on an agreed statement of facts or case stated, except where facts, and facts only, are stated. If there be question as to the competency or effect of evidence, or any rulings of the court below upon evidence to be examined, the court cannot entertain the case as an agreed statement. Burr *v.* The Des Moines, etc., R. Co., 1 Wall. 99, 17 L. Ed. 561, affirmed in Pomeroy *v.* Bank, 1 Wall. 592, 17 L. Ed. 638.

9. Should state all material facts.—"The result of the decisions under the statutes providing for a waiver of trial by jury, and the proceedings on a trial by the court, Rev. Stat., § 649, and Rev. Stat., § 700, is that when there are special findings they must be findings of what are termed ultimate facts, and not the evidence from which such facts might be but are not found. If, therefore, an agreed statement contains certain facts of that nature, and in addition thereto and as part of such statement there are other facts of an evidential character only, from which a material ultimate fact might be inferred, but which is not agreed upon or found, we cannot find it, and we cannot decide the case on the ultimate facts agreed upon without reference to such other facts. In such case we must be limited to the general finding by the court. We are so limited because the agreed statement is not a compliance with the statute." Wilson *v.* Merchants' Loan, etc., Co., 183 U. S. 121, 126, 46 L. Ed. 113. See, also, cases cited in preceding note.

10. As waiver of jury.—A stipulation, signed by the parties or their attorneys, and filed with the clerk of the circuit court, submitting a civil cause for trial on an agreed statement of facts, is "a stipulation in writing waiving a jury," within the meaning of § 649 of the Revised Statutes. Supervisors *v.* Kennicott, 103 U. S. 554, 2 L. Ed. 486. See the title JURY.

11. As waiver of questions of pleading.—"The case having been submitted to the circuit court upon a statement of facts agreed by the parties, or case cited, upon which the court was to render such judgment as the law required, all questions of the sufficiency of the pleadings were waived, and the want of an answer was immaterial. * * * Willard *v.* Wood, 135 U. S. 309, 314, 34 L. Ed. 210; Bond *v.* Dustin, 112 U. S. 604, 607, 28 L. Ed. 835." Saltonstall *v.* Russell, 152 U. S. 628, 630, 38 L. Ed. 576.

form of action, which might have been cured by amendment.[12]

C. As Enabling Court of Law to Assume Equity Jurisdiction.—A statement of facts agreed by the parties in an action at law cannot enable a court of law to assume the jurisdiction of a court of equity.[13]

D. Court Not Concluded by Statement of Legal Conclusions.—Where all the facts are stated, the court cannot be concluded by a stipulation of the parties as to the legal conclusions to be drawn therefrom.[14]

VII. Submission of Controversy.

A. Definition and What Constitutes.—A submission of controversy is the waiver of a jury trial and submitting the trial of both facts and law to the court.[15]

Submission to Special Tribunal.—A reference by consent of parties, of an entire case for the determination of all its issues, though not strictly a submission of the controversy to arbitration—a proceeding which is governed by special rules—is a submission of the controversy to a tribunal of the parties' own selection, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law.[16]

12. Form of action.—Willard *v.* Wood, 135 U. S. 309, 34 L. Ed. 210.

13. Law court assuming equity jurisdiction.—Willard *v.* Wood, 135 U. S. 309, 34 L. Ed. 210.

14. "The circuit court of appeals disposed of this case upon the view that the judgment of conviction would have been warranted upon the evidentiary facts stipulated, and that the stipulation, in so far as it stated that the escape of the immigrants could not have been reasonably anticipated by the master or officers of the steamship, and did not occur by reason of any negligence or want of proper care upon their part, was the statement of a mere conclusion, not binding upon the court, and would not prevent it from rendering an independent judgment upon the facts stated. We cannot take this view of the case. It may be conceded that where the facts are all stated, the court cannot be concluded by a stipulation of the parties as to the legal conclusions to be drawn therefrom, but we know no rule of public policy which will prevent the United States attorney from stipulating with the defendant in a case of this character as to the ultimate facts in the controversy. * * * The evidentiary facts in the stipulation upon which this case was tried are not very fully set forth, and the government and the defendant were content to stipulate that the method of escape through the portholes (assuming that it was by this means the immigrants escaped) could not have been reasonably anticipated by those in charge of the Korea, and that the escape did not occur by reason of any negligence or lack of proper care upon the part of the officers of the vessel or the defendant. We think the parties were entitled to have this case tried upon the assumption that these ultimate facts, stipulated into the record, were established, no less than the specific facts recited." Hackfeld & Co. *v.* United States, 197 U. S. 442, 446, 49 L. Ed. 826.

15. Definition.—See Guild *v.* Frontin, 18 How. 135, 15 L. Ed. 290, citing Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 265. See, also, Kelsey *v.* Forsyth, 21 How. 85, 16 L. Ed. 32; Suydam *v.* Williamson, 20 How. 427, 428, 15 L. Ed. 978; Campbell *v.* Boyreau, 21 How. 223, 16 L. Ed. 96; Rogers *v.* United States, 141 U. S. 548, 35 L. Ed. 853.

Requesting court to instruct verdict.—A request, made to the court by each party to instruct the jury to render a verdict in his favor, is not equivalent to a submission of the case to the court without the intervention of a jury, within the intendment of Rev. Stat., §§ 649, 700. Buetell *v.* Magone, 157 U. S. 154, 39 L. Ed. 654.

Where, "however, both parties asked the court to instruct a verdict, both affirmed that was no disputed question of fact which could operate to deflect or control the question of law. This was necessarily a request that the court find the facts, and the parties are, therefore, concluded by the finding made by the court, upon which the resulting instruction of law was given." Buetell *v.* Magone, 157 U. S. 154, 157, 39 L. Ed. 654.

16. Submission to special tribunal.—Kimberly *v.* Arms, 129 U. S. 512, 524, 32 L. Ed. 764.

When the parties consent to the reference of a case to a master or other officer to hear and decide all the issues therein, both of fact and of law, and such reference is entered as a rule of court, it is a submission of the controversy to a special tribunal, selected by the parties, to be governed in its conduct by the ordinary rules applicable to the administration of justice in tribunals established by law; and its determinations are not subject to

B. Right to Submit—Waiver of Jury.—Parties may, by consent, waive the trial of issues of fact by a jury, and submit the trial of both facts and law to the court. It will not be a mistrial.[17]

C. Submission Must Be in Writing.—The stipulation, between the parties, to waive a jury trial and submit the case to the court must be in writing, otherwise no errors in the rulings of the trial court can be examined by the reviewing court.[18]

D. Court Assumes Character of Arbitrator.—If, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator.[19]

AGREEMENT.—See, generally, the title CONTRACTS. The word agreement, does not necessarily import any direct and express stipulation; nor is it necessary that it should be in writing. If there is a verbal understanding, to which both parties have assented, and upon which both are acting, it is an agreement.[1]

be set aside and disregarded at the discretion of the court. Kimberly *v.* Arms, 129 U. S. 512, 32 L. Ed. 764.

As to submission to arbitrators, see the title ARBITRATION AND AWARD.

17. Right to submit.—Guild *v.* Frontin, 18 How. 135, 15 L. Ed. 290; Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 265; Suydam *v.* Williamson, 20 How. 427, 428, 15 L. Ed. 978; Kelsey *v.* Forsyth, 21 How. 85, 88, 16 L. Ed. 32; Campbell *v.* Boyreau, 21 How. 223, 16 L. Ed. 96; Rogers *v.* United States, 141 U. S. 548, 35 L. Ed. 853; Shankland *v.* Washington, 5 Pet. 390, 8 L. Ed. 166; Martin *v.* Ihmsen, 21 How. 394, 16 L. Ed. 134.

Under the 4th section of the act of March 5th, 1865, the parties may submit cases to the court without a jury. Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Insurance Co. *v.* Tweed, 7 Well. 44, 19 L. Ed. 65; Coddington *v.* Richardson, 10 Wall. 516, 19 L. Ed. 981; Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678.

Waiver of jury.—"As a case cannot be submitted to the court for trial without waiving a jury, a stipulation to submit, especially if it be on agreed facts, is of itself a sufficient waiver to meet the requirements of § 649." Supervisors *v.* Kennicott, 103 U. S. 554, 556, 26 L. Ed. 486.

As to waiver of jury, see the title JURY.

18. "The condition upon which, according to the act of March 3d, 1865, the parties are authorized to waive a trial by jury, and substitute the court, and, at the same time, save to themselves all the rights and privileges which belong to them in trials by jury at common law, * * * is the filing with the clerk a written stipulation, signed by the parties, or their attorneys." Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678, followed in Flanders *v.* Tweed, 154 U. S. 569, 19 L. Ed. 680; Coddington *v.* Richardson, 10 Wall. 516, 19 L. Ed. 981; Martinton *v.* Fairbanks, 112 U. S. 670, 675, 28 L. Ed. 862. See the title EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL.

No error can be examined in the rulings of the court at the trial of a cause by the court without a jury by agreement of parties, if there is no allegation in the record that the stipulation was in writing, as required by the statute. Bond *v.* Dustin, 112 U. S. 604, 28 L. Ed. 835, and Dundee Mortgage, etc., Co. *v.* Hughes, 124 U. S. 157, 31 L. Ed. 357, followed in Spalding *v.* Manasse, 131 U. S. 65, 33 L. Ed. 86. See, also, Grayson *v.* Lynch, 163 U. S. 468, 41 L. Ed. 230.

19. Courts act as arbitrators.—Rogers *v.* United States, 141 U. S. 548, 35 L. Ed. 853, citing Campbell *v.* Boyreau, 21 How. 223, 16 L. Ed. 96; Weems *v.* George, 13 How. 190; 14 L. Ed. 108. Subsequent to the act of Mar. 3, 1865, § 4, see Martinton *v.* Fairbanks, 112 U. S. 670, 675, 28 L. Ed. 862.

1. Agreement.—Holmes *v.* Jennison, 14 Pet. 540, 572, 10 L. Ed. 579; Wharton *v.* Wise, 153 U. S. 155, 168, 38 L. Ed. 669.

A statute provided that when the terms of an **agreement** had been reduced to writing by the parties, it was to be considered as containing all the terms, and that no evidence should be admitted except in certain cases. In construing this provision, the court, in Bogk *v.* Gassert, 149 U. S. 17, 24, 37 L. Ed. 631, said: "The term **agreement** includes deed and wills, as well as contracts between the parties."

Insurance.—An insurance company's charter required that contracts, bargains, **agreements**, policies or other instruments should be in writing and under seal of the corporation, and signed by the president and attested by the secretary. It was held, the **agreement** as thus used did not include the initial preliminary **agreement** for insurance which precedes the execution of the formal policy. Franklin Ins. Co. *v.* Colt, 20 Wall. 560, 22 L. Ed. 422.

Agreement between the states.—See the title STATES.

Agreement to sell.—See CALL.

AGRICULTURE.—See the title CROPS.

AID.—See note 1.

AID AND COMFORT.—See note 2.

AIDER AND ABETTOR.—See the title ACCOMPLICES AND ACCESSORIES, ante, p. 63.

AIDER BY VERDICT.—See the title AMENDMENTS.

AIDING AND ASSISTING TREASON.—See note 3.

AID SOCIETIES.—See the title BENEFICIAL AND BENEVOLENT ASSOCIATIONS.

AIR.—See the titles ADJOINING LANDOWNERS, ante, p. 117; EASEMENTS.

ALABAMA.—As to Alabama claims, see the titles COURTS; TREATIES.

ALASKA.—See the titles ADMIRALTY, ante, p. 119; APPEAL AND ERROR; COURTS.

ALCALDE.—An alcalde was an officer of the Spanish law, with duties corresponding somewhat to those of a mayor or justice of the peace.[4]

ALCOHOLIC LIQUORS.—See the titles COMMERCE; CONSTITUTIONAL LAW; INTOXICATING LIQUORS.

ALCOHOLISM.—As to defense to action on life policy, see the title INSURANCE.

ALDERMEN.—See the title MUNICIPAL CORPORATIONS.

ALIAS WRITS.—See the titles ATTACHMENT AND GARNISHMENT; EXECUTIONS; SUMMONS AND PROCESS.

ALIBI.—See the titles CRIMINAL LAW; INSTRUCTIONS.

ALIENATE—ALIENATION.—See note 5.

ALIENATION IN MORTMAIN.—See MORTMAIN.

ALIENATION OF AFFECTIONS.—See the title HUSBAND AND WIFE.

1. See, also, Abet. And see the title ACCOMPLICES AND ACCESSORIES, ante, p. 63. As to aid to corporations and public improvements, see the title MUNICIPAL, COUNTY, STATE AND FEDERAL AID.

2. **Aid and comfort.**—In Young *v.* United States, 97 U. S. 39, 62, 24 L. Ed. 992, it is said: "There can be no doubt that the words 'aid or comfort' are used in this statute in the same sense they are in the clause of the constitution defining treason (art. 3, § 3), that is to say, in their hostile sense. The acts of aid and comfort which will defeat a suit must be of the same general character with those necessary to convict of treason, where the offense consists in giving aid and comfort to the enemies of the United States. But there may be aid and comfort without treason; for 'treason is a breach of allegiance, and can be committed by him only who owes allegiance, either perpetual or temporary.' United States *v.* Wiltberger, 5 Wheat. 76, 96, 5 L. Ed. 37. The benefits of the statute are withheld not for treason only, but for giving aid and comfort as well. A claimant to be excluded need not have been a traitor; it is sufficient if he has done that which would have made him a traitor if he had owed allegiance to the United States." The act under consideration in this case was the abandoned and captured property act. See the title ABANDONED AND CAPTURED PROPERTY, ante, p. 1. And see, also, the title TREASON.

3. **Aiding and assisting treason.**—See Respublica *v.* Carlisle, 1 Dall. 35, 37, 1 L. Ed. 26.

4. See United States *v.* Castillero, 2 Black 1, 194, 17 L. Ed. 360; Strother *v.* Lucas, 12 Pet. 410, 9 L. Ed. 1137. And see, generally, the title PUBLIC LANDS.

5. **Alienate.**—That a contract to alienate is an alienation of public lands, see Anderson *v.* Carkins, 135 U. S. 483, 34 L. Ed. 272. And see the title PUBLIC LANDS.

Alienation.—In United States *v.* Schurz, 102 U. S. 378, 397, 26 L. Ed. 167, it is said: "Blackstone describes four modes of alienation or transfer of title to real estate, which he calls common assurance; the first of which is by matter in pais or deed; the second by matter of record, or an assurance transacted only in the king's public courts of record; the third by special custom; and the fourth by devise in a last will or testament."

ALIENS.

BY JAMES F. MINOR.

I. Definition and Status, 212.

II. What Determines Relation, 213.
- A. Birth, Domicile or Marriage, 213.
  - 1. Birth, 213.
  - 2. Domicile, 213.
  - 3. Marriage, 214.
- B. Annexation, 214.
- C. Conquest, 214.
- D. Division of Country, 214.
  - 1. In General, 214.
  - 2. Infants, 215.
    - a. Children Born before Division, 215.
    - b. Children Born after Division, 215.
  - 3. Right of Election, 216.
  - 4. Burden of Proof and Presumptions, 217.
- E. Rights under Treaties, 217.
- F. Expatriation, 217.
- G. Naturalization, 217.

III. Duties, Rights and Powers, 217.
- A. Allegiance and Jurisdiction over, 217.
  - 1. Domiciled Aliens, 217.
  - 2. Nonresident Aliens, 218.
  - 3. Crew of Vessel of Merchant Marine, 218.
  - 4. Foreign Public Vessel, 219.
- B. Right to Protection of Laws, 219.
- C. Holding Office, Sitting as Juror, or Voting, 219.
- D. Suing and Being Sued, 220.
  - 1. Suits between Aliens, 220.
  - 2. Suits between Aliens and Citizens, 221.
    - a. In General, 221.
    - b. Alien Residents, 222.
    - c. Venue, Scope, and Rule of Decision, 222.
  - 3. Suits between a State and an Alien, 223.
  - 4. Suits by Aliens against the United States, 223.
  - 5. Suits by Foreign Governments, 223.
  - 6. Suits by and against Alien Enemies, 224.
  - 7. Suits to Enforce Title to Land, 224.
- E. Property Rights, 224.
  - 1. Real Property, 224.
    - a. Right to Acquire and Hold, 224.
      - (1) At Common Law, 224.
        - (a) By Inheritance, 224.
        - (b) By Purchase, 225.
        - (c) Termination or Waiver of Objection of Alienage, 227.
      - (2) By the Civil Law, 227.
      - (3) Constitutional and Statutory Provisions, 227.
        - (a) In General, 227.
        - (b) Laws of Particular States, 228.

b. Right to Transmit or Convey, 233.
c. Confiscation and Forfeiture, 234.
d. Evidence, Presumptions and Pleading, 234.
2. Personalty, 234.
3. Tax on Right of Succession, 234.
4. Effect of Division of Country, 234.
5. Equitable Conversion, 235.
6. Treaty Rights, 235.
a. In General, 235.
b. Treaties with France, 236.
c. Treaties with Great Britain, 237.
d. Treaties with Switzerland, 239.
F. Criminal Jurisdiction over Aliens, 240.
G. Alien Enemies and Effect of War, 240.

IV. Pleading and Practice, 240.
A. Declaration or Bill, 240.
1. Averments as to Alienage or Citizenship, 240.
2. Effect and Necessity for Denial, 242.
3. Amendment, 242.
B. Plea, 242.
C. Replication, 243.
D. Evidence, 243.
1. Presumptions and Burden of Proof, 243.
a. Inferences and Presumptions, 243.
b. Burden of Proof, 244.
2. Competency, 244.
3. Weight and Sufficiency, 244.
E. Limitation of Actions, 245.
F. Removal of Causes, 245.

V. Admission or Exclusion of Aliens or Immigrants, 245.
A. Power of Congress and States, 245.
1. In General, 245.
2. Mode of Exercise and Discretion, 245.
3. Inalienability, 246.
4. Conditional Admission, 247.
5. To Punish Criminally Illegal Entry and Residence, 247.
6. Construction of Acts of Congress, 247.
7. Powers of States, 248.
B. Classes Excluded, 248.
1. Paupers, Criminals and Deceased Persons, 248.
2. Anarchists, 249.
3. Chinese, 250.
4. Alien Contract Laborers, 250.
C. Procedure, 250.
1. Delegation to Inspectors or Other Officers, or a Department, 250.
a. In General, 250.
b. Authority and Discretion, 250.
c. Finality of Decision and Court Review, 252.
2. Provisions for Registration and Identification, 253.
3. Detention and Expulsion or Deportation, 253.
4. Right to Habeas Corpus, 255.
5. Due Process of Law, 255.
D. Liability of Person Bringing in Immigrants Not Permitted to Land, 255.
E. Privilege of Transit, 255.

F. Chinese Exclusion Acts, 255.
G. Alien Contract Labor Laws, 255.
H. Head Money Laws and Taxes on Immigration, 255.

CROSS REFERENCES.

See the titles ABANDONED AND CAPTURED PROPERTY, ante, p. 1; BLOCKADE; CHINESE EXCLUSION ACTS; CITIZENSHIP; CONFEDERATE STATES; CONFLICT OF LAWS; CONSTITUTIONAL LAW; CONTRACT LABOR LAW; CONTRACTS; COURTS; DESCENT AND DISTRIBUTION; DOMICILE; DOWER; ELECTIONS; EMBARGO AND NONINTERCOURSE LAWS; ESCHEAT; EXTRADITION; FOREIGN CORPORATIONS; FOREIGN LAWS; HABEAS CORPUS; HOMESTEAD EXEMPTIONS; INDIANS; INTERNATIONAL LAW; NATURALIZATION; PRIZE; QUARANTINE; REMOVAL OF CAUSES; REVENUE LAWS; SEAMEN; SEQUESTRATION; TAXATION; TERRITORIES; TREATIES; UNITED STATES; WAR.

As to alien corporations, see the title FOREIGN CORPORATIONS. As to Indians as aliens, see the title INDIANS. As to liability for treason, see the title TREASON. As to limitation of actions by or against, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION. As to location of public lands by aliens, see the title PUBLIC LANDS. As to removal of cause for alienage, see the title REMOVAL OF CAUSES. As to rights under patent laws, see the title PATENTS. As to suits by alien against state, see the title STATES. As to taxation of immigrants, see the titles COMMERCE; TAXATION. As to tax on immigrants as regulation of commerce, see the title COMMERCE.

I. Definition and Status.

See post, "What Determines Relation," II. As to presumptions, see post, "Evidence," IV, D.

The word "aliens" has been held to embrace subjects or citizens of foreign countries, resident or nonresident in this country;[1] and aliens do not cease to be such by a residence in this country.[2] And a grant from the king did not constitute the alien grantee a denizen, so as to enable him to hold an indefeasible estate. The effect of an alien being made a denizen is not to enable him to take lands, but it has the effect to enable him to hold them against the king.[3] By residence they acquire rights and incur duties in many respects the same as those of citizens.[4]

1. **Foreigners, resident or nonresident.**—Hennessy *v.* Richardson Drug. Co., 189 U. S. 25, 34, 47 L. Ed. 697.

In § 6 of the judiciary act of March 3, 1891, making final the judgments and decrees of the circuit courts of appeals in cases, among others, in which the jurisdiction was dependent entirely on the opposite parties to the suit or controversy being citizens of different states, or "aliens and citizens of the United States," the word "aliens," as there used, embraces subjects or citizens of foreign countries, and not merely persons resident in this country, who owe allegiance to another. Hennessy *v.* Richardson Drug Co., 189 U. S. 25, 34, 47 L. Ed. 697.

A person born in England, before the year 1775, and who always resided there, and never was in the United States, is an alien. Dawson *v.* Godfrey, 4 Cranch 321, 2 L. Ed. 634.

2. **Same.**—Breedlove *v.* Nicolet, 7 Pet. 413, 8 L. Ed. 731. But an alien is presumed not to reside in the United States. Galveston, etc., R. Co. *v.* Gonzales, 151 U. S. 496, 507, 38 L. Ed. 248.

Porto Ricans.—Citizens of Porto Rico, whose permanent allegiance is due to the United States, who live in the peace of the dominion of the United States; the organic law of whose domicile was enacted by the United States, and is enforced through officials sworn to support the constitution of the United States, are not aliens. Gonzales *v.* Williams, 192 U. S. 1, 13, 48 L. Ed. 317. See the title CITIZENSHIP.

Foreign states.—There is a distinction between foreign states and foreign citizens. The word "aliens" could include the former only by straining it beyond its natural meaning. Columbia *v.* Cauca Co., 190 U. S. 524, 47 L. Ed. 1159.

3. **As denizen—Grant of land.**—Doe *v.* Robertson, 11 Wheat. 332, 352, 6 L. Ed. 488.

4. **Rights and duties.**—By general inter-

II. What Determines Relation.

As to evidence, see post, "Evidence," IV, D. See, generally, the title CITIZENSHIP.

A. Birth, Domicile or Marriage—1. BIRTH.—The rule commonly laid down in the books is, that every person who is born within the ligeance of a sovereign, is a subject; and, e converso, that every person born without such allegiance is an alien. This, however, is little more than a definition of terms.[5]

2. DOMICILE.—One removing to a foreign country may acquire the national character of that country by residence there, animo manendi. It is a question of intention.[6]

national law, foreigners who have become domiciled in a country other than their own, acquire rights, and must discharge duties, in many respects the same as possessed by and imposed upon the citizens of that country, and no restriction on the footing upon which such persons stand by reason of their domicil of choice, or commercial domicil, is to be presumed. Lau Ow Bew *v.* United States, 144 U. S. 47, 61, 36 L. Ed. 340. See post, "Allegiance and Jurisdiction Over," III, A.

5. As determined by birth.—Inglis *v.* Sailor's Snug Harbour, 3 Pet. 99, 7 L. Ed. 617 (dissenting opinion of Story, J.); Dawson *v.* Godfrey, 4 Cranch 321, 2 L. Ed. 634; United States *v.* Wong Kim Ark, 169 U. S. 649, 660, 42 L. Ed. 890. See post, "Division of Country," II, D. See the title CITIZENSHIP.

Children born in a country, continuing, while under age, in the family of the father, partake of his national character as a citizen of that country. Shanks *v.* Dupont, 3 Pet. 242, 245, 7 L. Ed. 666; Jones *v.* McMasters, 20 How. 8, 20, 15 L. Ed. 805.

6. As determined by domicile.—The Venus, 8 Cranch 253, 279, 3 L. Ed. 553; The Friendschraft, 3 Wheat. 12, 14, 4 L. Ed. 322.

"In deciding whether a person has obtained the right of an acquired domicil, it is not to be expected that much, if any, assistance should be derived from mere elementary writers on the law of nations. They can only lay down the general principles of law; and it becomes the duty of courts to establish rules for the proper application of those principles. The question, whether the person to be affected by the right of domicil had sufficiently made known his intention of fixing himself permanently in the foreign country, must depend upon all the circumstances of the case. If he had made no express declaration on the subject, and his secret intention is to be discovered, his acts must be attended to, as affording the most satisfactory evidence of his intention. On this ground it is, that the courts of England have decided, that a person who removes to a foreign country, settles himself there, and engages in the trade of the country, furnishes, by these acts, such evidence of an intention permanently to reside there, as to stamp him with the national character of the state where he resides. In questions on this subject, the chief point to be considered, is the animus manendi; and courts are to devise such reasonable rules of evidence as may establish the fact of intention. If it sufficiently appear, that the intention of removing was to make a permanent settlement, or for an indefinite time, the right of domicil is acquired by a residence even of a few days. This is one of the rules of the British courts, and it appears to be perfectly reasonable. Another is, that a neutral or subject, found residing in a foreign country is presumed to be there animo manendi; and if a state of war should bring his national character into question, it lies upon him to explain the circumstances of his residence." The Venus, 8 Cranch 253, 279, 3 L. Ed. 553.

"The writers upon the law of nations distinguish between a temporary residence in a foreign country, for a special purpose, and a residence accompanied with an intention to make it a permanent place of abode. The latter is styled by Vattel, domicil, which he defines to be, 'a habitation fixed in any place, with an intention of always staying there.' Such a person, says this author, becomes a member of the new society, at least, as a permanent inhabitant, and is a kind of a citizen of an inferior order from the native citizens; but is, nevertheless, united and subject to the society, without participating in all its advantages. This right of domicil, he continues, is not established, unless the person makes sufficiently known his intention of fixing there, either tacitly, or by an express declaration. Vatt. p. 92, 93. Grotius nowhere uses the word domicil, but he also distinguishes between those who stay in a foreign country, by the necessity of their affairs, or from any other temporary cause, and those who reside there from a permanent cause. The former he denominates strangers, and the latter, subjects." The Venus, 8 Cranch 253, 277, 3 L. Ed. 553. See post, "Allegiance and Jurisdiction Over," III, A; "Power of Congress and States," V, A. And see the titles CITIZENSHIP; DOMICILE; NATURALIZATION.

3. MARRIAGE.—Alienage may be determined and citizenship acquired by marriage to a citizen of the United States.[7]

B. Annexation.—When previously foreign territory is acquired by or annexed to the United States, or admitted to the Union as a state, the alienage of the inhabitants of each with reference to the other is determined.[8]

C. Conquest.—On a conquest by one nation of another, and the subsequent surrender of the soil and change of sovereignty, those of the former inhabitants who do not remain and become citizens of the victorious sovereign, but, on the contrary, adhere to their old allegiance and continue in the service of the vanquished sovereign, deprive themselves of protection or security to their property except so far as it may be secured by treaty.[9]

D. Division of Country—1. IN GENERAL.—In case of a successful revolution, a person born in the old country before the separation and who always resided there and never was in the new country is an alien to the new country.[10] And so the nationality of the ante-nati in the case of such a revolution is determined by their choice of allegiance, under the British doctrine, as of the time

7. As determined by marriage.—Citizenship acquired by a woman's marriage to a citizen of the United States, removes a disability to acquire property in the District of Columbia. Kelly *v.* Owen, 7 Wall. 496, 19 L. Ed. 283.

8. As determined by annexation.—Osterman *v.* Baldwin, 6 Wall. 116, 122, 18 L. Ed. 730; Christy *v.* Scott, 14 How. 282, 294, 14 L. Ed. 422; Soulard *v.* United States, 4 Pet. 511, 7 L. Ed. 938; Gonzales *v.* Williams, 192 U. S. 1, 13, 48 L. Ed. 317; American Ins. Co. *v.* 356 Bales of Cotton, 1 Pet. 511, 542, 7 L. Ed. 242; Dorr *v.* United States, 195 U. S. 138, 49 L. Ed. 128; Lincoln *v.* United States, 197 U. S. 419, 49 L. Ed. 816; De Lima *v.* Bidwell, 182 U. S. 1, 45 L. Ed. 1041; Dooley *v.* United States, 182 U. S. 222, 45 L. Ed. 1074; S. C., 183 U. S. 151, 46 L. Ed. 128; Goetze *v.* United States, 182 U. S. 221, 45 L. Ed 1065; Downes *v.* Bidwell, 182 U. S. 244, 45 L. Ed. 1088; Fourteen Diamond Rings *v.* United States, 183 U. S. 176, 46 L. Ed. 138.

Subject to their right of election to retain their former nationality. Boyd *v.* Nebraska, 143 U. S. 135, 36 L. Ed. 103.

When Texas was admitted into the Union, the alienage of a citizen of one of the United States was determined. His present status is that of a person naturalized, and that naturalization has a retroactive effect, so as to be deemed a waiver of all liability to forfeiture, and a confirmation of his former title. Osterman *v.* Baldwin, 6 Wall. 116, 122, 18 L. Ed. 730; Christy *v.* Scott, 14 How. 282, 294, 14 L. Ed. 422. See post, "Constitutional and Statutory Provisions," III, E, 1, a, (3).

In the treaty by which Louisiana was acquired, the United States stipulated, that the inhabitants of the ceded territory should be protected in the free enjoyment of their property; the United States, as a just nation, regard this stipulation as the avowal of a principle which would have been held equally sacred, though it had not been inserted in the contract. The term "property," as applied to lands, comprehends every species of title, inchoate or complete; it is supposed to embrace those rights which lie in contract; those which are executory, as well as those which are executed. In this respect, the relation of the inhabitants of Louisiana to their government is not changed; the new government takes the place of that which has passed away. Soulard *v.* United States, 4 Pet. 511, 7 L. Ed. 938. See, generally, the titles CITIZENSHIP; INTERNATIONAL LAW.

9. As determined by conquest.—United States *v.* Repentigny, 5 Wall. 211, 18 L. Ed. 627; Shanks *v.* Dupont, 3 Pet. 242, 7 L. Ed. 666; Boyd *v.* Nebraska, 143 U. S. 135, 162, 36 L. Ed. 103.

Hence, where on such a conquest, treaty provided that the former inhabitants who wished to adhere in allegiance to their vanquishd sovereign, might sell their property, provided they sold it to a certain class of persons and within a time named, the property, if not so sold, became abandoned to the conqueror. United States *v.* Repentigny, 5 Wall. 211, 18 L. Ed. 627. See the titles CONSTITUTIONAL LAW; INTERNATIONAL LAW; WAR. See ante, "Annexation," II, B.

The capture and possession of James Island, in February, 1789, and of Charleston, on the 11th of May, in the same year, by the British troops, was not an absolute change of the allegiance of the captured inhabitants; they owed allegiance to the conquerors, during their occupation; but it was a temporary allegiance, which did not destroy, but only suspended, their former allegiance. Shanks *v.* Dupont, 3 Pet. 242, 246, 7 L. Ed. 666.

10. Ante-Nati.—Dawson *v.* Godfrey, 4 Cranch 321, 2 L. Ed. 634; Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99, 7 L. Ed. 617; Blight *v.* Rochester, 7 Wheat. 535, 544, 5 L. Ed. 516.

of the treaty of peace, but under the American rule, as of the time of the Declaration of Independence; viz, 1776.[11]

2. INFANTS—a. *Children Born before Division.*—The nationality of an infant, born before the division and continuing such until after the election of the father to continue his allegiance to the old country, is determined by that election where acquiesced in by the infant after becoming of age, and he is an alien.[12]

b. *Children Born after Division.*—In case of birth in New York after American Declaration of Independence, before its occupation by the British troops, such infant would share the alienage of his father, subject to his election to determine it in a reasonable time after majority by electing American nationality. If born after such occupation, he was born an alien.[13]

11. Same.—Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99, 7 L. Ed. 617; Dawson *v.* Godfrey, 4 Cranch 321, 2 L. Ed. 634; McKinney *v.* Saviego, 18 How. 235, 15 L. Ed. 365; Blight *v.* Rochester, 7 Wheat. 535, 544, 5 L. Ed. 516; Boyd *v.* Nebraska, 143 U. S. 135, 163, 36 L. Ed. 103. See post, "Right of Election," II, D, 3.

The rule as to the point of time at which the American ante-nati ceased to be British subjects, differs in this country and in England, as established by the courts of justice in the respective countries. The English rule is, to take the date of the treaty of peace in 1783; our rule is, to take the date of the Declaration of Independence. Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99, 7 L. Ed. 617; Dawson *v.* Godfrey, 4 Cranch 321, 2 L. Ed. 634.

The settled doctrine in this country is, that a person born here, but who left the country, before the Declaration of Independence, and never returned here, became an alien, and incapable of taking lands, subsequently, by descent; the right to inherit depends upon the existing state of allegiance, at the time of the descent cast. Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99, 7 L. Ed. 617.

The doctrine of perpetual allegiance is not applied by the British courts to the American ante-nati; and this court, in the case of Blight *v.* Rochester, 7 Wheat. 535, 544, 5 L. Ed. 516, adopted the same rule with respect to the rights of British subjects here—that, although born before the revolution, they are equally incapable with those born subsequently to that event, of inheriting or transmitting the inheritance of lands in this country. Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99, 7 L. Ed. 617.

The British doctrine, therefore, is, that the American ante-nati, by remaining in America, after the peace, lost their character of British subjects; and our doctrine is, that by withdrawing from this country, and adhering to the British government, they lost, or perhaps, more properly speaking, never acquired, the character of American citizens. Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99, 7 L. Ed. 617.

The constitution of Texas considered as aliens all who did not reside there at the time of the Declaration of Independence, unless they were afterwards naturalized. McKinney *v.* Saviego, 18 How. 235, 15 L. Ed. 365. See post, where the laws of Texas are considered under "Constitutional and Statutory Provisions," III, E, 1, a, (3).

A citizen of Mexico became an alien to Texas by virtue of the separation of that state from the rest of the Mexican Republic. Airhart *v.* Massieu, 98 U. S. 491, 495, 25 L. Ed. 213.

12. Alienage determined by father's election.—Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99, 101, 7 L. Ed. 617; Jones *v.* McMasters, 20 How. 8, 15 L. Ed. 805.

A person born in New York, before the 4th of July, 1776, and who remained an infant, with his father, in the city of New York, during the period it was occupied by the British troops, his father being a loyalist, and having adhered to the British government, and left New York with the British troops, taking his son with him, who never returned to the United States, but afterward became a bishop of the Episcopal church, in Nova Scotia; such a person was born a British subject, and continued an alien, and is disabled from taking land by inheritance in the state of New York. Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99, 101, 7 L. Ed. 617.

Where a person was born at Goliad, then in the state of Coahuila and Texas, being a part of the republic of Mexico, which place was also the domicil of her father and mother until their deaths, and was removed at the age of four years, before the declaration of Texan independence, to Matamoras, in Mexico, this person is an alien, and can sue in the courts of the United States. Jones *v.* McMasters, 20 How. 8, 15 L. Ed. 805. See ante, "Birth," II, A, 1; post, "Burden of Proof and Presumptions," II, D, 4.

13. Birth after division.—Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99, 7 L. Ed. 617.

If such a person had been born after the 4th of July, 1776, and before the 15th of September, 1776, when the British troops took possession of the city of New York and the adjacent places, his infancy incapacitated him from making an election

3. Right of Election.—As to rights under treaties, see post, "Treaty Rights," III, E, 6.

The right of election must necessarily exist in all revolutions like ours, and is well established by adjudged cases.[14] But its exercise, to be effectual, must be voluntary and final.[15]

for himself, and his election and character followed that of his father, subject to the right of disaffirmance, in a reasonable time after the termination of his minority; which never having been done, he remained a British subject, and disabled from inheriting land in the state of New York. Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99, 7 L. Ed. 617. But see opinion of Story, J., dissentiente, 3 Peters 168.

If born after the British took possession of New York, and before the evacuation on the 25th of November, 1783, he was, under the circumstances stated in the case, born a British subject, under the protection of the British government, and not under that of the state of New York, and, of course, owing no allegiance to the state of New York. He was an alien, and incapable of taking lands in New York by inheritance. Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99, 125, 7 L. Ed. 617.

14. Existence of right.—Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99, 7 L. Ed. 617; McIlvaine *v.* Coxe, 4 Cranch 209, 211, 2 L. Ed. 598; White *v.* Burnley, 20 How. 235, 250, 15 L. Ed. 886; Respublica *v.* Chapman, 1 Dall. 52, 53, 1 L. Ed. 33. See ante, "In General," II, D, 1; "Infants," II, D, 2.

The supreme court, in the case of McIlvaine *v.* Coxe, 4 Cranch 209, 2 L. Ed. 598, fully recognized the right of election; but they considered that Mr. Coxe had lost that right by remaining in the state of New Jersey, not only after she had declared herself a sovereign state, but after she had passed laws by which she declared him to be a member of, and in allegiance to, the new government. Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99, 100, 7 L. Ed. 617; White *v.* Burnley, 20 How. 235, 250, 15 L. Ed. 886.

He did not become an alien then, even by joining the British army during the Revolutionary war. McIlvaine *v.* Coxe, 4 Cranch 209, 216, 2 L. Ed. 598.

On the 4th of October, 1776, the state of New Jersey was completely a sovereign and independent state, and had a right to compel the inhabitants of the state to become citizens thereof, and a person born in the colony of New Jersey, before the year 1775, and residing there until the year 1777, but who then joined the British army, and ever afterward adhered to the British, claiming to be a British subject, and demanding and receiving compensation from that government, for his loyalty and his sufferings as a refugee, has a right to take lands by descent, in the state of New Jersey. McIlvaine *v.* Coxe, 4 Cranch 209, 2 L. Ed. 598. See case argued but not decided in 2 Cranch 280.

"Prima facie, and as a general rule, the character in which the American antenati are to be considered, will depend upon, and be determined by, the situation of the party, and the election made, at the date of the Declaration of Independence according to our rule; or the treaty of peace, according to the British rule. But this general rule must necessarily be controlled by special circumstances attending particular cases. And if the right of election be at all admitted, it must be determined, in most cases, by what took place during the struggle, and between the Declaration of Independence and the treaty of peace. To say, that the election must have been before, or immediately at the Declaration of Independence, would render the right nugatory." Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99, 120, 7 L. Ed. 617.

Where an American born woman was of age, before December, 1782, when she removed to England with her husband, as she remained in South Carolina, her native state, until that time, her birth and residence must be deemed to constitute her, by election, a citizen of South Carolina, while she remained in that state; if she was not of age, then, under the circumstances of this case, she might be deemed to hold the citizenship of her father; for children, born in a country, continuing, while under age, in the family of the father, partake of his national character as a citizen of that country. Shanks *v.* Dupont, 3 Pet. 242, 245, 7 L. Ed. 666.

"The general doctrine asserted in the American courts has been, that natives who were not here at the Declaration of Independence, but were then, and for a long while afterwards remained, under British protection, if they returned before the treaty of peace, and were here at that period, were to be deemed citizens. If they adhered to the British crown, up to the time of the treaty, they were deemed aliens." Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99, 160, 7 L. Ed. 617, dissenting opinion of Story, J. See post, "Burden of Proof and Presumptions," II, D, 4.

In Pennsylvania.—In Pennsylvania this right of election continued until the 11th of February, 1777. Respublica *v.* Chapman, 1 Dall 52, 53, 1 L. Ed. 33.

15. Departure involuntary.—White *v.* Burnley, 20 How. 235, 250, 15 L. Ed. 886.

A grantee having been compelled to leave Texas, there was no evidence of his

4. Burden of Proof and Presumptions.—See post, "Evidence," IV, D.

A plaintiff having been born and having always lived under the old government, the burden rested upon the defendants, who claimed that she was a citizen of the new one, to establish the fact of the change of her allegiance [16] And a prima facie presumption against alienage may arise from being here at the Declaration of Independence.[17]

E. Rights under Treaties.—See post, "Treaty Rights," III, E, 6.

F. Expatriation.—See the title Citizenship.

G. Naturalization.—See the title Naturalization.

III. Duties, Rights and Powers.

As to status generally, see ante, "Definition and Status," I.

A. Allegiance and Jurisdiction over.—See ante, "Birth, Domicile or Marriage," II, A. See the title Citizenship.

1. Domiciled Aliens.—Aliens domiciled in the United States owe a local and temporary allegiance to the government of the United States; they are bound to obey all the laws of the country, not immediately relating to citizenship, during their residence in it, and are equally amenable with citizens for any infraction of those laws.[18]

voluntary and final abandonment of the country. As there was no evidence, the jury could not express opinion upon the subject. White *v.* Burnley, 20 How. 235, 15 L. Ed. 886; Cook *v.* Burnley, 11 Wall. 659, 670, 20 L. Ed. 29.

Of infants.—See ante, "Infants," II, D, 2.

16. Presumptions from birth and residence.—Jones *v.* McMasters, 20 How. 8, 20, 15 L. Ed. 805, citing Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99, 122, 123, 7 L. Ed. 617.

Where there was no evidence which would justify the court in leaving it to the jury to decide whether or not a grantor was an alien enemy when he made a conveyance, he being then a resident of Louisiana, the mere fact of his being a Spaniard was not sufficient for an inference that he was an enemy of Texas. The averment in the deed that he was a citizen of Mexico was not sufficient to establish alienage. White *v.* Burnley, 20 How. 235, 15 L. Ed. 886.

17. Same.—Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99, 122, 7 L. Ed. 617.

One who was here, at the time of the Declaration of Independence, prima facie, may be deemed to have become thereby an American citizen. But this prima facie presumption may be rebutted; otherwise, there is no force or meaning in the right of election. It surely cannot be said, that nothing short of actually removing from the country, before the Declaration of Independence, will be received as evidence of the election, where every act that could be done to signify the choice that had been made, except actually withdrawing from the country, was done. Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99, 122, 7 L. Ed. 617.

Presumption as to election during minority.—If a woman was competent to make an election while a minor, but after she had arrived at mature years, as to the government to which she would owe allegiance, the presumption, upon the fact, is, that she has made it in favor of the one under which she has lived since her birth. If she was incompetent to make it during her minority, then the allegiance due at her birth continued, and existed at the time of the commencement of the suit. Jones *v.* McMasters, 20 How. 8, 20, 15 L. Ed. 805.

Her allegiance remained unchanged, unless by her election, which it was incumbent on the opposite party to show. Jones *v.* McMasters, 20 How. 8, 15 L. Ed. 805.

18. Allegiance of domiciled aliens.—Radich *v.* Hutchins, 95 U. S. 210, 24 L. Ed. 409; Carlisle *v.* United States, 16 Wall. 147, 21 L. Ed. 426; Lau Ow Bew *v.* United States, 144 U. S. 47, 36 L. Ed. 340; The Exchange *v.* McFaddon, 7 Cranch 116, 143, 3 L. Ed. 287; United States *v.* Wong Kim Ark, 169 U. S. 649, 694, 42 L. Ed. 890.

"By general international law, foreigners who have become domiciled in a country other than their own, acquire rights and must discharge duties in many respects the same as possessed by and imposed upon the citizens of that country, and no restriction on the footing upon which such persons stand by reason of their domicil of choice, or commercial domicil, is to be presumed." Fuller, C. J., Lau Ow Bew *v.* United States, 144 U. S. 47, 61, 36 L. Ed. 340, Brewer, J., dissenting in Fong Yue Ting *v.* United States, 149 U. S. 698, 736, 37 L. Ed. 905.

"When private individuals of one nation spread themselves through another, as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant vessels enter

2. Nonresident Aliens.—A nonresident alien cannot be a traitor.[19]

3. Crew of Vessel of Merchant Marine.—When a foreigner enters the mercantile marine of any nation and becomes one of the crew of a vessel having undoubtedly a national character, he assumes a temporary allegiance to the flag under which he serves, and in return for the protection afforded him becomes subject to the laws by which that nation in the exercise of an unquestioned authority governs its vessels and seamen.[20] The rule, that the vessel being American is evidence that the seamen on board are such, is now an established doctrine of this country; and in support of it there is with the American people no diversity of opinion and can be no division of action.[21] But it is part of the law of civilized nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two countries have come to some different understanding or agreement.[22]

for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction, and the government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country." The Exchange *v.* McFaddon, 7 Cranch 116, 143, 3 L. Ed. 287.

Liability for treason and kindred offenses.—Aliens who, being domiciled in the country prior to the rebellion, gave aid and comfort to the rebellion, were, therefore, subject to be prosecuted for violation of the laws of the United States against treason and for giving aid and comfort to the rebellion. Carlisle *v.* United States, 16 Wall. 147, 21 L. Ed. 426; Radich *v.* Hutchins, 95 U. S. 210, 24 L. Ed. 409.

Aliens domiciled in the United States in 1862 were engaged in manufacturing saltpetre in Alabama, and in selling that article to the Confederate States, knowing that it was to be used by them in the manufacture of gunpowder for the prosecution of the war of the rebellion; held, that they thus gave aid and comfort to the rebellion. Carlisle *v.* United States, 16 Wall. 147, 21 L. Ed. 426.

Amnesty.—The proclamation of the President of the United States, dated December 25th, 1868, granting "unconditionally, and without reservation, to all and to every person who, directly or indirectly, participated in the late insurrection or rebellion, a full pardon and amnesty for the offense of treason against the United States, or of adhering to their enemies during the late civil war, with restoration of all rights, privileges, and immunities under the constitution and the laws which have been made in pursuance thereof," included aliens domiciled in the country who gave aid and comfort to the rebellion. Carlisle *v.* United States, 16 Wall. 147, 148, 21 L. Ed. 426. See the titles CONFEDERATE STATES; TREASON; WAR. See post, "Criminal Jurisdiction over Aliens," III, F.

"Chinese persons born out of the United States, remaining subjects of the emperor of China, and not having become citizens of the United States, are entitled to the protection of, and owe allegiance to, the United States, so long as they are permitted by the United States to reside here; and are 'subject to the jurisdiction thereof,' in the same sense as all other aliens residing in the United States. Yick Wo *v.* Hopkins (1886), 118 U. S. 356, 30 L. Ed. 220; Lau Ow Bew *v.* United States (1892), 144 U. S. 47, 36 L. Ed. 340; Fong Yue Ting *v.* United States (1893), 149 U. S. 698, 724, 37 L. Ed. 905; Lem Moon Sing *v.* United States (1895), 158 U. S. 538, 547, 39 L. Ed. 1082; Wong Wing *v.* United States (1896), 163 U. S. 228, 239, 41 L. Ed. 140." United States *v.* Wong Kim Ark, 169 U. S. 649, 694, 42 L. Ed. 890.

Authority of congress.—See post, "Power of Congress and States," V, A.

Liability to taxation.—It seems well settled that aliens are subject to ordinary reasonable taxation in their persons and property by the government where they reside, as fully as citizens. Woodbury, J., dissenting, in Passenger Cases, 7 How. 238, 532, 12 L. Ed. 702. See, generally, the title TAXATION.

19. Nonresident alien incapable of treason.—Young *v.* United States, 97 U. S. 39, 63, 24 L. Ed. 992. See the title TREASON.

20. Crew of foreign merchant vessel.—Ross *v.* McIntyre, 140 U. S. 453, 473, 35 L. Ed. 581; United States *v.* Holmes, 5 Wheat. 412, 5 L. Ed. 122.

"This law may be suspended while he is in the ports of a foreign nation, but where such foreign nation grants to the country which he serves the power to administer its own laws in such foreign territory, then the law under which he enlisted again becomes supreme." Ross *v.* McIntyre, 140 U. S. 453, 474, 35 L. Ed. 581.

21. Vessel American, crew American.—Ross *v.* McIntyre, 140 U. S. 453, 479, 35 L. Ed. 581.

22. Owner and crew of foreign vessel in port.—Wildenhus' Case, 120 United

4. Foreign Public Vessel.—A public vessel of war of a foreign sovereign at peace with the United States, coming into our ports, and demeaning herself in a friendly manner, is exempt from the jurisdiction of the country.[23]

B. Right to Protection of Laws.—Aliens lawfully residing within the United States, permanently or temporarily, are entitled to the equal protection of the laws and the United States constitution.[24]

C. Holding Office, Sitting as Juror, or Voting.—While alienage might have been a cause of challenge, before the juror was sworn, advantage cannot be taken of it, after verdict.[25] Nor does the presence of an alien on the grand jury

States, 1, 11, 30 L. Ed. 565. See, also, The Exchange *v.* McFaddon, 7 Cranch 116, 143, 3 L. Ed. 287; Ross *v.* McIntyre, 140 U. S. 452, 474, 35 L. Ed. 581; Patterson *v.* Bark Eudora, 190 U. S. 169, 176, 47 L. Ed. 1002.

"As the owner has voluntarily taken his vessel for his own private purposes to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled." Wildenhus' Case, 120 U. S. 1, 12, 30 L. Ed. 565. See ante, "Domiciled Aliens," III, A, 1; post, "Criminal Jurisdiction over Aliens," III, F.

23. Foreign public vessel exempt from jurisdiction.—The Exchange *v.* McFaddon, 7 Cranch 116, 3 L. Ed. 287; Patterson *v.* Bark Eudora, 190 U. S. 169, 176, 47 L. Ed. 1002.

"It may safely be affirmed, that there is a manifest distinction between the private property of the person who happens to be a prince, and that military force which supports the sovereign power, and maintains the dignity and the independence of a nation. A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction: he may be considered as so far laying down the prince, and assuming the character of a private individual; but this he cannot be presumed to do, with respect to any portion of that armed force, which upholds his crown, and the nation he is intrusted to govern." The Exchange *v.* McFaddon, 7 Cranch 116, 145, 3 L. Ed. 287.

As to criminal jurisdiction, see post, "Criminal Jurisdiction over Aliens," III, F.

24. Carlisle *v.* United States, 16 Wall. 147, 21 L. Ed. 426; Yick Wo *v.* Hopkins, 118 U. S. 356, 371, 30 L. Ed. 220; Lau Ow Bew *v.* United States, 144 U. S. 47, 61, 36 L. Ed. 340; Fong Yue Ting *v.* United States, 149 U. S. 698, 724, 37 L. Ed. 905; Lem Moon Sing *v.* United States, 158 U. S. 538, 547, 39 L. Ed. 1082; Wong Wing *v.* United States, 163 U. S. 228, 239, 41 L. Ed. 140; United States *v.* Wong Kim Ark, 169 U. S. 649, 694, 42 L. Ed. 890. See Ah Sin *v.* Wittman, 198 U. S. 500, 49 L. Ed. 1142. See, however, post, "Admission or Exclusion of Aliens or Immigrants," V. And see the title CONSTITUTIONAL LAW.

"By the law of nations, doubtless, aliens residing in a country, with the intention of making it a permanent place of abode, acquire, in one sense, a domicil there; and, while they are permitted by the nation to retain such a residence and domicil, are subject to its laws, and may invoke its protection against other nations." (Gray, J.) Fong Yue Ting *v.* United States, 149 U. S. 698, 724, 37 L. Ed. 905.

"Aliens from countries at peace with us, domiciled within our country by its consent, are entitled to all the guaranties for the protection of their persons and property which are secured to native-born citizens." Field, J., dissenting in Fong Yue Ting *v.* United States, 149 U. S. 698, 754, 37 L. Ed. 905.

"That those who have become domiciled in a country are entitled to a more distinct and larger measure of protection than those who are simply passing through, or temporarily in it, has long been recognized by the law of nations." Brewer, J., dissenting in Fong Yue Ting *v.* United States, 149 U. S. 698, 734, 37 L. Ed. 905.

But it was held, however, in Baldwin *v.* Franks, 120 U. S. 678, 30 L. Ed. 766, that aliens were not protected by federal legislation against conspiracy to deprive them of rights guaranteed them under treaties, and that such legislation for the protection of "citizens," did not include within its purview resident aliens. See dissenting opinions of Harlan and Field, J.J. See, also, the titles CHINESE EXCLUSION ACTS; CITIZENSHIP.

Necessary averments.—Where it is claimed that the enforcement of a municipal ordinance denies to Chinese persons the equal protection of the law by being executed solely against them, it must be averred also that the conditions and practices to which it is properly directed did not exist exclusively among them, or that there were other offenders than the Chinese against whom it was not enforced. Ah Sin *v.* Whittman, 198 U. S. 500, 49 L. Ed. 1142.

25. Alienage of juror not a fundamental defect.—Hollingsworth *v.* Duane, 4 Dall. 353, 1 L. Ed. 864; Kohl *v.* Lehlback, 160 U. S. 293, 302, 40 L. Ed. 432.

"In Hollingsworth *v.* Duane, reported

which found the indictment deprive the court of jurisdiction to try the accused thereunder.[26]

Right to Vote and Hold Office Confined to Citizens.—Aliens differ only from citizens in that they cannot vote or hold any public office.[27]

D. Suing and Being Sued.—See the title COURTS. As to maritime contracts and causes of action, see the title ADMIRALTY, ante, p. 119.

1. SUITS BETWEEN ALIENS.—It was doubted, in one early case, whether the federal courts have jurisdiction in cases between aliens;[28] in another it was unanimously held, that no such jurisdiction existed;[29] and in three later cases it was expressly declared that congress had no power to confer such jurisdiction.[30] But these were all cases arising in a federal court for a state, and in a very recent case, without alluding to these earlier cases, the supreme court unanimously held that congress had conferred such jurisdiction, i. e., where the parties on both sides were aliens, on the federal district court for Porto Rico.[31]

in Wallace C. C. Reports, 147, and also, but imperfectly, in 4 Dall. 353, 1 L. Ed. 864, it was held, by the circuit court of the United States for the eastern district of Pennsylvania, at October term, 1801, that alienage of a juror is cause of challenge, but it is not per se sufficient to set aside a verdict, and this whether the party complaining knew of the fact or not; and that this was the rule at common law as shown by authorities cited from the Year Books and otherwise." Kohl *v.* Lehlback, 160 U. S. 293, 300, 40 L. Ed. 432. See the titles JURY; PUBLIC OFFICERS.

"**The disqualification of alienage is cause of challenge propter defectum**, on account of personal objection, and if, voluntarily, or through negligence, or want of knowledge, such objection fails to be insisted on, the conclusion that the judgment is thereby invalidated is wholly inadmissible. The defect is not fundamental as affecting the substantial rights of the accused, and the verdict is not void for want of power to render it. United States *v.* Gale, 109 U. S. 65, 72, 27 L. Ed. 857. Whether, where the defendant is without fault and may have been prejudiced, a new trial may not be granted on such a ground, is another question." Kohl *v.* Lehlback, 160 U. S. 293, 302, 40 L. Ed. 432.

26. Alienage of grand juror.—"The fact that a law of the territory allowed an alien who had declared his intention to become a citizen of the United States to sit on a grand jury, and that an alien did in fact sit on the jury that found the indictment against this petitioner, did not deprive the court of its jurisdiction for his trial under the indictment. The objection, if it be one, goes only to the regularity of the proceedings, not to the jurisdiction of the court." Ex parte Harding, 120 U. S. 782, 784, 30 L. Ed. 824.

27. Fong Yue Ting *v.* United States, 149 U. S. 698, 754, 37 L. Ed. 905. See the titles CITIZENSHIP; ELECTIONS; PUBLIC OFFICERS.

28. Suits between aliens.—Quære, whether the courts of the United States have jurisdiction in cases between aliens. Bailiff *v.* Tipping, 2 Cranch 406, 2 L. Ed. 320.

29. In Montalet *v.* Murray, 4 Cranch 46, 2 L. Ed. 545, the court was unanimously of opinion, that the courts of the United States have no jurisdiction of cases between aliens.

30. Limitation on power of congress.—Mossman *v.* Higginson, 4 Dall. 12, 1 L. Ed. 720; Hodgson *v.* Bower Bank, 5 Cranch 303, 3 L. Ed. 108; Jackson *v.* Twentyman, 2 Pet. 136, 7 L. Ed. 374.

The power of congress to confer jurisdiction on the federal courts of suits "where an alien is a party," is confined to suits between citizens and foreigners. Mossman *v.* Higginson, 4 Dall. 12, 1 L. Ed. 720; Hodgson *v.* Bower Bank, 5 Cranch 303, 3 L. Ed. 108.

The 11th section of the act of 1789 (giving jurisdiction where an alien is a party), must be construed in connection with, and in conformity to, the constitution of the United States; by this latter, the judicial power does not extend to private suits in which an alien is a party, unless a citizen be the adverse party; and it is indispensable, to aver the citizenship of the defendants, to show, on the record, the jurisdiction of the court. Jackson *v.* Twentyman, 2 Pet. 136, 7 L. Ed. 374.

31. Recent ruling as to Porto Rico.—The district court of the United States for the district of Porto Rico has jurisdiction of a cause, where the parties on both sides were subjects of the king of Spain. Ortega *v.* Lara, 202 U. S. 339, 50 L. Ed. 1055.

The court said: "The jurisdiction of the District Court, when the parties on both sides were subjects of the King of Spain, has several times been sustained by this court, and we do not feel required in this case to make any other ruling." Citing § 3, of Act of March 2, 1901, 31 Stat. 93, c. 812, as conferring such jurisdiction. Ortega *v.* Lara, 202 U. S. 339, 50 L. Ed. 1055. See, also, Perez *v.* Fernandez, 202 U. S. 80, 50 L. Ed. 942. And

2. Suits between Aliens and Citizens.—As to pleading, see post, "Pleading and Practice," IV.

a. *In General.*—Where all the substantial plaintiffs, for whose benefit the decree is sought, are aliens, the United States circuit courts have original jurisdiction between them and all the defendants, citizens of the United States.[32] Although the nominal plaintiffs may be citizens suing for aliens.[33] His becoming

see, post, "Averments as to Alienage or Citizenship," IV, A, 1.

In courts of admiralty.—See the title ADMIRALTY, ante, p. 119.

32. Jurisdiction of circuit courts.—Conolly *v.* Taylor, 2 Pet. 556, 7 L. Ed. 518; Bors *v.* Preston, 111 U. S. 252, 28 L. Ed. 419; Gracie *v.* Palmer, 8 Wheat. 699, 5 L. Ed. 719; Weems *v.* George, 13 How. 190, 14 L. Ed. 108; Hennessy *v.* Richardson Drug Co., 189 U. S. 25, 47 L. Ed. 697; Hughes *v.* Edwards, 9 Wheat. 489, 6 L. Ed. 142; Hepburn *v.* Dunlop, 1 Wheat. 179, 4 L. Ed. 65; Chisholm *v.* Georgia, 2 Dall. 419, 1 L. Ed. 440; Lacassagne *v.* Chapuis, 144 U. S. 119, 126, 36 L. Ed. 368; Re Hohorst, 150 U. S. 653, 37 L. Ed. 121. See, generally, the title COURTS.

By the act of March 3, 1887, c. 373, § 1, as corrected by the act of August 13, 1888, c. 886, 24 Stat. 552; 25 Stat. 434, congress, following the very words of the constitution, has vested in those courts jurisdiction of controversies between citizens of a state and foreign states, citizens or subjects. Re Hohorst, 150 U. S. 653, 659, 37 L. Ed. 1211; Press Pub. Co. *v.* Monroe, 164 U. S. 105, 110, 41 L. Ed. 367.

Where it affirmatively appears from the pleadings that complainants are citizens of a foreign state and defendant a citizen of a state, no issue of fact arising in that regard, the federal circuit court has jurisdiction. Henessy *v.* Richardson Drug Co., 189 U. S. 25, 47 L. Ed. 697.

Where there was a sale of an undivided moiety of a tract of land, and the purchaser undertook to extinguish certain liens upon it, which he failed to do; and in consequence of such failure the liens were enforced, and had to be paid by the alien heirs of the original owner, who was a citizen of same state with defendant, a suit by these heirs against the purchaser to recover damages for the nonfulfillment of his contract to extinguish the liens, was not within the prohibition of the 11th section of the judiciary act, 1 Stat. at L., 78. The heirs, being aliens, had a right to sue in the circuit court, for they did not claim as assignees. Weems *v.* George, 13 How. 190, 14 L. Ed. 108.

Alien trustees.—Where the plaintiffs are aliens, although they sue as trustees, yet they are entitled to sue in the circuit court. Chappedelaine *v.* Dechenaux, 4 Cranch 306, 2 L. Ed. 629.

Under treaty.—By the fifth article of the treaty of peace with Great Britain "it is agreed, that all persons who have any interest in confiscated lands, either by debts, marriage settlements or otherwise, shall meet with no lawful impediment in the prosecution of their just rights." The interest by debt, intended to be protected by the treaty, must be an interest holden as a security for money at the time of the treaty; and the debt must still remain due. Owings *v.* Norwood, 5 Cranch 344, 345, 3 L. Ed. 120. See Higginson *v.* Mein, 4 Cranch 415, 2 L. Ed. 664.

In Virginia.—Legal impediments to the recovery of British debts existed in Virginia, until the year 1793. Dunlop *v.* Ball, 2 Cranch 180, 2 L. Ed. 246.

In Texas.—Several cases have undoubtedly decided that an alien cannot sue for lands in Texas. "The last case referred to is that of White *v.* Sabriego (23 Tex. 243), which presented the naked question of alienage as a bar. The court, however, stated that under special circumstances aliens may sue; that is, under circumstances which entitle them to hold land; as, where they have a title emanating directly from the government, or where they acquired land by descent or purchase before the division of the empire and the change of government. In the subsequent case of Sabriego *v.* White (30 Tex. 576), involving the same title, the plaintiff showed that the land was granted to her mother before the revolution; and that her mother (with herself) removed to Matamoras during the revolution, and her mother died there in 1842; and that the plaintiff had ever since continued to reside in Matamoras, remaining a Mexican citizen. The court held that the plaintiff lawfully succeeded to her mother's rights, and retained her title to the property, no office having been found to forfeit it and hence that she was entitled to maintain her action. The case of Jones *v.* McMasters (20 How. 822, 15 L. Ed. 805) is also a case in point on this question, it being there held that alienage was no bar to an action, if the title of the alien was good; and the title was held good as against third persons until office found, and a judgment of forfeiture." Airhart *v.* Massieu, 98 U. S. 491, 499, 25 L. Ed. 213. Where it was held, that alienage was no objection to the right to vindicate the plaintiff's title in the courts here. See post, "Real Property," III, E, 1.

33. Citizen nominal party.—The courts of the United States have jurisdiction in a case between citizens of the same state, if the plaintiffs are only nominal plaintiffs, for the use of an alien. Browne *v.* Strode, 5 Cranch 303, 3 L. Ed. 108.

a citizen pending the suit will not divest the jurisdiction;[34] and the alien may be a foreign consul as well.[35] But the citizen defendant in suit by alien must be a resident of the United States, to give its circuit courts jurisdiction of the suit.[36]

b. *Alien Residents.*—Aliens do not lose their right to sue in the federal courts by residence within one of the United States.[37]

c. *Venue, Scope and Rule of Decision.*—An alien is assumed not to reside in the United States, and hence must resort to the domicil of the defendant when he sues. On the other hand, if the suit be against the alien, he may doubtless be sued in any district wherein he is found.[38] Where the jurisdiction of the United States circuit court in construing a state statute was based upon the fact that the plaintiffs were aliens and subjects of Great Britain, that court had the same jurisdiction as a state court would have had to try the whole question and to examine and decide not only as to its conformity with the federal constitution, but in addition whether the act were a violation of the state constitution, and whether the provisions of the act itself had been complied with. In exercising that jurisdiction it was nevertheless the duty of the trial court to follow and be guided by the decisions of the highest state court, upon the construction of the statute, and upon the question whether, as construed, the statute violated any provision of the state constitution. The same duty rests upon the federal

34. Citizenship acquired pending suit.—If an alien becomes a citizen, pending the suit, the jurisdiction which was once vested, is not divested by this circumstance. Conolly *v.* Taylor, 2 Pet. 556, 565, 7 L. Ed. 518.

Where plaintiff was an alien when the suit began, he had the right to sue in the courts of the United States. Cook *v.* Lillo, 103 U. S. 792, 26 L. Ed. 460.

35. Alien as foreign consul.—The jurisdiction of the circuit courts, conferred without qualification, of a controversy between a citizen and an alien, is not defeated by the fact that the alien happens to be the consul of a foreign government. Bors *v.* Preston, 111 U. S. 252, 261, 28 L. Ed. 419.

36. Nonresident citizen defendant not suable.—"Where a party defendant was a citizen of the United States, but resident in a foreign country, having no inhabitancy in any state of the Union, the circuit courts had no jurisdiction over him in a suit brought by an alien, though his property were attached in the district." Galveston, etc., Railway *v.* Gonzales, 151 U. S. 496, 500, 38 L. Ed. 248. See post, "Venue, Scope and Rule of Decision," III. D, 2, c.

37. Alien residents can sue.—If originally aliens, they did not cease to be so, nor lose their right to sue in the federal court, by a residence in Louisiana; neither the constitution nor the acts of congress require that aliens should reside abroad, to entitle them to sue in the courts of the United States. Breedlove *v.* Nicolet, 7 Pet. 413, 8 L. Ed. 731.

38. Venue.—Galveston, etc., Railway *v.* Gonzales, 151 U. S. 496, 503, 38 L. Ed. 248; Re Hohorst, 150 U. S. 653, 662, 37 L. Ed. 1211.

"In the case of Re Hohorst, 150 U. S. 653, 37 L. Ed. 1211, * * *, it was held, that the clause in question (act of Aug. 13, 1888, c. 866, 25 Stat. 433, revising jurisdiction of circuit courts), that no civil suit should be brought against any person in any other district than that whereof he was an inhabitant, was manifestly inapplicable to a suit brought by a citizen of one of the United States against an alien, and that the words of the provision evidently looked to those persons, and those persons only, who were inhabitants of some district within the United States." Galveston, etc., Railway *v.* Gonzales, 151 U. S. 496, 503, 38 L. Ed. 248.

Especially in a suit for the infringement of a patent right; and consequently, such a person may be sued by a citizen of a state of the Union in any district in which valid service can be made upon the defendant. Re Hohorst, 150 U. S. 653, 662, 37 L. Ed. 1211; Ex parte Louisville Underwriters, 134 U. S. 488, 33 L. Ed. 991.

It is there enacted that "no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant; but, where the jurisdiction is founded only on the fact that the action is between citizens of different states, suit shall be brought only in the district of the residence of either the plaintiff or the defendant." Of these two provisions, the latter relates only to suits between citizens of different states of the Union, and is therefore manifestly inapplicable to a suit brought by a citizen of one of these states against an alien. And the former of the two provisions cannot reasonably be construed to apply to such a suit." Re Hohorst, 150 U. S. 653, 660, 37 L. Ed. 1211; Barrow S. S. Co. *v.* Kane, 170 U. S. 100, 112, 42 L. Ed. 964.

supreme court, and it has been so determined from the earliest period of its history.[39]

3. Suits between a State and an Alien.—Where a state has a controversy with an alien about a contract, or other matter of a civil nature, the supreme court of the United States has original jurisdiction of it, and the circuit or district courts have nothing to do with such a case.[40] And that the federal courts cannot entertain a suit brought against a state by an alien, is not to be controverted.[41]

4. Suits by Aliens against the United States.—The privilege of suing in the court of claims on claims against the United States is accorded to such aliens only whose governments accord essentially the same privilege to citizens of the United States.[42]

5. Suits by Foreign Governments.—A foreign government may, if it see fit, submit its case to the courts of the country with whose citizens its contro-

39. Scope and rule of decision.—Fallbrook Irrigation District *v.* Bradley, 164 U. S. 112, 154, 41 L. Ed. 369. See the titles CONSTITUTIONAL LAW; COURTS.

Pleading and objections to jurisdiction, see post, "Pleading and Practice," IV.

40. Jurisdiction exclusive in supreme court.—Respublica *v.* Cobbett, 3 Dall. 467, 475, 1 L. Ed. 683. See Chisholm *v.* Georgia, 2 Dall. 419, 1 L. Ed. 440.

41. State cannot be sued.—See the eleventh amendment to federal constitution. Osborn *v.* United States, 9 Wheat. 738, 903, 6 L. Ed. 204. See Chisholm *v.* Georgia, 2 Dall. 419, 1 L. Ed. 440. See the title STATES.

42. United States *v.* O'Keefe, 11 Wall. 178, 20 L. Ed. 131; Carlisle *v.* United States, 16 Wall. 147, 21 L. Ed. 426. See, generally, the titles COURTS; UNITED STATES.

"One nation treats with the citizens of another only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation, must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. It rests with the sovereign against whom the demand is made to determine for himself what he will do in respect to it. He may pay or reject it; he may submit to arbitration, open his own courts to suit, or consent to be tried in the courts of another nation. All depends upon himself." United States *v.* Diekelman, 92 U. S. 520, 524, 23 L. Ed. 742. See the title INTERNATIONAL LAW.

District court for Porto Rico.—By the act of April 12, 1900, the district court of the United States for Porto Rico was given, "in addition to the ordinary jurisdiction of district courts of the United States, jurisdiction of all cases cognizant in the circuit courts of the United States, and shall proceed in the same manner as a circuit court." 31 Stat. 85, c. 191, § 34. If, therefore, an action could have been brought in a district or circuit court of the United States, it was within the cognizance of this court. This is determined by the act of March 3, 1887, commonly known as the "Tucker Act," and which provides for the bringing of suits against the government of the United States. 24 Stat. 505, c. 359. Hijo *v.* United States, 194 U. S. 315, 321, 48 L. Ed. 994.

Quære, whether the requirement in the Tucker Act, that the petition shall be filed "in the district where the plaintiff resides," precludes a suit against the United States by any person, natural or corporate, residing out of the country. Hijo *v.* United States, 194 U. S. 315, 322, 48 L. Ed. 994.

British subjects.—By the proceeding known as a "petition of right," the government of Great Britian accords to citizens of the United States the right to prosecute claims against the government in its courts, and therefore British subjects, if otherwise entitled, may, under the act of congress of July 27th, 1868, prosecute claims against the United States in the court of claims. Carlisle *v.* United States, 16 Wall. 147, 21 L. Ed. 426; United States *v.* O'Keefe, 11 Wall. 178, 20 L. Ed. 131.

Accordingly, British subjects, if otherwise entitled, may recover by process in our court of claims the proceeds of captured and abandoned property; a privilege granted only to the citizens or subjects of such foreign governments as accord to our citizens the right to prosecute claims against such governments in their courts. United States *v.* O'Keefe, 11 Wall. 178, 20 L. Ed. 131. See, generally, the title ABANDONED AND CAPTURED PROPERTY, ante, p. 1.

versy exists, and the federal circuit courts have jurisdiction, but it has the right of appeal therefrom.[43] And the right of a foreign sovereign to sue is not defeated, nor does such suit abate, by change in the person of such sovereign.[44]

6. SUITS BY AND AGAINST ALIEN ENEMIES.—See the title CONFEDERATE STATES; WAR.

7. SUITS TO ENFORCE TITLE TO LAND—ALIEN MORTGAGEE.—An alien cannot have an action to enforce the title to land which he has taken by way of purchase; but the supreme court has decided, in Hughes *v.* Edwards, 9 Wheat. 489, 6 L. Ed. 142, that an alien mortgagee may have the aid of a court of equity to foreclose a mortgage by a sale, because the debt is the principal thing and the land only an incident.[1]

E. Property Rights—1. REAL PROPERTY—a. *Right to Acquire and Hold*—(1) *At Common Law*—(a) *By Inheritance.*—The common law, unmodified by statute or treaty, would have excluded aliens from inheriting lands in the United States from a citizen thereof. Its doctrine is that aliens have no inheritable blood through which a title can be transferred by operation of law.[45] There is no admitted difference between alien friends and enemies in this respect.[46]

43. Suits by foreign states and right of appeal.—Colombia *v.* Cauca Co., 190 U. S. 524, 47 L. Ed. 1159; The Sapphire, 11 Wall. 164, 20 L. Ed. 127. See Cherokee Nation *v.* Georgia, 5 Pet. 18 L. Ed. 25.

Where a foreign government has seen fit to submit its case to the courts of the country with whose citizens its controversy exists, it would be unfortunate if through any mistake it was prevented from carrying questions of law to the court of last resort, and it had the right to appeal. The circuit court had jurisdiction under the constitution, article 3, § 2, and the act of August 13, 1888, c. 866, § 1, 25 Stat. 434, as the suit is "a controversy between citizens of a state and foreign states, citizens, or subjects," within the words and meaning of the act. The Sapphire, 11 Wall. 164, 167, 20 L. Ed. 127. The right to appeal from the decree of the circuit court of appeals is given by the act of March 3, 1891, c. 517, § 6, 26 Stat. 826, 828, "in all cases not hereinbefore, in this section, made final." The only words of the section relied upon as making the decree of the circuit court of appeals final are those which declare it so "in all cases where the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states." There is no reason to doubt that congress was as well aware of the distinction between foreign states and foreign citizens when it passed the act of 1891 as when it passed the act of 1888, and that when it spoke of aliens it meant foreign citizens alone. Colombia *v.* Cauca Co., 190 U. S. 524, 47 L. Ed. 1159.

44. Effect of change in sovereign's person.—The Sapphire, 11 Wall. 164, 20 L. Ed. 127. See the title ABATEMENT, REVIVAL AND SURVIVAL, ante, p. 12.

1. Neilson *v.* Lagow, 12 How. 98, 108, 13 L. Ed. 909.

45. Cannot take by operation of law.—Geofroy *v.* Riggs, 133 United States, 258, 265, 33 L. Ed. 642; Fairfax *v.* Hunter, 7 Cranch 603, 619, 3 L. Ed. 453, reaffirmed in 1 Wheat. 304; Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. Ed. 628; Orr *v.* Hodgson, 4 Wheat. 453, 4 L. Ed. 613; Jackson *v.* Clarke, 3 Wheat. 1, 13, 4 L. Ed. 319; McCreery *v.* Somerville, 9 Wheat. 354, 6 L. Ed. 109; Minor *v.* Happersett, 21 Wall. 162, 169, 22 L. Ed. 627; Sullivan *v.* Burnett, 105 U. S. 334, 337, 26 L. Ed. 1124; McKinney *v.* Saviego, 18 How. 235, 15 L. Ed. 365; Kelly *v.* Owen, 7 Wall. 496, 19 L. Ed. 283; Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99, 7 L. Ed. 617; Blight *v.* Rochester, 7 Wheat. 535, 544, 5 L. Ed. 516; Spratt *v.* Spratt, 4 Pet. 393, 408, 7 L. Ed. 897; Beard *v.* Rowan, 9 Pet. 301, 9 L. Ed. 135; Lambert *v.* Paine, 3 Cranch 97, 130, 2 L. Ed. 377; Dawson *v.* Godfrey, 4 Cranch 321, 2 L. Ed. 634; Phillips *v.* Moore, 100 U. S. 208, 212, 25 L. Ed. 603; Craig *v.* Leslie, 3 Wheat. 563, 574, 4 L. Ed. 460; Levy *v.* McCartee, 6 Pet. 102, 8 L. Ed. 334; Hanrick *v.* Patrick, 119 U. S. 156, 165, 30 L. Ed. 396; Middleton *v.* McGrew, 23 How. 45, 16 L. Ed. 403.

There is no exception, at common law, which gives the right to inherit distinctly from the obligation of allegiance, existing either in fact or in supposition of law. Dawson *v.* Godfrey, 4 Cranch 321, 323, 2 L. Ed. 634. See post, "Effect of Division of Country," III, E, 4.

Where a person dies, leaving issue, who are aliens, the latter are not deemed his heirs in law; but the estate descends to the next of kin who have an inheritable blood, in the same manner as if no such alien issue were in existence. Orr *v.* Hodgson, 4 Wheat. 453, 4 L. Ed. 613.

46. Alien friends and enemies alike.—Fairfax *v.* Hunter, 7 Cranch 602, 619, 3 L. Ed. 453, reaffirmed in 1 Wheat. 304; Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. Ed. 628.

And lands cast by descent will escheat, where the beneficiary is an alien, without office found.[47]

(b) *By Purchase.*—But aliens may take by grant or devise though not by descent. In other words, they may take by the act of a party, but not by operation of law; and they may convey or devise to another, but such a title is always liable to be devested at the pleasure of the sovereign by office found. In such cases the sovereign, until entitled by office found or its equivalent, cannot pass the title to a grantee.[48] And the same rule prevails in equity, although a chan-

47. Escheat.—Fairfax *v.* Hunter, 7 Cranch 603, 3 L. Ed. 453; Taylor *v.* Benham, 5 How. 233, 12 L. Ed. 130; McKinney *v.* Saviego, 18 How. 235, 15 L. Ed. 365. See the title ESCHEAT.

48. May take by purchase or act of party.—Fairfax *v.* Hunter, 7 Cranch 602, 619, 3 L. Ed. 453, reaffirmed in 1 Wheat. 304; Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. Ed. 628; Orr *v.* Hodgson, 4 Wheat. 453, 4 L. Ed. 613; Conrad *v.* Waples, 96 U. S. 279, 289, 24 L. Ed. 721; Craig *v.* Leslie, 3 Wheat. 563, 588, 4 L. Ed. 460; Phillips *v.* Moore, 100 U. S. 208, 212, 25 L. Ed. 603; Cross *v.* De Valle, 1 Wall. 1, 17 L. Ed. 515; Airhart *v.* Massieu, 98 U. S. 491, 493, 25 L. Ed. 213; Jackson *v.* Clarke, 3 Wheat. 1, 13, 4 L. Ed. 319; Craig *v.* Radford, 3 Wheat. 594, 4 L. Ed. 467; Doe *v.* Robertson, 11 Wheat. 332, 6 L. Ed. 488; Society for the Propagation of the Gospel *v.* New Haven, 8 Wheat. 464, 491, 5 L. Ed. 662. See Jones *v.* McMasters, 20 How. 8, 21, 15 L. Ed. 805.

"It is clear by the common law, that an alien can take lands by purchase, though not by descent; or, in other words, he cannot take by the act of law, but he may by the acts of the party. This principle has been settled in the Year Books, and has been uniformly recognized as sound law from that time." Fairfax *v.* Hunter, 7 Cranch 603, 619, 3 L. Ed. 453, reaffirmed in 1 Wheat. 304; Orr *v.* Hodgson, 4 Wheat. 453, 4 L. Ed. 613; Conrad *v.* Waples, 96 U. S. 279, 289, 24 L. Ed. 721.

Freehold interest.—An alien cannot only take an interest in land, but a freehold interest in the land itself, and may hold it against all the world but the king, and even against him, until office found, and he is not accountable for the rents and profits previously received. Craig *v.* Leslie, 3 Wheat. 563, 588, 4 L. Ed. 460; Craig *v.* Radford, 3 Wheat. 594, 4 L. Ed. 467.

Necessity for inquest of office or equivalent.—As to land taken by devise or purchase, an alien can always hold it till office found. Taylor *v.* Benham, 5 How. 232, 270, 12 L. Ed. 130; Doe *v.* Robertson, 11 Wheat. 332, 355, 6 L. Ed. 488; Fairfax *v.* Hunter, 7 Cranch 603, 618, 3 L. Ed. 453; Manuel *v.* Wulff, 152 U. S. 505, 507, 38 L. Ed. 532; Cross *v.* De Valle, 1 Wall. 1, 17 L. Ed. 515; National Bank *v.* Matthews, 98 U. S. 621, 628, 25 L. Ed. 188; Phillips *v.* Moore, 100 U. S. 208, 212, 25 L. Ed. 603; Craig *v.* Leslie, 3 Wheat. 563, 588, 4 L. Ed. 460; McKinley Mining Co. *v.* Alaska Mining Co., 183 U. S. 563, 571, 46 L. Ed. 331. See Jones *v.* McMasters, 20 How. 8, 21, 15 L. Ed. 805; Runyan *v.* Coster, 14 Pet. 122, 131, 10 L. Ed. 382; Bennett *v.* Hunter, 9 Wall. 326, 336, 19 L. Ed. 672; King *v.* Mullins, 171 U. S. 404, 417, 43 L. Ed. 214; Fritts *v.* Palmer, 132 U. S. 282, 293, 33 L. Ed. 317.

An alien may take, by purchase, a freehold estate, which cannot be divested on the ground of alienage, but by inquest of office, or some legislative act equivalent thereto. Craig *v.* Radford, 3 Wheat. 594, 4 L. Ed. 467; Craig *v.* Leslie, 3 Wheat. 563, 589, 4 L. Ed. 460; Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. Ed. 628.

"The case of Fairfax's Devisee *v.* Hunter's Lessee, 7 Cranch 603, involved the title to a large tract of land in Virginia, granted to Lord Fairfax. The lands were devised by will to Denny Fairfax, a British subject, who never became a citizen of the United States, but always resided in England, and was an alien enemy. In 1789, the governor of the commonwealth of Virginia granted the lands by patent to Hunter, a citizen of Virginia, who entered into possession prior to the institution of the action. It was the opinion of the court that the title acquired by an alien by purchase is not divested until office found, although it was contended that the common law as to inquests of office had been dispensed with by statute, so as to make the grant to Hunter complete and perfect. As to this point Mr. Justice Story observed, p. 622: 'We will not say that it was not competent for the legislature (supposing no treaty in the way), by a special act, to have vested the land in the commonwealth without an inquest of office for the cause of alienage. But such an effect ought not, upon principles of public policy, to be presumed upon light grounds; that an inquest of office should be made in cases of alienage, is a useful and important restraint upon public proceedings.'" (Obiter.) Atlantic, etc., R. Co. *v.* Mingus, 165 U. S. 413, 41 L. Ed. 770.

"Mr. Justice Johnson, dissenting, was of opinion that the interest acquired by Denny Fairfax under the devise was a mere scintilla juris, and that that scintilla was extinguished by the grant of the state vesting the tract in Hunter; that it was competent for the state to assert

cellor may not entertain a bill by an alien to enforce a trust, which, if conveyed

its rights over an alien's property by other means than by an inquest of office; subsequent cases in this court have asserted this power to exist beyond any controversy." Atlantic, etc., R. Co. *v.* Mingus, 165 U. S. 413, 41 L. Ed. 770.

Whether the purchase be by grant or devise, the estate vests in the alien, not for his own benefit, but for the benefit of the state; or, in the language of the ancient law, the alien has the capacity to take but not to hold lands, and they may be seized into the hands of the sovereign. But, until the lands are so seized, the alien has complete dominion over the same. Fairfax *v.* Hunter, 7 Cranch 603, 3 L. Ed. 453; S. C., 1 Wheat 304; Conrad *v.* Waples, 96 U. S. 279, 289, 24 L. Ed. 721.

"The legislature must first act before any proceedings can be taken to annul the title of an alien, or any other escheatable titles." Airhart *v.* Massieu, 98 U. S. 491, 498, 25 L. Ed. 213. See Jones *v.* McMasters, 20 How. 8, 21, 15 L. Ed. 805. See post, "Laws of Particular States," III, E, 1, a, (3), (b).

And until office found, an alien was competent to hold land against third persons, even in a country the laws of which forbade the holding of real estate by an alien. No one has any right to complain in a collateral proceeding, if the sovereign does not enforce his prerogative. Osterman *v.* Baldwin, 6 Wall. 116, 121, 18 L. Ed. 730; Phillips *v.* Moore, 100 U. S. 208, 25 L. Ed. 603.

Nature of proceeding.—"By the common law, an alien cannot acquire real property by operation of law, but may take it by act of the grantor, and hold it until office found; that is, until the fact of alienage is authoritatively established by a public officer, upon an inquest held at the instance of the government. The proceeding which contains the finding of the fact upon the inquest of the officer is technically designated in the books of law as 'office found.' It removes the fact, upon the existence of which the law devests the estate and transfers it to the government, from the region of uncertainty, and makes it a matter of record." Phillips *v.* Moore, 100 U. S. 208, 212, 25 L. Ed. 603. See the title ESCHEAT.

As ground for rescission or specific performance.—The alienage of the vendee is an insufficient ground to entitle the vendor to a decree for rescinding a contract for the sale of lands, though it may afford a reason for refusing a specific performance, as against the vendee. Hepburn *v.* Dunlop, 1 Wheat. 179, 4 L. Ed. 65.

Modes of acquisition distinguished.—Whether the executor had a power to sell coupled with a trust, or a power coupled with an interest, the residuary legatees took by devise and not by descent, although they were supposed to be also cestuis que trust. If, therefore, they were aliens, the land did not escheat on the death of the trustee, because land taken by devise does not escheat until office found, although land cast by descent does. Talyor *v.* Benham, 5 How. 233, 12 L. Ed. 130.

Homestead entry or mining claim.—See the titles MINES AND MINERALS; PUBLIC LANDS.

The transfer of a mining claim by a qualified locator to an alien is not to be treated as ipso facto an abandonment, and the analogy of such a case to the casting of descent upon an alien cannot be maintained. Manuel *v.* Wulff, 152 U. S. 505, 508, 38 L. Ed. 532; McKinley Mining Co. *v.* Alaska Mining Co., 183 U. S. 563, 571, 46 L. Ed. 331.

"The supreme court of Montana has recognized the settled rule that an alien may take and hold land by purchase until office found, and that, if the alien become a citizen before his alienage has been adjudged, the act of naturalization takes effect by relation; but held that 'possessory rights to mining claims on the public domain of the United States,' although 'endowed with the qualities of real estate to a high degree,' did not come within that rule." Manuel *v.* Wulff, 152 U. S. 505, 507, 38 L. Ed. 532.

Where locator was a citizen, if his location were valid, his claim passed to his grantee, not by operation of law, but by virtue of his conveyance, and the incapacity of the latter to take and hold by reason of alienage was, under the circumstances, open to question by the government only. Manuel *v.* Wulff, 152 U. S. 505, 511, 38 L. Ed. 532; McKinley Mining Co. *v.* Alaska Mining Co., 183 U. S. 563, 571, 46 L. Ed. 331. See post, "Termination or Waiver of Objection of Alienage," III, E, 1, a, (1), (c).

Under state grant.—"If there is any view of the subject in which an alien, taking under grant, may be considered as taking by operation of law, it is because the grant issues and takes effect, under a law of the state. But this is by no means the sense of the rule, since attaching to it this idea would be to declare the legislative power of the state incompetent to vest in an alien even a defeasible estate." Doe *v.* Robertson, 11 Wheat. 332, 355, 6 L. Ed. 488.

Possessory right to entry on public lands.—Under a state constitution giving aliens, who were bona fide residents of the state, the rights of native born citizens in respect to the possession and enjoyment of property, a possessory right, to a cattle range on public lands, is property of value. Griffith *v.* Godey, 113 U. S. 89, 96, 28 L. Ed. 934.

Reason for rule.—The only unexcep-

to him, might immediately escheat.[49] In these respects there is no difference between an alien friend and an alien enemy.[50]

(c) *Termination or Waiver of Objection of Alienage.*—If an alien became a citizen before his alienage has been adjudged, the act of naturalization takes effect by relation, so as to be a waiver of all liability to forfeiture and a confirmation of his former title.[51] And an alien having made homestead entry and subsequently filed his intention to become a citizen, the alienage at time of entry, in the absence of an adverse claim, would not defeat the right of purchase.[52] This objection of alienage may be waived by the government entitled to insist thereon.[1]

(2) *By the Civil Law.*—By the civil law, some proceeding, equivalent in its substantive features to office found, was also essential to take the fact of alienage from being a matter of mere surmise and conjecture, and to make it a matter of record. Such a proceeding was usually had before the local magistrate or council, and might be taken at the instance of the government, or upon the denouncement of a private citizen.[53]

(3) *Constitutional and Statutory Provisions.*—See post, "Treaty Rights," III, E, 6.

(a) *In General.*—The law of nations recognizes the liberty of every government to give to foreigners only such rights, touching immovable property within its territory, as it may see fit to concede. In our country, this authority is primarily in the states where the property is situated.[54] And it may refuse to allow an alien to succeed to either real or personal property situated within its limits.[55] So, of course, it may expressly allow such transmission of property to

tionable reason that can be assigned why an alien can take by deed, though he cannot hold, is, that otherwise the proprietor would be restricted in his choice of an alienee; or in other words, in his right of alienation.

49. Cross *v.* De Valle, 1 Wall. 1, 4, 13, 17 L. Ed. 515.

50. Friends and enemies on same footing.—Fairfax *v.* Hunter, 7 Cranch 603, 619, 3 L. Ed. 543; S. C., 1 Wheat. 304, 4 L. Ed. 97; Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. Ed. 628; Craig *v.* Radford, 3 Wheat. 594, 4 L. Ed. 467; Conrad *v.* Waples, 96 U. S. 279, 290, 24 L. Ed. 721.

51. Alienage determined before adjudication.—Manuel *v.* Wulff, 152 U. S. 505, 507, 38 L. Ed. 532; Osterman *v.* Baldwin, 6 Wall. 116, 18 L. Ed. 730. See, generally, the title PUBLIC LANDS.

52. In a contested application for a patent to a mining claim, made by the grantee of the locator, who was an alien at the time of the conveyance to him but was subsequently naturalized, inasmuch as this proceeding was based upon an adverse claim to the application for a patent, the objection of alienage was properly made, but this was as in right and on behalf of the government, and naturalization removed the infirmity before judgment was rendered. Manuel *v.* Wulff, 152 U. S. 505, 511, 38 L. Ed. 532. See, generally, the title PUBLIC LANDS.

And the acquisition of citizenship by a woman, by virtue of marriage to a citizen of the United States, removes her disability to inherit lands. Kelly *v.* Owen, 7 Wall. 496, 19 L. Ed. 283. And see the titles CITIZENSHIP; NATURALIZATION.

1. Waiver of objection of alienage.—Semble, that where congress authorizes a court to hear a question of title, to which the United States is a party, and in adjudicating it to be governed by the law of nations and of the country from which the title was derived, by principles of natural justice and according to the law of nations and stipulations of treaties, an objection of mere alienage and consequent incapacity to take or hold, must be regarded as waived. See ante, "By Purchase," III, E, 1, a, (1), (b); post, "By the Civil Law," III, E, 1, a, (2). United States *v.* Repentigny, 5 Wall. 211, 212, 18 L. Ed. 627.

53. Some proceeding necessary to establish alienage.—Phillips *v.* Moore, 100 U. S. 208, 212, 25 L. Ed. 603. See ante, "By Purchase," III, E, 1, a, (1), (b).

54. Freedom of legislation under law of nations.—Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. Ed. 628; Blythe *v.* Hinckley, 180 U. S. 333, 45 L. Ed. 557. See, also, Beard *v.* Rowan, 9 Pet. 301, 317, 9 L. Ed. 135; Chirac *v.* Chirac, 2 Wheat. 259, 4 L. Ed. 234; Levy *v.* McCartee, 6 Pet. 102, 8 L. Ed. 334.

55. May forbid alien to take by succession.—"Every state or nation may unquestionably refuse to allow an alien to take either real or personal property, situated within its limits, either as heir or legatee, and may, if it thinks proper, direct that property so descending or bequeathed shall belong to the state. In many of the states of this Union at this day, real

aliens.[56]

(b) *Laws of Particular States*—**California.**—The constitution of California in force in 1870 invested foreigners, who were bona fide residents of the state, with the same rights, in respect to the possession and enjoyment of property, as native born citizens. Art. I, § 17.[57]

Georgia.—By the act of 1810, when a citizen died with no heir capable of inheriting his real estate on account of alienage, the real estate did not escheat, but was sold and the proceeds paid to the devisees named in decedent's will. "Heir" here does not include next of kin or devisee, but means an heir that may inherit the real estate under the laws of Georgia.[58]

Kentucky.—Under the Kentucky act of 1800 the condition upon which aliens other than enemies were placed on the same footing with citizens, with respect to the right of holding and disposing of land, was a two years' residence within the state; and the full effect and benefit of the act, and the clear intention of the legislature, required a construction which gave to it a prospective as well as retrospective application.[59]

Maryland and District of Columbia.—The statute of 11 & 12 Wm. III, ch. 6, which is in force in Maryland, removes the common-law disability of claiming title through an alien ancestor, but does not apply to a living alien ancestor, so as to create a title by heirship, where none would exist by the common-law, if the ancestor were a natrual-born subject or citizen.[60] By acts of the Maryland

property devised to an alien is liable to escheat. And if a state may deny the privilege altogether, it follows that, when it grants it, it may annex to the grant any conditions which it supposes to be required by its interests or policy. This has been done by Louisiana. The right to take is given to the alien, subject to a deduction of ten per cent. for the use of the state." Mager *v.* Crima, 8 How. 490, 493, 12 L. Ed. 1168.

56. Express authority to acquire.—"There has not been cited a single case where any doubt has been thrown upon the right of a state, in the absence of a treaty, to declare an alien capable of inheriting or taking property and holding the same within its borders. The treaties have always been for the purpose of enabling an alien to take even though the particular state may not have expressly permitted it. But no case has arisen where it was asserted or claimed that a state in the absence of a treaty might not itself permit an alien to take property within its limits." Blythe *v.* Hinckley, 180 U. S. 333, 341, 45 L. Ed. 557. See Chirac *v.* Chirac, 2 Wheat. 259, 4 L. Ed. 234; Levy *v.* McCartee, 6 Pet. 102, 8 L. Ed. 334.

It is not necessary that aliens should be made citizens, in order to hold real estate; and the condition upon which this may be done, is a matter resting entirely with the state legislature. Beard *v.* Rowan, 9 Pet. 301, 317, 9 L. Ed. 135.

57. California laws.—Griffith *v.* Godey, 113 U. S. 89, 96, 28 L. Ed. 934.

The possessory right to a cattle range on public lands, though held by aliens, was property of value in California in 1870. Griffith *v.* Godey, 113 U. S. 89, 96, 28 L. Ed. 934.

58. Georgia laws.—McLearn *v.* Wallace, 10 Pet. 625, 637, 9 L. Ed. 559.

The preamble of this act refers only to estates of citizens bequeathing their property to aliens, but the first section seems to refer as well to cases of intestacy, such as this. And where the next of kin of such intestate are aliens, there being more remote kin who are citizens, the latter are entitled to the remaining proceeds of the real estate which was sold to pay its part of a mortgage on the entire property, and not the next of kin. McLearn *v.* Wallace, 10 Pet. 625, 637, 9 L. Ed. 559.

The rights of foreign heirs, under the laws of Georgia, are to be regarded equally as those of domestic heirs; where each has interests in the property of a deceased person, they are alike entitled to the consideration and protection of a court of chancery. McLearn *v.* Wallace, 10 Pet. 625, 641, 9 L. Ed. 559.

59. Kentucky laws.—Beard *v.* Rowan, 9 Pet. 301, 317, 9 L. Ed. 135.

The preamble shows that the legislative intention was to make a general provision for removing the disability of aliens to hold real estate, and it is not to be restricted to aliens who had resided two years in the state before its passage. It does not profess to naturalize aliens, and is not objectionable on that ground. Beard *v.* Rowan, 9 Pet. 301, 317, 9 L. Ed. 135.

60. Maryland laws.—McCreery *v.* Somerville, 9 Wheat. 354, 6 L. Ed. 109.

Thus, where A. died seised of lands in Maryland, leaving no heirs, except B., a brother, who was an alien, and had never been naturalized as a citizen of the United States, and three nieces, the daughters of the said B., who were native citizens of the United States; it was held, that they could

legislature, passed in 1780 and 1791, respectively, the disqualification of alienage was further modified, but not entirely removed. The former act applied only to French heirs of naturalized Frenchmen, with a proviso, that they must become resident citizens of the state within ten years.[61] The latter act, which applied to any foreigner, although only to the District of Columbia, did not do away with the disability to take realty by inheritance from a citizen of the United States.[62]

not claim title by inheritance through B., their father, he being an alien, and still living. McCreery *v.* Somerville, 9 Wheat. 354, 6 L. Ed. 109.

61. Acts of 1780 and 1791.—Chirac *v.* Chirac, 2 Wheat. 259, 4 L. Ed. 234; Geofroy *v.* Riggs, 133 U. S. 258, 265, 33 L. Ed. 642; Spratt *v.* Spratt, 1 Pet. 343, 7 L. Ed. 171; S. C., 4 Pet. 393, 7 L. Ed. 897.

J. B. C. having died seised in fee of the lands in question, his heirs being French subjects, the treaty of 1778 having been abrogated, and the act of Maryland, of 1780, permitting the lands of a French subject, who had become a citizen of Maryland, dying intestate, to descend on the next of kin, being nonnaturalized Frenchmen, with a proviso vesting the land in the state, if the French heirs should not, within ten years, become resident citizens of the state, or convey the lands to a citizen; it was determined, that the time for the performance of this condition having expired, before the action was brought, the estate was terminated, unless supported in some other manner than by the act of Maryland. Chirac *v.* Chirac, 2 Wheat. 259, 4 L. Ed. 234.

The act of Maryland of 1780 modified the common law so far as to allow a subject of France who had settled in that state, and given assurances of allegiance and attachment to it as required of citizens to devise to French subjects, who for that purpose were to be deemed citizens, of the state. Act of March, 1780, c. 8, § 5, 1 Dorsey's Laws of Maryland, 158. It also provided that if the decedent died intestate, his natural kindred, whether residing in France or elsewhere, should inherit his real estate in like manner as if such decedent, and his kindred, were citizens of the United States. It had no bearing, however, upon the inheritance of a subject of France, except from a Frenchman domiciled in the state. Geofroy *v.* Riggs, 133 U. S. 258, 265, 33 L. Ed. 642.

62. Land in the county of Washington, and District of Columbia, purchased by a foreigner, before naturalization, was held by him, under the law of Maryland, and might be transmitted to the relations of the purchaser, who were foreigners; and the capacity so to transmit those lands is given absolutely by this act, and is not affected by his becoming a citizen; but passes to his heirs and relations, precisely as if he had remained a foreigner. Spratt *v.* Spratt, 1 Pet. 343, 7 L. Ed. 171.

The act of the legislature of Maryland of 1791, which authorizes the descent to alien heirs, of lands held by aliens under "deed or will," in that part of the District of Columbia which was ceded to the United States by the state of Maryland, does not authorize the descent to such heirs of land, in that part of the district, which was purchased by an alien, at a sale made under an order of the court of chancery, and for which no deed was executed, before the purchaser became a citizen of the United States, or before his decease. Spratt *v.* Spratt, 4 Pet. 393, 7 L. Ed. 897.

"The act of Maryland of December, 19, 1791, which provided in its sixth section that any foreigner might, by deed or will thereafter made, take and hold lands within the state in the same manner as if he were a citizen thereof, and that the lands might be conveyed by him, and transmitted to and inherited by his heirs and relations as if he and they were citizens of the state, did not do away with the disability of foreigners to take real property within that state by inheritance from a citizen of the United States. It was so held in effect in Spratt *v.* Spratt, 1 Pet. 343, 7 L. Ed. 171; S. C., 4 Pet. 393, 7 L. Ed. 897." Geofroy *v.* Riggs, 133 U. S. 258, 265, 33 L. Ed. 642.

It is an enabling act; and applies to those only who could not take lands without the provisions of that law. It enables a "foreigner" to take, in the same manner as if he were a citizen. Spratt *v.* Spratt, 1 Pet. 343, 7 L. Ed. 171.

"In a controversy between the alien heirs of James Spratt and Sarah Spratt, 1 Pet. 343, 7 L. Ed. 171, this court determined, that land which James Spratt took and held under the enabling act of Maryland, descended to his alien heirs, but that land which he took and held as a citizen, did not pass to those heirs." Spratt *v.* Spratt, 4 Pet. 393, 408, 7 L. Ed. 897.

A foreigner who becomes a citizen is no longer a foreigner, within the purview of the act. Thus, after-purchased lands vest in him as a citizen; not by virtue of the act of the legislature of Maryland, but because of his acquiring the rights of citizenship. Spratt *v.* Spratt, 1 Pet. 343, 7 L. Ed. 171.

Federal legislation.—The act of Congress of March 3, 1887 (24 Stat. 476, c. 340), prohibits aliens who have not declared their intention to become citizens, to thereafter acquire, hold, or own real

Missouri.—The first section of chapter 110, Rev. Stat. of Missouri, conferred upon two classes of aliens the same capacity of acquiring by descent or purchase real estate in Missouri, and of holding and alienating it, as is enjoyed by citizens of the United States—those residing in this country who had made a declaration of intention to become citizens of the United States, by taking the required oath, and those, whether they had made such declaration or not, who resided in that state. Aliens not belonging to one or the other of those classes were left subject to the operation of the common-law rule—recognized as in force in Missouri—that an alien, for the want of inheritable blood, could not take land by descent.[63]

But the object of the act of 1855 was not, for purposes of descent, to obliterate all distinction between aliens residing in, and those residing out of, the United States.[64]

The act of the Missouri legislature of 1872, removing in toto the disabilities of aliens of every class to acquire real estate, was not retrospective in operation.[65]

New Jersey.—See ante, "Division of Country," II, D.

New York.—See ante, "Division of Country," II, D; post, "Treaty Rights," III, E, 6.

By the New York statute in force in 1874, it was enacted that every devise of any interest in real property to a person who, at the time of the death of the testator, shall be an alien, not authorized by statute to hold real estate, shall be void. 2 Rev. Stat. of New York, 58.[66]

estate, or any interest therein, in the District of Columbia or any of the Territories, except by inheritance or for a debt previously contracted, unless such privilege is conferred by a treaty, and impliedly recognizes an existing right in aliens to so acquire real estate. Geofroy *v.* Riggs, 133 U. S. 258, 272, 33 L. Ed. 642.

63. Missouri laws.—Sullivan *v.* Burnett, 105 U. S. 334, 337, 26 L. Ed. 1124.

Construction as to residence.—"The statute of Missouri which permits the demandant to inherit from an intestate, notwithstanding his ancestor, through whom he derives his descent, is or has been an alien, must be interpreted with reference as well to other provisions conferring upon aliens the capacity to inherit real estate, as to the public policy which manifestly induced such legislation. These provisions, in terms, make an alien resident in Missouri, or an alien resident elsewhere in this country, intending to become a citizen, capable of inheriting real estate by descent or purchase." Sullivan *v.* Burnett, 105 U. S. 334, 341, 26 L. Ed. 1124.

Aliens living or dead may transmit inheritance.—In making title by descent it may be that his ancestor is or was an alien, without inheritable blood, either at common law or by statute. That fact would ordinarily constitute an insuperable difficulty in the way of his taking or holding the estate. But the statute elsewhere interposes in his behalf, and says that he shall not be barred in tracing his descent from the intestate, by reason of the fact that any ancestor either is or has been an alien—language broad enough to include a living as well as a dead progenitor. Sullivan *v.* Burnett, 105 U. S. 334, 341, 26 L. Ed. 1124.

Thus, where, at the time descent was cast, the plaintiffs were the nearest of kin of the class of aliens, who, by the first section of ch. 110, were capable of acquiring real estate in Missouri by descent or purchase, their right to take by descent was not affected by the fact that their respective mothers were, when the intestate died, alive, and alien nonresidents of this country, incapable themselves of inheriting the estate. Sullivan *v.* Burnett, 105 U. S. 334, 340, 26 L. Ed. 1124; McCreery *v.* Somerville, 9 Wheat. 354, 6 L. Ed. 109. (A Maryland case), distinguished.

64. Statute of 1855.—Sullivan *v.* Burnett, 105 U. S. 334, 338, 26 L. Ed. 1124.

The Missouri statute of 1855 (§ 2, ch. 110, Rev. Stat. 1865), allowing an alien who cannot take to sell and convey to a person who can, plainly had no reference to those aliens upon whom had already been conferred, by statute, the capacity to inherit and hold, or to sell and convey, in the same manner as citizens of the United States. Sullivan *v.* Burnett, 105 U. S. 334, 339, 26 L. Ed. 1124.

65. Statute of 1872, removing all disability, prospective.—Sullivan *v.* Burnett, 105 U. S. 334, 26 L. Ed. 1124.

66. New York laws.—Scholey *v.* Rew, 23 Wall. 331, 350, 23 L. Ed. 99.

And in 1832 it was held, that, under the laws of New York, one citizen of the state cannot inherit in the collateral line to the other, when he must take his pedigree or title through a deceased alien ancestor; the legislature must be presumed to use words in their known and ordinary signification, unless that sense

Rhode Island.—The well-settled principle, that aliens may take land by deed or devise, and hold against any one but the sovereign until office found, exists in Rhode Island as elsewhere; not being affected by that statute which allows them to hold land "provided" they previously obtain a license from the probate court.[67]

Texas.—See ante, "Division of Country," II, D; post, "Effect of Division of Country," III, E, 4.

According to general principles, mere alienage did not forfeit a title to land in Texas; and although the constitution of Texas provided that no alien should hold land in Texas, except by title emanating directly from the government of that republic, yet it was afterwards declared that the legislature should, by law, provide a method for determining what lands may have been forfeited or escheated.[68] The constitution and laws of Texas provide for the case of an alien

be repelled by the context; "the common law" is constantly used in contradistinction to the statute law. Levy *v.* McCartee, 6 Pet. 102, 8 L. Ed. 334.

67. Rhode Island laws.—Cross *v.* De Valle, 1 Wall. 1, 17 L. Ed. 515.

Nor by the fact that a chancellor may not entertain a bill by an alien to enforce a trust, which, if conveyed to him, might immediately escheat to the crown. Cross *v.* De Valle, 1 Wall. 1, 13, 17 L. Ed. 515.

68. Texas laws.—Jones *v.* McMasters, 20 How. 8, 15 L. Ed. 805; McKinney *v.* Saviego, 18 How. 235, 15 L. Ed. 365.

By way of exception to this general inhibition, it provided that "if any citizen should die intestate or otherwise, his children or heirs shall inherit his estate, and aliens shall have a reasonable time to take possession of and dispose of the same in a manner hereafter to be pointed out by law." McKinney *v.* Saviego, 18 How. 235, 238, 15 L. Ed. 365; Hanrick *v.* Patrick, 119 U. S. 156, 164, 30 L. Ed. 396; Airhart *v.* Massieu, 98 U. S. 491, 494, 25 L. Ed. 213.

In the absence of such a legislative provision, a title emanating from the government of Mexico, anterior to Texan independence, is not forfeited. Jones *v.* McMasters, 20 How. 8, 15 L. Ed. 805.

"The course of decision in the courts of Texas appears to be, that, until some act of the legislature is passed on the subject, effect cannot be given to the plea of alienage, or, at least, that some proceeding must be had, on the part of the government, divesting the estate for this cause, before effect can be given to it." Jones *v.* McMasters, 20 How. 8, 21, 15 L. Ed. 805.

In pursuance of this provision, the acts of 1840, and 1848, were passed; § 9 of the latter act was as follows: "Section 9. In making title to land by descent, it shall be no bar to a party that any ancestor through whom he derives his descent from the intestate is or hath been an alien; and every alien to whom any land may be devised or may descend shall have nine years to become a citizen of the republic, and take possession of such land, or shall have nine years to sell the same, before it shall be declared to be forfeited, or before it shall escheat to the government." Hanrick *v.* Patrick, 119 U. S. 156, 164, 30 L. Ed. 396; Airhart *v.* Massieu, 98 U. S. 491, 495, 25 L. Ed. 213.

The effect of the provision of the constitution of the republic, and the statutes of 1840 and 1848, upon the subject of alienage, was to vest a defeasible title to real estate in Texas into the alien children and heirs of a citizen of the United States who may have died intestate leaving such property; which title was valid both against individuals and also the state, not only for the period of nine years, but for such further time until the state by some proper proceedings in the nature of office found had declared a forfeiture, and the passage of the English Naturalization act of 1870, within such nine years, made this title an indefeasible one. Hanrick *v.* Patrick, 119 United States, 156, 168, 169, 30 L. Ed. 396; McKinney *v.* Saviego, 18 How. 235, 239, 15 L. Ed. 365.

And a citizen of the United States, and who, as such, was of course, before the admission of Texas into the Union, an alien to that republic, and so, as against office found, incompetent to hold land there, became, on the admission, competent, no office having been previously found. Osterman *v.* Baldwin, 6 Wall. 116, 18 L. Ed. 730.

A sale of lands in Texas, made before her separation from Mexico, by a citizen to a nonresident alien, passed the title to the latter, who thereby acquired a defeasible estate in them, which he could hold until deprived thereof by the supreme authority, upon the official ascertainment of the fact of his nonresidence and alienage, or upon the denouncement of a private citizen. Phillips *v.* Moore, 100 U. S. 208, 210, 25 L. Ed. 603.

"In Barrett *v.* Kelly, in the 31st of Texas, where land had been sold, in 1833, to citizens of the United States, then nonresident aliens, it was held that, unless there was an adjudication by some court or political authority upon their alienage, while it existed, their rights

heir who may inherit from a citizen, but not for an alien heir inheriting from an alien. The legislature of Texas had power to modify these rules, but did not change them in this respect when it introduced the common law by statute. Upon the death of the ancestor, the estate was cast upon the state, without the necessity of an inquest of office.[69]

Vermont.—The act of the legislature of Vermont, which prohibits the recovery of mesne profits in certain cases, applies to the claim to such profits by aliens suing to recover lands in Vermont; and the provisions of the treaty of peace of 1783, and those of the treaty with Great Britain in 1794, do not interfere with the provisions of that act. The law has prescribed the restrictions under which mesne profits shall be recovered, and these restrictions are obligatory on the citizens of the state; the plaintiffs take the benefit of the statute remedy, to recover their right to the land; and they must take the remedy, with all the statute restrictions.[70]

Virginia.—See ante, "At Common Law," III, E, 1, a, (1); post, "Treaty Rights," III, E, 6.

The common law as to aliens, except so far as it has been modified by her legislature, is the local law of Virginia. But the Virginia Revised Code of 1873 has obliterated nearly all the distinctions between aliens and citizens with respect to their rights as to both real and personal property. See ch. 4, § 18, p. 130, and ch. 119, §§ 4 and 10, pp. 917, 918.[71]

were not devested. The decision proceeded upon the ground that the title had passed to the grantees, notwithstanding their alienage, though subject to be devested upon an official determination of that fact." Phillips *v.* Moore, 100 U. S. 208, 210, 25 L. Ed. 603. See post, "Confiscation and Forfeiture," III, E, 1, c; "Effect of Division of Country," III, E, 4.

The Texas statute of 1854, neither by its express terms nor by a proper construction of its provisions and intention, did so repeal § 9, act of 1848, as to prevent, if they are otherwise entitled, alien heirs from deriving title by descent under it to real estate in Texas. Hanrick *v.* Patrick, 119 U. S. 156, 168, 30 L. Ed. 396.

That act did not in terms limit the rights of aliens under § 9 of the act of 1848, but was, on the contrary, an affirmative or enlarging statute, and intended to give to aliens such rights and privileges, in addition to those granted, by that act, as had been or should be given by their government to citizens of the United States. Hanrick *v.* Patrick, 119 U. S. 156, 168, 30 L. Ed. 396.

By the laws which governed Texas before the revolution, the proprietor of land must have resided within the jurisdiction of the Mexican government, and foreigners could not inherit land. McKinney *v.* Saviego, 18 How. 235, 15 L. Ed. 365.

The alien heirs of a colonist in Texas, who died intestate in 1835, cannot inherit his landed property there. The courts of Texas have so decided, and this court adopts their decision. Middleton *v.* McGrew, 23 How. 45, 16 L. Ed. 403.

For the laws of Mexico, as construed by the courts of Texas, furnish the rule, and that construction is that the capacity of aliens to hold lands in the republic of Mexico, if it ever existed under the laws of Spain, was extinguished by the decree of March 12th, 1828. These decisions declare a law of descent applicable to landed property in Texas generally. Middleton *v.* McGrew, 23 How. 45, 48, 16 L. Ed. 403.

"By the colonization laws of Mexico, and of Coahuila and Texas, a nonresident alien could not hold real estate." Airhart *v.* Massieu, 98 U. S. 491, 495, 25 L. Ed. 213; McKenny *v.* Saviego, 18 How. 235, 15 L. Ed. 365.

69. Alien, heir of alien.—McKinney *v.* Saviego, 18 How. 235, 15 L. Ed. 365. Thus, where a person who owned land in Texas whilst it was a part of Mexico, removed into Mexico prior to the Declaration of Independence by Texas, and continued to reside in Mexico until her death, her daughter, who was also a citizen of Mexico, could not, as heir, recover the land in Texas. McKinney *v.* Saviego, 18 How. 235, 15 L. Ed. 365. See post, "Right to Transmit or Convey," III, E, 1, b.

70. Vermont laws.—Propagation Society *v.* Pawlet, 4 Pet. 480, 7 L. Ed. 927.

71. Virginia laws.—Hauenstein *v.* Lynham, 100 U. S. 483, 485, 25 L. Ed. 628. See now Va. Code (1904) § 43.

The act of assembly of Virginia, of 1779, ch. 13, § 3, secured from escheat all the interest acquired by aliens in real property, previous to the issuing of the patent, and left the right acquired by them under the patent, to be determined by the general principles of the common

b. *Right to Transmit or Convey.*—An alien has no inheritable blood, and cannot transmit land himself to others by descent.[72] But it is not necessary that aliens be made citizens in order to pass title to real estate; and the condition upon which this may be done is a matter resting entirely with the state legislature.[73]

law. Doe *v.* Robertson, 11 Wheat. 332, 6 L. Ed. 488.

These legislative acts were valid, under the compact of 1789, between the states of Virginia and Kentucky. Doe *v.* Robertson, 11 Wheat. 332, 6 L. Ed. 488.

The title of an alien, thus acquired by patent, in 1784, under the laws of Virginia, and subsequently confirmed to him by a legislative act of Kentucky, in 1796, and to his heirs and their grantees, by an act of the same state, in 1799, will overreach a grant made by Virginia, to a citizen, in 1785, and defeat the claim of all persons holding under such grant. Doe *v.* Robertson, 11 Wheat. 332, 6 L. Ed. 488.

Quære, whether a British subject, born in England, in the year 1750, and who always resided in England, could, in the year 1786, take and hold lands in Virginia, by descent or by devise? Lambert *v.* Paine, 3 Cranch 97, 2 L. Ed. 377.

72. Incapacity to transmit by descent.—Levy *v.* McCartee, 6 Pet. 102, 8 L. Ed. 334; Airhart *v.* Massieu, 98 U. S. 491, 493, 25 L. Ed. 213; McCreery *v.* Somerville, 9 Wheat. 354, 6 L. Ed. 109; McKinney *v.* Saviego, 18 How. 235, 15 L. Ed. 365; Sullivan *v.* Burnett, 105 U. S. 334, 340, 341, 26 L. Ed. 1124; Minor *v.* Happersett, 21 Wall. 162, 22 L. Ed. 627.

The case of Collingwood *v.* Pace, 1 Vent. 413, furnishes conclusive evidence that, by the common law, in all cases of mediate descents, if any mediate ancestor through whom the party makes his pedigree, is an alien, that is a bar to his title as heir. Levy *v.* McCartee, 6 Pet. 102, 8 L. Ed. 334; McCreery *v.* Somerville, 9 Wheat. 354, 355, 6 L. Ed. 109. See ante, "Constitutional and Statutory Provisions," III, E, 1, a, (3).

In Texas.—The 10th section of the Texas law of distribution and descent (Hart. Dig. art. 585), provides: "In making title to land by descent, it shall be no bar to a party that any ancestor, through whom he derives his descent from the intestate, is or hath been an alien; and every alien to whom any land may be devised or may descend, shall have nine years to become a citizen of the republic and take possession of such land; or shall have nine years to sell the same, before it shall be declared forfeited, or before it shall escheat to the government." The first clause of this section is substantially a re-enactment of the statute of 11 and 12 William III, ch. 6, and removes no other defect than the want of inheritable blood arising from the alienage of some person through whom the heir must deduce his claim. McKinney *v.* Saviego, 18 How. 235, 239, 15 L. Ed. 365.

But the remedial effect of the act does not extend beyond the disability of an alien heir. It contains no enactment in favor of an alien who may have acquired possession or property in lands, whereby he could make a valid bequest or transmit it to his heirs, whether aliens or citizens by descent. McKinney *v.* Saviego, 18 How. 235, 239, 15 L. Ed. 365.

Neither the language of the act nor the policy of Texas, as it may be discovered from its constitutions and laws, authorizes the conclusion that an alien, claiming real property in Texas, can transmit it, by descent, to an heir who is also an alien. McKinney *v.* Saviego, 18 How. 235, 239, 15 L. Ed. 365.

"This law would seem to be the legitimate result of the status of aliens with regard to title to land in Texas; the prohibition to hold lands being provisional only, not operative unless they failed to become citizens or dispose of their land within nine years; and not even then until regular proceedings should be provided for and should be had to annul the title. The later cases in Texas have fully established this doctrine." Airhart *v.* Massieu, 98 U. S. 491, 25 L. Ed. 213; Hanhick *v.* Patrick, 119 U. S. 156, 30 L. Ed. 396. See ante, "Laws of Particular States," III, E, 1, a, (3), (b).

In Missouri.—See ante, "Constitutional and Statutory Provisions," III, E, 1, a, (3).

73. Passing title otherwise.—Beard *v.* Rowan, 9 Pet. 301, 317, 9 L. Ed. 135; Airhart *v.* Massieu, 98 U. S. 491, 497, 25 L. Ed. 213.

An alien friend can convey his lands situate in a foreign government, and that the title is defeasible is nothing to defeat the right. White *v.* Burnley, 20 How. 235, 249, 15 L. Ed. 886; Cook *v.* Burnley, 11 Wall. 659, 670, 20 L. Ed. 29.

"Notwithstanding the existence of hostilities between Texas and Mexico, it was competent for one citizen of Mexico to convey to another, both residing and being in Mexico, lands situated in Texas. This point was settled by the late decision of this court in the case of Conrad *v.* Waples, 96 U. S. 279, 24 L. Ed. 721." Airhart *v.* Massieu, 98 U. S. 491, 497, 25 L. Ed. 213.

As to citizens of Mexico, it is well settled that they never lost the right of disposing of their Texas lands by the division of the empire. Williams *v.* Conger, 125 U. S. 397, 426, 31 L. Ed. 778.

And where an alien may take, as by act of a party, he may devise or convey to another; but such title is liable to be divested at the pleasure of the sovereign by office found.[74]

c. *Confiscation and Forfeiture.*—See ante, "Laws of Particular States," III, E, 1, a, (3),(b). See the titles CONFEDERATE STATES; WAR.

The general principle is undisputed, that the division of an empire works no forfeiture of a right of property previously acquired.[75] The removal that worked a forfeiture under Mexican colonization laws, and divestiture of the title without judicial inquiry, was a removal out of the republic of Mexico, and settlement in a foreign country.[76]

d. *Evidence, Presumptions and Pleading.*—See ante, "Burden of Proof and Presumptions," II, E, 4; post, "Pleading and Practice," IV.

2. PERSONALTY.—The incapacity of an alien to take, and to hold beneficially, a legal or equitable estate in real property, does not extend to personal estate.[77]

3. TAX ON RIGHT OF SUCCESSION.—See the title SUCCESSION TAXES.

By a law of the state of Louisiana, every person not being domiciliated in that state, and not being a citizen of any other state or territory in the Union, who shall be entitled, whether as heir, legatee, or donee, to the whole or any part of the succession of a person deceased, shall pay a tax to the state of ten per cent. of the value thereof. This law is not repugnant to the constitution of the United States.[78]

4. EFFECT OF DIVISION OF COUNTRY.—See ante, "Division of Country," II, D; "Laws of Particular States," III, E, 1, a, (3), (b); "Confiscation and Forfeiture," III, E, 1, c.

citing Airhart *v.* Massieu, 98 U. S. 491, 493, 497, 25 L. Ed. 213.

74. Same—Divestiture by office found.—Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. Ed. 628; Fairfax *v.* Hunter, 7 Cranch 603, 619, 3 L. Ed. 453; S. C., 1 Wheat. 304, 4 L. Ed. 97, 116.

75. Division of country.—Jones *v.* McMasters, 20 How. 8, 20, 15 L. Ed. 805. See post, "Effect of Division of Country," III, E, 4; "Treaties with Great Britain," III, E, 6, c.

76. Removal from Texas under Mexican law.—McKinney *v.* Saviego, 18 How. 235, 15 L. Ed. 365; Jones *v.* McMasters, 20 How. 8, 21, 15 L. Ed. 805.

"A change of domicile operated to defeat the estate of the grantee, and to restore the land without incumbrance to the public domain, so that, without a judicial or other inquiry, it might be regranted." McKinney *v.* Saviego, 18 How. 235, 238, 15 L. Ed. 365.

The treaty of Guadaloupe Hidalgo provided for those Mexicans who inhabited territories ceded to the United States, but had no relation to Texas. McKinney *v.* Saviego, 18 How. 235, 15 L. Ed. 365.

77. Incapacity does not extend to personalty.—Craig *v.* Leslie, 3 Wheat. 563, 574, 4 L. Ed. 460; McLean *v.* Wallace, 10 Pet. 625, 637, 9 L. Ed. 559.

Alienage does not incapacitate to take personal property by descent. McLean *v.* Wallace, 10 Pet. 625, 637, 9 L. Ed. 559.

78. Succession tax constitutional.—Mager *v.* Crima, 8 How. 490, 12 L. Ed. 1168; Frederickson *v.* Louisiana, 23 How. 445, 16 L. Ed. 577.

The treaty concluded between the King of Wurtemberg and the United States in 1844 (8 Stat. at L., 588), did not include the case of a citizen of the United States dying at home, and disposing of property within the state of which he was a citizen, and in which he died, for a citizen of Louisiana domiciliated abroad is subject to this tax. Frederickson *v.* Louisiana, 23 How. 445, 16 L. Ed. 577.

Consequently, where the state of Louisiana claimed, under a statute, a tax of ten per cent. on the amount of certain legacies left by one of her citizens to certain subjects of the King of Wurtemberg, the statute was not in conflict with the treaty, and the claim must be allowed. Frederickson *v.* Louisiana, 23 How. 445, 16 L. Ed. 577.

The treaty does not regulate the testamentary dispositions of citizens or subjects of the contracting powers, in reference to property within the country of their origin or citizenship, but only in reference to property possessed by such citizens within the states of the other power. But if it did there would be no illegal discrimination between aliens and citizens of Louisiana domiciliated abroad. Frederickson *v.* Louisiana, 23 How. 448, 16 L. Ed. 577.

Estoppel.—An alien to whom a devise of an interest in real estate has been made, and who has received its value in proceedings for partition, is estopped to set up against a demand for a succession tax thereon, that by the law of the state where the estate is, the devise is absolutely null and void. Scholey *v.* Rew, 23 Wall. 331, 23 L. Ed. 99.

The division of a country and the maintenance of independent governments over its different parts do not of themselves divest the rights which the citizens of either have to property situate within the territory of the other.[79]

5. Equitable Conversion.—In order to avoid an escheat, and carry out the wishes of the testator, a court of equity will, if necessary, consider land as money, where a testator, who is a trustee, has directed the land to be sold, and will direct the proceeds to be given to the cestui que trust.[80]

6. Treaty Rights.—See the title Treaties.

a. *In General.*—See ante, "Constitutional and Statutory Provisions," III, E, 1, a, (3).

79. Property rights not necessarily divested.—Airhart *v.* Massieu, 98 U. S. 491, 25 L. Ed. 213; Society *v.* New Haven, 8 Wheat. 464, 5 L. Ed. 662; Propagation Society *v.* Pawlet, 4 Pet. 480, 502, 7 L. Ed. 927.

A Mexican was not, by the revolution which resulted in the independence of Texas, or by her constitution of March 17, 1836, or her laws subsequently enacted, divested of his title to lands in that state, but he retained the right to alienate and transmit them to his heirs, and the latter are entitled to sue for and recover them. Airhart *v.* Massieu, 98 U. S. 491, 25 L. Ed. 213.

That constitution, although declaring generally that aliens shall not hold land in Texas except by title emanating directly from the government, did not divest their title; for it adds, that "they shall have a reasonable time to take possession of and dispose of the same in a manner hereafter to be pointed out by law." Before the title can be divested, proceedings for enforcing its forfeiture must be provided by law, and carried into effect; and hitherto they have not been provided. Airhart *v.* Massieu, 98 U. S. 491, 25 L. Ed. 213.

The capacity of private individuals (British subjects) or of corporations, created by the crown, in this country, or in Great Britain, to hold lands or other property in this country, was not affected by the revolution. Society *v.* New Haven, 8 Wheat. 464, 5 L. Ed. 662; Propagation Society *v.* Pawlet, 4 Pet. 480, 502, 7 L. Ed. 927. See ante, "Confiscation and Forfeiture," III, E, 1, c; post, "Treaty Rights," III, E, 6.

Effect on right of succession.—The correct doctrine of the English law is, that the right to inherit depends upon the existing state of allegiance, at the time of the descent cast. (Inglis *v.* Sailors' Snug Harbor, 3 Pet. 99.) And the idea that it depends upon community of allegiance, at the time of birth, is a consequence that follows from the doctrines that a man can never put off his allegiance, or be deprived of the benefits of it, but for a crime. Community of allegiance once existing, must, upon these principles, exist ever after. Hence it is, that the ante-nati of America may continue to inherit in Great Britain, because we once owed allegiance to that crown. But the same reason does not extend to the ante-nati of Great Britain, because they never owed allegiance to our government. Dawson *v.* Godfrey, 4 Cranch 321, 2 L. Ed. 634.

"Whatever doubts may have been formerly entertained, it is now settled, that a British subject, born before, cannot, since the revolution, take lands by descent in the United States. Dawson *v.* Godfrey, 4 Cranch 321, 2 L. Ed. 634." Fairfax *v.* Hunter, 7 Cranch 603, 620, 3 L. Ed. 453, reaffirmed in 1 Wheat. 304, 4 L. Ed. 97. See quære in McIlvaine *v.* Coxe, 4 Cranch 209, 211, 2 L. Ed. 598.

British subjects, born before the revolution, are equally incapable, with those born after, of inheriting, or transmitting the inheritance of, lands in this country. Blight *v.* Rochester, 7 Wheat. 535, 5 L. Ed. 516; Inglis *v.* Sailors' Snug Harbor, 3 Pet. 99, 7 L. Ed. 617.

80. Construction to avoid escheat.—Taylor *v.* Benham, 5 How. 233, 12 L. Ed. 130; Craig *v.* Leslie, 3 Wheat. 563, 4 L. Ed. 460.

R. C., a citizen of Virginia, being seised of real property in that state, made his will: "In the first place, I give, devise and bequeath unto J. L.," and four others, "all my estate, real and personal, of which I may die seised and possessed, in any part of America, in special trust, that the afore-mentioned persons, or such of them as may be living at my death, will sell my personal estate to the highest bidder, on two years' credit, and my real estate on one, two and three years' credit, provided satisfactory security be given, by bond and deed of trust: In the second place, I give and bequeath to my brother T. C." an alien, "all the proceeds of my estate, real and personal, which I have herein directed to be sold, to be remitted to him, accordingly as the payments are made, and I hereby declare the aforesaid J. L." and the four other persons, "to be my trustees and executors for the purposes afore mentioned." Held, that the legacy given to T. C., in the will of R. C., was to be considered as a bequest of personal estate, which he was capable of taking for his own benefit, though an alien, on the principle of equitable conversion. Craig *v.* Leslie, 3 Wheat. 563, 4 L. Ed. 460.

The protection of the citizens of one country owning property in another, and the manner of transferring, devising or inheriting the same, are fitting subjects for the exercise of the treaty power of the United States.[81]

b. *Treaties with France.*—Citizens of France can take land in the district of Columbia by descent from citizens of the United States, and in all the states have all the rights permitted by their laws to aliens as to holding property and disposing thereof.[82]

81. Treaty power and its scope.—Geofroy *v.* Riggs, 133 U. S. 258, 266, 33 L. Ed. 642; Orr *v.* Hodgson, 4 Wheat. 453, 4 L. Ed. 613.

That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, and the manner in which that property may be transferred, devised or inherited, are fitting subjects for such negotiation and of regulation by mutual stipulations between two countries, under the treaty power. Geofroy *v.* Riggs, 133 U. S. 258, 266, 33 L. Ed. 642; Chirac *v.* Chirac, 2 Wheat. 259, 4 L. Ed. 234.

A treaty stipulation may be effectual to protect an alien's land from escheat by a state. Hauenstein *v.* Lynham, 100 U. S. 483, 489, 25 L. Ed. 628.

And such treaties require no further legislation to give them force. Chirac *v.* Chirac, 2 Wheat. 259, 4 L. Ed. 234; Baldwin *v.* Franks, 120 U. S. 678, 703, 30 L. Ed. 766.

Conflict with state statutes.—Questions have arisen as to the rights of aliens to hold property in a state under treaties between this government and foreign nations which distinctly provide for that right, and it has been said that in such case the right of aliens was governed by the treaty, and if that were in opposition to the law of the particular state where the property was situated, in such case the state law was suspended during the treaty or the term provided for therein. See Geofroy *v.* Riggs, 133 U. S. 258, 33 L. Ed. 642, a case arising, and affecting lands, in the District of Columbia, in regard to which congress has exclusive jurisdiction, and in that case Mr. Justice Field, in delivering the opinion of the court, said at page 266: "This article, by its terms, suspended, during the existence of the treaty, the provisions of the common law of Maryland and of the statutes of that state of 1780 and 1791, so far as they prevented citizens of France from taking by inheritance from citizens of the United States, property, real or personal, situated therein." Blythe *v.* Hinckley, 180 U. S. 333, 340, 45 L. Ed. 557.

"The question of the extent of the power of the United States to provide by treaty for the inheriting by aliens, of real estate, in spite of the statutes of the state in which the land may be, does not arise in this case, and we express no opinion thereon." Blythe *v.* Hinckley, 180 U. S. 333, 342, 45 L. Ed. 557.

Quære, whether the government of the United States is incompetent to regulate testamentary dispositions or laws of inheritance of foreigners, in reference to property within the states. Frederickson *v.* Louisiana, 23 How. 455, 448, 16 L. Ed. 577. See Hauenstein *v.* Lynham, 100 U. S. 483, 489, 25 L. Ed. 628.

Effect of expiration or repeal.—The expiration or repeal of a treaty conferring property rights on aliens does not affect rights which have become complete thereunder during its continuance in force. Chirac *v.* Chirac, 2 Wheat. 259, 4 L. Ed. 234; Carneal *v.* Banks, 10 Wheat. 181, 6 L. Ed. 297.

Right to tax succession.—See ante, "Tax on Right of Succession," III, E, 3.

82. Rights under convention of 1853.—Geofroy *v.* Riggs, 133 U. S. 258, 264, 33 L. Ed. 642.

Article 7 of the convention with France, of 1853, means that in all the states of the Union by whose laws aliens are permitted to hold real estate, so long as such laws remain in force, Frenchmen shall enjoy the right of possessing personal and real property by the same title and in the same manner as citizens of the United States. They shall be free to dispose of it as they may please—by donation, testament, or otherwise—just as those citizens themselves. But as to the states by whose existing laws aliens are not permitted to hold real estate, the treaty engages that the president shall recommend to them the passage of such laws as may be necessary for the purpose of conferring that right. Geofroy *v.* Riggs, 133 U. S. 258, 270, 33 L. Ed. 642.

The District of Columbia, under the government of the United States, is as much a state as any of those political communities which compose the United States, in the sense that the word was used in the French convention of 1853. Geofroy *v.* Riggs, 133 U. S. 258, 268, 33 L. Ed. 642.

Under treaty of 1778 and convention of 1800.—While the power of naturalization is exclusively in congress, the treaty of amity and commerce between the United States and France, of 1778, art. 11, enabled the subjects of France to purchase and hold lands in the United States, and vice versa. Quære, what was the effect

c. *Treaties with Great Britain.*—The 6th article of the treaty of peace between the United States and Great Britain, of 1783, completely protected the titles of British subjects to lands in the United States, which would have been liable to forfeiture, by escheat, for the defect of alienage; that article was not meant to be confined to confiscations jure belli.[83] The treaties of 1783 and 1794 only provided for titles existing at the time those treaties were made, and not for

of this treaty under the confederation? Chirac *v.* Chirac, 2 Wheat. 259, 4 L. Ed. 234; see Pollard *v.* Kibbe, 14 Pet. 353, 413, 10 L. Ed. 490.

And no further legislation was required to give it effect. Chirac *v.* Chirac, 2 Wheat. 259, 4 L. Ed. 234; Baldwin *v.* Franks, 120 U. S. 678, 703, 30 L. Ed. 766.

The repeal of the treaty of 1778 with France did not abrogate the act of Maryland of 1780, by implication. Chirac *v.* Chirac, 2 Wheat. 259, 4 L. Ed. 234.

A naturalized Frenchman having died seised in fee of the lands in question, his heirs being French subjects, the treaty of 1778 having been abrogated, and the act of Maryland, of 1780, permitting the lands of a French subject, who had become a citizen of Maryland, dying intestate, to descend on the next of kin, being nonnaturalized Frenchmen, with a proviso vesting the land in the state, if the French heirs should not, within ten years, become resident citizens of the state, or convey the lands to a citizen, being still in force, it was determined, that the time for the performance of this condition having expired, before the action was brought, the estate was terminated, unless supported in some other manner than by the act of Maryland. Chirac *v.* Chirac, 2 Wheat. 259, 260, 4 L. Ed. 234.

But the convention of 1800, between the United States and France, enabling the people of one country holding lands in the other, to dispose of the same by testament or otherwise, and to inherit lands in the respective countries, without being obliged to obtain letters of naturalization, it was held, that it rendered the performance of this condition a useless formality, and that the conventional rule applied equally to the case of those who took by descent, under the act, as to those who acquired by purchase, without its aid. Chirac *v.* Chirac, 2 Wheat. 259, 4 L. Ed. 234.

The further stipulation in the convention, "that in case the laws of either of the two states should restrain strangers from the exercise of the rights of property with respect to real estate, such real estate may be sold, or otherwise disposed of, to citizens or inhabitants of the country where it may be," was held not to affect the rights of a French subject, who takes or holds, by the convention, so as to deprive him of the power of selling to citizens of this country; and was held to give to a French subject, who had acquired lands by descent or devise (and perhaps, in any other manner), the right, during life, to sell or otherwise dispose thereof, if lying in a state where lands purchased by an alien, generally, would be immediately escheatable. Chirac *v.* Chirac, 2 Wheat. 259, 4 L. Ed. 234.

Although the convention of 1800 has expired, by its own limitation, it was determined, that the instant the descent was cast on a French subject, during its continuance, his rights became complete under it, and could not be affected by its subsequent expiration. Chirac *v.* Chirac, 2 Wheat. 259, 4 L. Ed. 234.

The treaty of 1778, between the United States and France, allowed the citizens of either country to hold lands in the other; and the title once vested in a French subject, to hold land in the United States, was not divested by the abrogation of that treaty, and the expiration of the subsequent convention of 1800. Carneal *v.* Banks, 10 Wheat. 181, 6 L. Ed. 297.

For construction of art. 7 of the convention with France of 1800, and art. 7 of the convention of 1853, see Geofroy *v.* Riggs, 133 U. S. 258, 33 L. Ed. 642.

Treaty ceding Louisiana.—The language of the treaty ceding Louisiana excludes every idea of interfering with private property; of transferring land which had been severed from the royal domain. The people changed their sovereign; their right to property remained unaffected by this change. The right of property, then, is protected and secured by the treaty; and an inchoate title to lands is property. Delassus *v.* United States, 9 Pet. 117, 133, 9 L. Ed. 71. See, also, Ainsa *v.* New Mexico, etc., R. Co., 175 U. S. 76, 79, 44 L. Ed. 78; Livingston *v.* Story, 11 Pet. 351, 394, 9 L. Ed. 746; Strother *v.* Lucas, 12 Pet. 410, 9 L. Ed. 1137.

83. Treaty of 1783.—Orr *v.* Hodgson, 4 Wheat. 453, 4 L. Ed. 613; Society *v.* New Haven, 8 Wheat. 464, 5 L. Ed. 662.

The treaty of 1783 acted upon the state of things as it existed at that period; it took the actual state of things as its basis; all those, whether natives or otherwise, who then adhered to the American states, were virtually absolved from all allegiance to the British crown; all those who then adhered to the British crown were deemed and held subjects of that crown; the treaty of peace was a treaty operating between states and the inhabitants thereof. Shanks *v.* Dupont, 3 Pet. 242, 247, 7 L. Ed. 666.

titles subsequently acquired.[84] And by the British treaty of 1794, all impediment of alienage was absolutely levelled with the ground despite the laws of the states.[85] Actual possession is not necessary to give the party the benefit of the treaty; but the existence of title at the time is necessary.[86] And all British-born

84. Same considered with treaty of 1794.—Where J. D., an alien and British subject, came into the United States, subsequent to the treaty of 1783, and before the signature of the treaty of 1794, died seised of the lands in question; held, that the title of his heirs was not protected by the treaties. Blight *v.* Rochester, 7 Wheat. 535, 5 L. Ed. 516.

And in Smith *v.* State of Maryland, 6 Cranch 286, 3 L. Ed. 225, it was held, that the acts of Maryland, 1780, ch. 45 and 49, confiscated and vested in the state the equitable interests of British subjects in lands without office found, prior to the treaty of peace of 1783, so that the British cestui que trust was not protected by the stipulation in that treaty, against future confiscations, nor by the stipulation in the 9th article of the treaty of 1794, securing to British subjects, who then held lands in this country, the right to continue to hold them.

The property of British corporations, in this country, was protected by the 6th article of the treaty of peace of 1783, in the same manner as those of natural persons; and their title, thus protected, was confirmed by the 9th article of the treaty of 1794, so that it could not be forfeited by any intermediate legislative act, or other proceeding for the defect of alienage. Society *v.* New Haven, 8 Wheat. 464, 5 L. Ed. 662.

85. Treaty of 1794 removed all disability.—Hauenstein *v.* Lynham, 100 U. S. 483, 489, 25 L. Ed. 628.

Whether the treaty of peace of 1783, declaring that no future confiscations should be made, protects from forfeiture, under the municipal laws respecting alienage, lands held by British subjects at the time of its ratification, or not, yet the 9th article of treaty of 1794 completely protected the title of a British devisee, whose estate had not been previously divested by an inquest of office, or some equivalent proceeding. Jackson *v.* Clarke, 3 Wheat. 1, 12, 4 L. Ed. 319.

The commonwealth of Virginia could not grant the unappropriated lands in the Northern Neck, the absolute property, seizin and possession of which was in Lord Fairfax at his death, until its title should have been perfected by possession; and the British treaty of 1794 confirmed the title to those lands in the devisee of Lord Fairfax. Fairfax *v.* Hunter, 7 Cranch 603, 3 L. Ed. 453, affirmed in 1 Wheat. 304, 4 L. Ed. 97.

"It was once in the power of the commonwealth of Virginia, by an inquest of office or its equivalent, to have vested the estate completely in itself, or its grantee. But it has not so done, and its own inchoate title (and of course, the derivative title, if any, of its grantee) has, by the operation of the treaty, become ineffectual and void." Fairfax *v.* Hunter, 7 Cranch 603, 627, 3 L. Ed. 453, reaffirmed in 1 Wheat. 304, 4 L. Ed. 97.

A defeasible title, thus vested, during the war of the revolution, in a British-born subject, who has never become a citizen, is completely protected and confirmed by the 9th article of the treaty of 1794, between the United States and Great Britain. Craig *v.* Radford, 3 Wheat. 594, 4 L. Ed. 467. See ante, "Confiscation and Forfeiture," III, E, 1, c; "Effect of Division of Country," III, E, 4.

86. Nature of title protected.—Blight *v.* Rochester, 7 Wheat. 535, 5 L. Ed. 516; Harden *v.* Fisher, 1 Wheat. 300, 4 L. Ed. 96.

It completely protects, without further legislation, the property rights of British aliens in this country, of every description, and its validity is unquestionable. Hughes *v.* Edwards, 9 Wheat. 489, 6 L. Ed. 142; Orr *v.* Hodgson, 4 Wheat. 453, 4 L. Ed. 613. See Baldwin *v.* Franks, 120 U. S. 678, 703, 30 L. Ed. 766.

Actual possession or seizin at time of treaty unnecessary.—Under the 9th article of the treaty between the United States and Great Britain, of 1794 (by which was provided that British subjects, holding lands in the United States, and their heirs, so far as respects those lands and the remedies incident thereto, should not be considered as aliens), it is not necessary for the alien to show that he was in the actual possession or seisin of the land, at the date of the treaty, which applies to the title, whatever that may be, and gives it the same legal validity as if the parties were citizens: the title of an alien mortgagee is protected by the treaty. Hughes *v.* Edwards, 9 Wheat. 489, 6 L. Ed. 142; Harden *v.* Fisher, 1 Wheat. 300, 4 L. Ed. 96; Orr *v.* Hodgson, 4 Wheat. 453, 463, 4 L. Ed. 613.

But, independent of the stipulations of the treaty, an alien mortgagee has a right to come into a court of equity, and have the property which has been pledged for the payment of the debt, sold for the purpose of raising the money; his demand is merely a personal one, the debt being considered as the principal, and the land as an incident. Hughes *v.* Edwards, 9 Wheat. 489, 6 L. Ed. 142. See, also, Neilson *v.* Lagow, 12 How. 98, 108, 13 L. Ed. 909.

subjects, whose allegiance has never been renounced, are included within its benefits, and citizens of the United States.[87]

d. *Treaties with Switzerland.*—The treaty of 1850, with the Swiss Confederation, removed the incapacity of a citizen of Switzerland so far as to entitle him to the proceeds of land in Virginia, as to which he is the next of kin.[88] And the time for asserting same is limited by no statute.[89]

87. All British-born subjects included.—All British-born subjects, whose allegiance Great Britain has never renounced, ought, upon general principles of interpretation, to be held within the intent, as they certainly are within the words, of the treaty of 1794, p. 250, removing the disabilities of alienage of British subjects and their heirs, as to lands held by them in the United States at the time of the treaty. Shanks *v.* Dupont, 3 Pet. 242, 7 L. Ed. 666.

But the 9th article of the treaty of 1794 did not mean to include any other persons than such as were British subjects or citizens of the United States. It did not apply to aliens to both governments. Orr *v.* Hodgson, 4 Wheat. 453, 4 L. Ed. 613.

G. C., born in the colony of New York, went to England in 1738, where he resided until his decease; and being seised of lands in New York, he, on the 30th of November, 1776, in England, devised the same to the defendant and E. C. as tenants in common, and died so seised, on the 10th of December, 1776; the defendant and E. C. having entered and becoming possessed, E. C., on the 3d of December, 1791, bargained and sold to the defendant all his interest. The defendant and E. C., were both born in England long before the revolution. On the 22d of March, 1791, the legislature of New York passed an act to enable the defendant to purchase lands, and to hold all other lands which he might then be entitled to, within the state, by purchase or descent, in fee simple, and to sell and dispose of the same, in the same manner as any natural born citizen might do. The treaty between the United States and Great Britain of 1794, contains the following provision: "Article 9th. It is agreed, that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of his majesty, shall continue to hold them, according to the nature and tenure of their respective estates and titles therein; and may grant, sell or devise the same, to whom they please, in like manner as if they were natives, and that neither they, nor their heirs or assigns, shall, so far as respects the said lands and the legal remedies incident thereto, be considered as aliens." The defendant, at the time of the action brought, still continued to be a British subject. Held, that he was entitled to hold the lands so devised to him by G. C., and transferred to him. Jackson *v.* Clarke, 3 Wheat. 1, 4 L. Ed. 319.

Thomas Scott, a native of South Carolina, died in 1782, intestate, seised of lands on James Island, having two daughters, Ann and Mary, both born in South Carolina, before the Declaration of Independence; Sarah married D. P., a citizen of South Carolina, and died in 1802, entitled to one-half of the estate. The British took possession of James Island and Charleston, in February and May, 1780; and in 1781, Ann Scott married Joseph Shanks, a British officer, and at the evacuation of Charleston, in 1782, she went to England with her husband, where she remained until her death in 1801; she left five children, born in England; they claimed the other moiety of the real estate of Thomas Scott, in right of their mother, under the ninth article of the treaty of peace between this country and Great Britain, of the 19th of November, 1794. Held, that they were entitled to recover and hold the same. Shanks *v.* Dupont, 3 Pet. 242, 7 L. Ed. 666.

Her subsequent removal to England, with her husband, operated as a virtual dissolution of her allegiance, and fixed her future allegiance to the British crown, by the treaty of peace in 1783, p. 246. Shanks *v.* Dupont, 3 Pet. 242, 7 L. Ed. 666.

88. Rights under treaty of 1850.—A, a citizen of Switzerland died in 1861 in Virginia intestate and without issue. For want of an heir capable under the statutes of the state to inherit the lands there situate whereof he died seised in fee, they were sold by the escheator of the proper district. A's next of kin, B, a citizen of Switzerland, filed a petition to recover the proceeds of that sale. Upon consideration of the treaty between the United States and the Swiss Confederation of November 25, 1850 (10 Stat. 587), held, that the treaty is the supreme law of the land, and by its terms the incapacity of B as an alien was so far removed as to entitle him to recover and sell the lands and "withdraw and export the proceeds thereof." Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. Ed. 628.

In view of B's rights in the premises, the escheator is entitled only to the amount allowed by law for making sales of real estate in ordinary cases, but counsel cannot be paid out of the fund in dispute. Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. Ed. 628.

89. Limitation.—His rights thus secured

F. Criminal Jurisdiction over Aliens.—The general rule of law is that aliens are subject to the law of the territory where the crime is committed.[90] But by comity it has come to be generally understood among civilized nations that all matters of discipline and all things done on board which affect only the vessel or those belonging to her, and do not involve the peace or dignity of the country, or the tranquillity of the port, should be left by the local government to be dealt with by the authorities of the nation to which the vessel belonged, as the laws of that nation or the interests of its commerce require. But if crimes are committed on board of a character to disturb the peace and tranquillity of the country to which the vessel has been brought, the offenders have never by comity or usage been entitled to any exemption from the operation of the local laws for their punishment, if the local tribunals see fit to assert their authority.[91] But this implied consent to waive jurisdiction over the internal affairs of such foreign merchant vessels may be withdrawn, partially or entirely.[92]

G. Alien Enemies and Effect of War.—See the titles ADMIRALTY, ante, p. 119; CONFEDERATE STATES; WAR.

IV. Pleading and Practice.

A. Declaration or Bill—1. AVERMENTS AS TO ALIENAGE OR CITIZENSHIP. —In order to give the federal courts jurisdiction of a cause to which an alien is a

are not barred by the lapse of time, inasmuch as no statute of Virginia prescribes the term within which they must be asserted, as may be done by the terms of the treaty. Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. Ed. 628.

90. Barrington *v.* Missouri, 205 U. S. 483, 487, 51 L. Ed. 890, citing Wildenhus' Case, 120 U. S. 1, 30 L. Ed. 565; Carlisle *v.* United States, 16 Wall. 147, 21 L. Ed. 426; Patterson *v.* Bark Eudora, 190 U. S. 169, 177, 47 L. Ed. 1002. See the title ADMIRALTY, ante, p. 119.

91. Comity rule—Dependent on public character of offense.—Wildenhus' Case, 120 U. S. 1, 12, 30 L. Ed. 565; Patterson *v.* Bark Eudora, 190 U. S. 169, 177, 47 L. Ed. 1002.

"The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction. It may not be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case, but all must concede that felonious homicide is a subject for the local jurisdiction, and that if the proper authorities are proceeding with the case in a regular way, the consul has no right to interfere to prevent it." Wildenhus' Case, 120 U. S. 1, 18, 30 L. Ed. 565.

Under the treaty which is the law which now governs the conduct of the United States and Belgium towards each other in this particular, each nation has granted to the other such local jurisdiction within its own dominion as may be necessary to maintain order on board a merchant vessel but has reserved to itself the right to interfere if the disorder on board is of a nature to disturb the public tranquility. Wildenhus' Case, 120 U. S. 1, 17, 30 L. Ed. 565.

No treaty gives to subjects of Great Britain any different measure of justice than is secured to citizens of this country. Barrington *v.* Missouri, 205 U. S. 483, 487, 51 L. Ed. 890, citing Spies *v.* Illinois, 123 U. S. 131, 182, 31 L. Ed. 80.

92. Subject to revocation or change.—Patterson *v.* Bark Eudora, 190 U. S. 169, 178, 47 L. Ed. 1002.

It is within the power of congress to prescribe penal provisions regulating contracts for seamen's wages, and no one within the jurisdiction of the United States can escape liability for a violation of those provisions on the plea that he is a foreign citizen or an officer of a foreign merchant vessel. It also follows that it is a duty of the courts of the United States to give full force and effect to such provisions. It is not pretended that this government can control the action of foreign tribunals. In any case presented to them they will be guided by their own views of the law and its scope and effect, but the courts of the United States are bound to accept this legislation and enforce it whenever its provisions are violated. The implied consent of this government to leave jurisdiction over the internal affairs of foreign merchant vessels in our harbors to the nations to which those vessels belong may be withdrawn. Indeed, the implied consent to permit them to enter our harbors may be withdrawn, and if this implied consent may be wholly with-

party, it is necessary to set forth the alienage or citizenship of the parties in positive terms.[93] When the jurisdiction of the circuit court depends upon the alienage of one of the parties, the fact of alienage must appear affirmatively either in the pleadings or elsewhere in the record.[94]

drawn it may be extended upon such terms and conditions as the government sees fit to impose. Patterson *v.* Bark Eudora, 190 U. S. 169, 178, 47 L. Ed. 1002. And see ante, "Allegiance and Jurisdiction Over," III, A.

93. Averments must be in positive terms.—Turner *v.* Enrille, 4 Dall. 7, 1 L. Ed. 717; Bingham *v.* Cabot, 3 Dall. 382, 1 L. Ed. 646; Abercrombie *v.* Dupuis, 1 Cranch 343, 2 L. Ed. 129; Capron *v.* Van Noorden, 2 Cranch 126, 2 L. Ed. 229; Mossman *v.* Higginson, 4 Dall. 12, 1 L. Ed. 720; Jackson *v.* Twentyman, 2 Pet. 136, 7 L. Ed. 374; Edwards *v.* Tanneret, 12 Wall. 446, 450, 20 L. Ed. 415; Rouse *v.* Letcher, 156 U. S. 47, 39 L. Ed. 341; Hodgson *v.* Bower Bank, 5 Cranch 303, 3 L. Ed. 108. See Turner *v.* Bank of N. America, 4 Dall. 8, 1 L. Ed. 718.

To give jurisdiction to the courts of the United States, on account of alienage of a party, it must be expressly averred in the pleading that one of the parties is an alien. Abercrombie *v.* Dupuis, 1 Cranch 343, 2 L. Ed. 129, following Bingham *v.* Cabot, 3 Dall. 382, 1 L. Ed. 646. The record must show the fact. Capron *v.* Van Noorden, 2 Cranch 126, 2 L. Ed. 229.

The power of congress to confer jurisdiction on the federal courts of suits "where an alien is a party," is confined to suits between citizens and foreigners, and therefore, a description of the parties in the pleadings showing this fact, is essential to the jurisdiction of the circuit court over suits to which an alien is party. Mossman *v.* Higginson, 4 Dall. 12, 1 L. Ed. 720; Jackson *v.* Twentyman, 2 Pet. 136, 7 L. Ed. 374.

Although the plaintiff be described in the proceedings as an alien, yet the defendant must be expressly stated to be a citizen of some one of the United States. Otherwise, the courts of the United States have not jurisdiction in the case. The words of the constitution were found to be "between a state, or the citizens thereof, and foreign states, citizens or subjects." Hodgson *v.* Bower Bank, 5 Cranch 303, 3 L. Ed. 108. See, however, ante, "Suits between Aliens," III, D, 1. See the title COURTS.

94. Must appear in pleadings or record.—Brown *v.* Keene, 8 Pet. 112, 115, 8 L. Ed. 885; Bingham *v.* Cabot, 3 Dall. 382, 1 L. Ed. 646; Capron *v.* Van Noorden, 2 Cranch 126, 2 L. Ed. 229; Robertson *v.* Cease, 97 U. S. 646, 24 L. Ed. 1057; Bors *v.* Preston, 111 U. S. 252, 263, 28 L. Ed. 419.

Where it does not appear from the record that the defendant is an alien, and it is consistent with the record that the defendant was and is a citizen of the same state with the plaintiff, the record, as it now is, does not present a case which the circuit court had authority to determine. Bors *v.* Preston, 111 U. S. 252, 263, 28 L. Ed. 419.

In Stuart *v.* Easton, 156 U. S. 46, 39 L. Ed. 341, it was held, that by the description of plaintiff as "a citizen of London, England," the fact that he was a subject of the British Crown was not made affirmatively to appear as required. In the case at bar, complainants described themselves as "all of Cognac in France, and citizens of the Republic of France," and this was sufficient. No averment of alienage was necessary. Hennessy *v.* Richardson Drug Co., 189 U. S. 25, 35, 47 L. Ed. 697.

An allegation that the plaintiff now is and for more than one year last past, has been a resident of a state of the Union and a citizen of Sweden, is a sufficient averment of alienage. The meaning of the pleader, being, evidently, to state the nationality of the plaintiff and the country to which he owed allegiance, an objection that he should have been styled "subject," was without merit. Nichols Lumber Co. *v.* Transon, 203 U. S. 278, 51 L. Ed. 181, citing Hennessy *v.* Richardson Drug Co., 189 U. S. 25, 47 L. Ed. 697.

A dismissal of a case for want of jurisdiction held to have been rightly made from the circuit court for Louisiana, as being a proceeding which, under the act of congress of July 28th, 1866, was to remain in the district court of the United States for that district; the case being one that had been begun in the "Provisional Court of Louisiana," on pleadings which showed that both parties were citizens of the state named. The jurisdiction of the circuit court was held not to have been helped by a suggestion made there on transferring the case, that the defendant was an alien; the fact being denied in the subsequent pleadings, and no proof of it in any way made. Edwards *v.* Tanneret, 12 Wall. 446, 20 L. Ed. 415.

"When the plaintiff in an action invokes the jurisdiction of the circuit court because of the citizenship of the parties, it must appear upon the record that the citizenship is such as to justify the court in taking cognizance of the case. And certainly the pleadings here exhibit nothing from which the court can see that both parties are not citizens of Louisiana.

2. Effect and Necessity for Denial.—Where the petitioners averred that they were aliens, and this averment is not contradicted on the record, the court cannot presume that they are citizens.[95] And where the declaration plainly sets out that the plaintiffs are aliens, and the defendant a citizen of Maryland, it is sufficient to give the federal court jurisdiction.[96]

3. Amendment.—If an alien should sue a citizen, and omit to state the character of the parties in the bill, though the court could not exercise jurisdiction, while the defect in the bill remained, yet it might, as is every day's practice, be corrected, at any time before the hearing, and the court would not hesitate to decree in the cause.[97]

B. Plea.—The general issue pleaded to an action of ejectment admits the capacity of the plaintiffs to sue, although aliens,[98] and a plea of alienage, to be

As already noticed, the petition makes no averment respecting the citizenship of the defendant, and simply describes the plaintiff as a citizen, without asserting of what state or kingdom. And the citation describes both parties as citizens of Louisiana." Edwards *v.* Tanneret, 12 Wall. 446, 450, 20 L. Ed. 415.

Residence.—Where the plaintiffs are aliens, the jurisdiction has been held to be sufficiently shown by stating that fact and the citizenship of defendants, without averring that the defendant is a resident of the district in which the suit is brought or served therein. His right of exemption to suit there may be waived by voluntary appearance. Gracie *v.* Palmer, 8 Wheat. 699, 5 L. Ed. 719. See ante, "Venue, Scope, and Rule of Decision," III, D, 2, c.

Alleging discrimination in protection of laws.—See ante, "Right to Protection of Laws," III, B.

95. Presumed true where uncontradicted.—Breedlove *v.* Nicolet, 7 Pet. 413, 8 L. Ed. 731. See Propagation Society *v.* Pawlet, 4 Pet. 480, 7 L. Ed. 927.

96. Waters *v.* Barrill, 131 U. S. (Appendix) lxxxiv, 18 L. Ed. 878.

Effect and collateral attack.—The jurisdiction of the circuit court of the United States, of a suit brought by a plaintiff alleging alienage, cannot be questioned as to the fact in another suit, when, by the record of the original suit, there appeared to be jurisdiction, and the question was not raised by the defendant in that suit. Lacassagne *v.* Chapuis, 144 U. S. 119, 126, 36 L. Ed. 368.

97. Amended to show character of parties.—Conolly *v.* Taylor, 2 Pet. 556, 7 L. Ed. 518; Rouse *v.* Letcher, 156 U. S. 47, 39 L. Ed. 341.

Where plaintiff is described throughout the record as "a citizen of London, England," and the defendants as "corporations of the state of Pennsylvania," as the jurisdiction of the circuit court confessedly depended on the alienage of plaintiff in error, and that fact was not made affirmatively to appear, the judgment must be reversed at the costs of plaintiff in error, and the cause be remanded to the circuit court with leave to apply for amendment and for further proceedings. Rouse *v.* Letcher, 156 U. S. 47, 39 L. Ed. 341, citing Bingham *v.* Cabot, 3 Dall. 382, 1 L. Ed. 646; Mossman *v.* Higginson, 4 Dall. 12, 1 L. Ed. 720; Capron *v.* Van Noorden, 2 Cranch 126, 2 L. Ed. 229; Jackson *v.* Twentyman, 2 Pet. 136, 7 L. Ed. 374; Conolly *v.* Taylor, 2 Pet. 556, 7 L. Ed. 518; Brown *v.* Keene, 8 Pet. 112, 115, 8 L. Ed. 885; Robertson *v.* Cease, 97 U. S. 646, 24 L. Ed. 1057; Bors *v.* Preston, 111 U. S. 252, 263, 28 L. Ed. 419.

Striking out and changing sides.—Where the suit was originally instituted by aliens and a citizen of the United States, as complainants, against the defendants, citizens of the United States; in the progress of the cause, and before the final hearing, the name of the citizen of the United States, who was one of the plaintiffs, was stricken out, and he was made a defendant. Held, the substantial parties plaintiffs, those for whose benefit the decree is sought, are aliens, and the court has original jurisdiction between them and all the defendants; but they prevented the exercise of this jurisdiction, by uniting with themselves a person between whom and one of the defendants the court could not take jurisdiction; strike out his name as a complainant, and the impediment is removed to the exercise of that original jurisdiction which the court possessed between the alien parties, and all the citizen defendants; there is no objection, founded on convenience or law, to this course. Conolly *v.* Taylor, 2 Pet. 556, 7 L. Ed. 518.

98. General issue admits capacity to sue.—Propagation Society *v.* Pawlet, 4 Pet. 480, 7 L. Ed. 927.

In ejectment to recover a lot of land, being the first division lot laid out to the right of the society in the town of Pawlet, the plaintiffs were described in the writ as "The Society for the Propagation of the Gospel in foreign parts, a corporation duly established in England, within the dominions of the king of the United Kingdom of Great Britain and Ireland, the members of which society are aliens, and subjects of the said king;" the defendants pleaded the general issue of not guilty. The general issue admits the com-

good, must allege a state of facts that will debar plaintiff as an alien from suing in the action.[99] And alienage as incapacitating to take property, cannot be availed of for the first time in the appellate court, though disclosed by the record.[1]

C. Replication.—Where alienage as a disqualification to acquire property is truthfully pleaded, particular circumstances avoiding it must be set up by special replication.[2]

D. Evidence.—See ante, "What Determines Relation," II.

1. Presumptions and Burden of Proof.—See ante, "Definition and Status," I; "Burden of Proof and Presumptions," II, D, 4.

a. *Inferences and Presumptions.*—Alienage cannot be inferred, argumentatively, from the single circumstance that such person holds and exercises the office of consul in a foreign government.[3] But in the absence of proof that an alien

petency of the plaintiffs to sue, in the corporate capacity in which they have sued. Propagation Society *v.* Pawlet, 4 Pet. 480, 7 L. Ed. 927.

If the defendants meant to insist on the want of a corporate capacity in the plaintiff, an English corporation, to sue, it should have been insisted upon by a special plea in abatement or bar; pleading to the merits has been held by this court to be an admission of the capacity of the plaintiffs to sue; the general issue admits, not only the competency of the plaintiffs to sue, but to sue in the particular action which they bring. Propagation Society *v.* Pawlet, 4 Pet. 480, 7 L. Ed. 927.

99. Must show incapacity to sue.—Christy *v.* Scott, 14 How. 282, 294, 14 L. Ed. 422; Dawson *v.* Godfrey, 4 Cranch 321, 2 L. Ed. 634.

A plea to an action of ejectment brought in the United States district court for Texas, alleging, among other things, that plaintiff, at the time of the acquisition of his title, was not and never had been a citizen of Texas or Mexico, but was a citizen of the United States, and such acquisition was before the annexation of Texas to the United States, if intended as a plea to the action of the alienage of the plaintiff, is manifestly bad, for the plaintiff, as a citizen of the United States is capable of maintaining an action to recover lands in Texas, to which he has title. Christy *v.* Scott, 14 How. 282, 294, 14 L. Ed. 422.

Overruling plea—Waiver of objection thereto.—Where a plea to the jurisdiction in a suit by plaintiffs alleging alienage, is overruled, presumably as being untrue, and error in so doing is not urged in the argument of the writ of error, it is considered as waived. Weems *v.* George, 13 How. 190, 14 L. Ed. 108.

1. Time for pleading alienage as incapacity to take property.—The alienage of a devisee, as making void the devise, cannot be availed of by him for the first time in the supreme court on a writ of error to a circuit judgment on a special case, even though the record discloses the fact of alienage. Scholey *v.* Rew, 23 Wall. 331, 350, 23 L. Ed. 99.

Where, beyond what may be inferred from the finding of the court that the plaintiff is an alien, it does not appear that the defense of alienage was set up in the court below, nor does the assignment of errors contain any specification of such a question, except that the plaintiff is not liable to a sucession tax and that the decision of the court below that he is so liable is erroneous, such an assignment is not a compliance with the rule upon that subject, but the court did not rest the decision upon that ground. Scholey *v.* Rew, 23 Wall. 331, 350, 23 L. Ed. 99.

Alienage pleadable in ejectment.—If the demandant in ejectment be incapable of taking as heir by descent, although there be a right, that may be shown by the tenant; as, if he be an alien, because it defeats the asserted descent of the title. Inglis *v.* Sailor's Snug Harbor, 3 Pet. 99, 172, 7 L. Ed. 617, dissenting opinion of Story, J.

2. Replication of matter in avoidance.—"If an action be commenced in England, by an ante-natus of America, for the recovery of land, the plea of alien born could not be maintained, because inconsistent with the fact; nor would a plea of the severance of these states avail the defendant, because the act of his government, independent of any crime of his own, does not deprive the plaintiff of his civil rights, although it may release him from the obligation of allegiance. But if a suit of the same kind is instituted here, by an ante-natus of Great Britain, the plea of alien born could be maintained, for the plaintiff never owed allegiance to our government. To avoid it, he would be put to a special replication, by which he must of necessity acknowledge the truth of the plea, and set forth circumstances which would amount to a recognition of his never having been a party in our social compact." Dawson *v.* Godfrey, 4 Cranch 321, 2 L. Ed. 634.

3. Not inferred from holding consulship.—Bors *v.* Preston, 111 U. S. 252, 263, 28 L. Ed. 419.

In what cases citizenship may be presumed, so as to confirm a title to lands, see Blight *v.* Rochester, 7 Wheat. 535, 5 L. Ed. 516.

has become a citizen of the United States, his original status is presumed to continue.[4] And an essential step in the termination of such incapacity by naturalization cannot ordinarily be presumed from lapse of time, where it should appear of record but does not.[5] And aliens are presumed, prima facie, to be residents abroad.[6]

b. *Burden of Proof.*—Where the common law deprives an alien generally of the right of inheriting, it is incumbent upon the plaintiff to establish some exception in favor of his case.[7]

2. COMPETENCY.—In an action by alleged citizens of the United States against an alien, the affidavit of a plaintiff, made in a former suit alleging alienage as ground for removal of the cause, is competent evidence.[8] But a passport, granted by the secretary of state of the United States, is incompetent to disprove the alienage of the grantee.[9]

3. WEIGHT AND SUFFICIENCY.—A mere recital in a deed,[10] or evidence of conversations and admissions,[11] have been held insufficient evidence of alienage.

4. Presumption of continuance of status.—Hauenstein *v.* Lynham, 100 U. S. 483, 25 L. Ed. 628.

5. Presumption of essential step in naturalization.—Blight *v.* Rochester, 7 Wheat. 535, 546, 5 L. Ed. 516.

The alienage being fully proved, and the laws of Virginia requiring, as indispensable to his citizenship, that he should take the oath of fidelity to the commonwealth, in a court of record, of which the clerk is directed to grant a certificate, it does not seem that this fact, which, had it taken place, must appear on record, ought to be presumed, unless there were some other fact, such as holding an office of which citizens alone were capable, or which required an oath of fidelity, from which it might be inferred. In favor of long possession, in favor of strong apparent equity, much may be presumed; but in a case where the presumption would defeat possession, where the equity is doubtful, where the parties rely upon strict law, courts will be cautious how they lean in favor of presuming that which does not appear, and which might be shown by a record. Blight *v.* Rochester, 7 Wheat. 535, 546, 5 L. Ed. 516.

6. Inference of residence abroad.—Propagation Society *v.* Pawlet, 4 Pet. 480, 7 L. Ed. 927.

And where the plaintiffs are a foreign corporation, the members of which are averred to be aliens, and British subjects, the natural presumption is, that they are residents abroad. Propagation Society *v.* Pawlet, 4 Pet. 480, 7 L. Ed. 927.

7. Burden on party alleging exception to rule against alien inheriting.—Dawson *v.* Godfrey, 4 Cranch 321, 323, 2 L. Ed. 634.

8. Affidavit of alienage in former suit.—The defendant in the circuit court offered in evidence the record, duly certified, of the district court of the United States for the district of Louisiana, containing the proceedings in a suit which had been originally instituted against D'Arbel, in a state court of Louisiana, and on his affidavit that he was an alien, and a subject of the king of Spain, had been removed for trial to the district court, under the authority of the act of congress authorizing such a removal of a suit against an alien into a court of the United States; the record was introduced, as containing a copy of the affidavit of D'Arbel in the state court, upon which the case was removed. Held, that this was legal evidence. Urtetiqui *v.* D'Arbel, 9 Pet. 692, 9 L. Ed. 276.

9. Passport incompetent to prove citizenship.—The plaintiffs instituted a suit in the circuit court of the United States for the district of Maryland, stating themselves to be citizens of the state of Maryland, and that the defendant was an alien, and a subject of the king of Spain; the defendant pleaded in abatement that one of the plaintiffs, Domingo D'Arbel, was not a citizen of Maryland, nor any of the United States, but was an alien, and a subject of the king of Spain; upon the trial of the issue joined on this plea, the plaintiffs produced and gave in evidence, under the decision of the circuit court, a passport granted by the secretary of state of the United States, stating D'Arbel to be a citizen of the United States. Held, that the passport was not legal evidence to establish the fact of the citizenship of the person in whose favor it was given. Urtetiqui *v.* D'Arbel, 9 Pet. 692, 9 L. Ed. 276.

10. Recital in deed.—A mere expression in a deed that a party was a citizen of Mexico did not establish alienage, as the state might claim his citizenship, notwithstanding. White *v.* Burnley, 20 How. 235, 250, 15 L. Ed. 886; Cook *v.* Burnley, 11 Wall. 659, 670, 20 L. Ed. 29.

11. Evidence of conversations or admissions.—Where the objection to a grant of land in California was, that the grantee was a foreigner, and therefore not entitled to hold land, this court is of the opinion that the testimony of conversations or admissions, relied upon to prove that fact, ought not to be received to

E. Limitation of Actions.—See ante, "Treaties with Switzerland," III, E, 6, d. See the title LIMITATIONS OF ACTIONS AND ADVERSE POSSESSION.

F. Removal of Causes.—See the title REMOVAL OF CAUSES.

V. Admission or Exclusion of Aliens or Immigrants.

A. Power of Congress and States—1. IN GENERAL.—Congress has the absolute power to exclude aliens, or to exclude some and admit others.[12] Congress may exclude aliens of a particular race from the United States; prescribe the terms and conditions upon which certain classes of aliens may come to this country; and establish regulations for sending out of the country such aliens as come in here in violation of law.[13]

But the policy of this country from the beginning has been to encourage the immigration of desirable aliens into the United States.[1]

2. MODE OF EXERCISE AND DISCRETION.—In the United States, this power is vested in the national government, to which the constitution has committed the entire control of international relations, in peace as well as in war. It belongs to the political department of the government, and may be exercised either through treaties made by the president and senate, or through statutes enacted by congress.[14] And the reasons for its discrimination are not open to challenge in the

outweigh the prima facie (if not conclusive) presumptions arising from the expediente and definitive title. Dalton *v.* United States, 22 How. 436, 16 L. Ed. 395.

12. Lees *v.* United States, 150 U. S. 476, 480, 37 L. Ed. 1150; The Chinese Exclusion Case, 130 U. S. 581, 603, 32 L. Ed. 1068; Fong Yue Ting *v.* United States, 149 U. S. 698, 37 L. Ed. 905; Church of the Holy Trinity *v.* United States, 143 U. S. 457, 36 L. Ed. 226; The Japanese Immigrant Case, 189 U. S. 86, 97, 47 L. Ed. 721.

"The power of the government to exclude foreigners from the country, whenever, in its judgment, the public interests require such exclusion, has been asserted in repeated instances, and never denied by the executive or legislative departments." Fong Yue Ting *v.* United States, 149 U. S. 698, 707, 37 L. Ed. 905; The Chinese Exclusion Case, 130 U. S. 581, 606, 32 L. Ed. 1068.

Although over aliens, qua aliens, no direct authority has been delegated to congress by the constitution, to regulate their admission or exclusion as friends. Passenger Cases, 7 How. 283, 508, 12 L. Ed. 702 (dissenting opinion of Daniel, J.); Fong Yue Ting *v.* United States, 149 U. S. 698, 731, 762, 37 L. Ed. 905.

13. Although a state of peace exists with such foreign country. The Chinese Exclusion Case, 130 U. S. 581, 606, 32 L. Ed. 1068; Nishimura Ekiu *v.* United States, 142 U. S. 651, 35 L. Ed. 1146; Fong Yue Ting *v.* United States, 149 U. S. 698, 37 L. Ed. 905; Lem Moon Sing *v.* United States, 158 U. S. 538, 39 L. Ed. 1082; Wong Wing *v.* United States, 163 U. S. 228, 41 L. Ed. 140; Fok Young Yo *v.* United States, 185 U. S. 296, 305, 46 L. Ed. 917; Chin Bak Kan *v.* United States, 186 U. S. 193, 46 L. Ed. 1121; United States *v.* Sing Tuck, 194 U. S. 161, 48 L. Ed. 917.

It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Fong Yue Ting *v.* United States, 149 U. S. 698, 705, 37 L. Ed. 905; Wong Wing *v.* United States, 163 U. S. 228, 231, 41 L. Ed. 140. Nishimura Ekiu *v.* United States, 142 U. S. 651, 654, 35 L. Ed. 1146; The Chinese Exclusion Case, 130 U. S. 581, 606, 32 L. Ed. 1068; Turner *v.* Williams, 194 U. S. 279, 26, 48 L. Ed. 979; Passenger Cases, 7 How. 525, 12 L. Ed. 702; Woodbury, J., dissenting.

The section which restrained congress from prohibiting the migration or importation of such persons as any of the states may think proper to admit, until the year 1808, has always been considered as an exception from the power to regulate commerce, and certainly seems to class migration with importation. Migration applies as appropriately to voluntary, as importation does to involuntary, arrivals. Gibbons *v.* Ogden, 9 Wheat. 1, 216, 6 L. Ed. 23. See post, "Powers of States," V, A, 7.

"The first restraint that nations reserve to themselves is the right to be informed of the name and quality of every foreigner that arrives." Wayne, J., Passenger Cases, 7 How. 283, 401, 423, 12 L. Ed. 702.

1. Passenger Cases, 7 How. 283, 401, 440, 461, 12 L. Ed. 702.

14. Fong Yue Ting *v.* United States, 149 U. S. 698, 705, 713, 37 L. Ed. 905; Nishimura Ekiu *v.* United States, 142 U.

courts. Given the power to exclude, it has the right to make that exclusion effective by punishing those who assist in introducing, or attempting to introduce, aliens in violation of its prohibition.[15]

3. INALIENABILITY.—This power of exclusion of foreigners is inalienable, by treaty or otherwise.[16] And the acquisition of a commercial domicile in this country by an alien is no bar to his exclusion.[17]

S. 651, 659, 35 L. Ed. 1146. See dissenting opinion of Daniel, J., in Smith *v.* Turner, 7 How. 283, 482, 513, 12 L. Ed. 702.

The doctrine is firmly established that the power to exclude or expel aliens is vested in the political departments of the government, to be regulated by treaty or by act of congress (Chew Heong *v.* United States, 112 U. S. 536, 63, 28 L. Ed. 770, dissenting opinion of Field, J.), and to be executed by the executive authority according to such regulations, except so far as the judicial department is authorized by treaty or by statute, or is required by the constitution, to intervene. Fong Yue Ting *v.* United States, 149 U. S. 698, 37 L. Ed. 905; Lem Moon Sing *v.* United States, 158 U. S. 538, 39 L. Ed. 1082; Li Sing *v.* United States, 180 U. S. 486, 45 L. Ed. 634. And as a general proposition this must be true of the privilege of transit. Fok Young Yo *v.* United States, 185 U. S. 296, 302, 46 L. Ed. 917.

15. Interference of judiciary.—Lees *v.* United States, 150 U. S. 476, 480, 37 L. Ed. 1150.

The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States, being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy, or the justice of the measures enacted by congress in the exercise of the powers confided to it by the constitution over this subject. Li Sing *v.* United States, 180 U. S. 486, 495, 45 L. Ed. 634; Fong Yue Ting *v.* United States, 149 U. S. 698, 731, 37 L. Ed. 905. See post, "Delegation to Inspectors or Other Officers, or a Department," V, C, 1.

Alien immigration act of 1903.—Whether rested on the accepted principle of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may seem fit to prescribe; or on the power to regulate commerce with foreign nations, which includes the entrance of ships, the importation of goods, and the bringing of persons into the ports of the United States, the alien immigration act of 1903 is not open to constitutional objection. Turner *v.* Williams, 194 U. S. 279, 290, 48 L. Ed. 979. See post, "In General," V, C, 1, a.

16. Inalienability.—Fong Yue Ting *v.* United States, 149 U. S. 698, 716, 720, 37 L. Ed. 905; The Chinese Exclusion Case, 130 U. S. 581, 32 L. Ed. 1068.

The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of anyone. Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure. The Chinese Exclusion Case, 130 U. S. 581, 609, 32 L. Ed. 1068.

If the government of the country of which the foreigners excluded are subjects is dissatisfied with this action it can make complaint to the executive head of our government, or resort to any other measure which, in its judgment, its interest or dignity may demand; and there lies its only remedy. The Chinese Exclusion Case, 130 U. S. 581, 606, 32 L. Ed. 1068.

The existence of a treaty with a foreign power, recognizing, to some extent, the right of subjects of that power to enter or remain in the United States, will not prevent the legislative power from exercising its right to exclude such aliens absolutely, and such laws will, to that extent, abrogate the treaty. The Chinese Exclusion Case, 130 U. S. 581, 32 L. Ed. 1068; United States *v.* Gue Lim, 176 U. S. 459, 464, 44 L. Ed. 544. See Chew Heong *v.* United States, 112 U. S. 536, 555, 28 L. Ed. 770.

If an act, construed to exclude certain aliens thus construed, takes away from the alien appellant any right given by previous laws or treaties to re-enter the country, the authority of congress to do even that cannot be questioned, although it is the duty of the courts not to construe an act of congress as modifying or annulling a treaty made with another nation, unless its words clearly and plainly point to such a construction. Lem Moon Sing *v.* United States, 158 U. S. 538, 549, 39 L. Ed. 1082; Chew Heong *v.* United States, 112 U. S. 536, 555, 28 L. Ed. 770.

17. Acquisition of commercial domicile no bar.—A statute passed in execution of

4. Conditional Admission.—The United States admits aliens conditionally, and preserves that condition notwithstanding preliminary decision in their favor by a board which it provides. The authority of Congress to impose such conditions hardly was disputed and is not open to doubt.[18]

5. To Punish Criminally Illegal Entry and Residence.—See post, "Detention and Expulsion or Deportation," V, C, 3.

It would be plainly competent for congress to declare the act of an alien in remaining unlawfully within the United States to be an offense, punishable by fine or imprisonment, if such offense were to be established by a judicial trial.[19] Or it may punish those who assist in introducing or attempting to introduce aliens over its prohibition.[20]

6. Construction of Acts of Congress.—Undoubtedly, an act of congress should be given a reasonable interpretation, with a view to effect its purpose to

that power is no less applicable to an alien, who has acquired a commercial domicil within the United States, but who, having voluntarily left the country, although for a temporary purpose, claims the right under some law or treaty to re-enter it. The words of the act of August 18, 1894, are broad and include "every case" of an alien, at least every Chinese alien, who, at the time of its passage, is out of this country, no matter for what reason, and seeks to come back. He is none the less an alien because of his having a commercial domicil in this country. Lem Moon Sing *v.* United States, 158 U. S. 538, 547, 39 L. Ed. 1082; The Chinese Exclusion Case, 130 U. S. 581, 32 L. Ed. 1068; Nishimura Ekiu *v.* United States, 142 U. S. 651, 35 L. Ed. 1146; Fong Yue Ting *v.* United States, 149 U. S. 698, 37 L. Ed. 905; Wong Wing *v.* United States, 163 U. S. 228, 41 L. Ed. 140; United States *v.* Wong Kim Ark, 169 U. S. 649, 699, 42 L. Ed. 890.

And this for reasons applicable to all aliens alike, and inapplicable to citizens of whatever race or color, without infringing on the 14th constitutional amendment. United States *v.* Wong Kim Ark, 169 U. S. 649, 699, 42 L. Ed. 890.

18. Pearson *v.* Williams, 202 U. S. 281, 284, 50 L. Ed. 1029; Lem Moon Sing *v.* United States, 158 U. S. 538, 543, 39 L. Ed. 1082; Nishimura Ekiu *v.* United States, 142 U. S. 651, 35 L. Ed. 1146; The Japanese Immigrant Case, 189 U. S. 86, 97, 99, 47 L. Ed. 721; Fong Yue Ting *v.* United States, 149 U. S. 698, 37 L. Ed. 905; Wong Wing *v.* United States, 163 U. S. 228, 41 L. Ed. 140; Fok Young Yo *v.* United States, 185 U. S. 296, 305, 46 L. Ed. 917.

In The Japenese Immigrant Case, 189 U. S. 86, 99, 47 L. Ed. 721, it was said: "Taking all its enactments together, it is clear that congress did not intend that the mere admission of an alien, or his mere entering the country, should place him at all times thereafter entirely beyond the control or authority of the executive officers of the government. On the contrary, if the secretary of the treasury became satisfied that the immigrant had been allowed to land contrary to the prohibition of that law, then he could at any time within a year after the landing, cause the immigrant to be taken into custody and deported. The immigrant must be taken to have entered subject to the condition that he might be sent out of the country by order of the proper executive officer if within a year he was found to have been wrongfully admitted into or had illegally entered the United States." See post, "Detention and Expulsion or Deportation," V, C, 3.

19. Power to punish criminally.—Wong Wing *v.* United States, 163 U. S. 228, 235, 41 L. Ed. 140.

But when congress sees fit to further promote such a policy by subjecting the persons of such aliens to infamous punishment at hard labor, or by confiscating their property, such legislation, to be valid, must provide for a judicial trial to establish the guilt of the accused. Wong Wing *v.* United States, 163 U. S. 228, 237, 41 L. Ed. 140; Li Sing *v.* United States, 180 U. S. 486, 495, 45 L. Ed. 634. See Turner *v.* Williams, 194 U. S. 279, 291, 48 L. Ed. 979.

"No limits can be put by the courts upon the power of congress to protect, by summary methods, the country from the advent of aliens whose race or habits render them undesirable as citizens, or to expel such if they have already found their way into our land and unlawfully remain therein. But to declare unlawful residence within the country to be an infamous crime, punishable by deprivation of liberty and property, would be to pass out of the sphere of constitutional legislation, unless provision were made that the fact of guilt should first be established by a judicial trial." Wong Wing *v.* United States, 163 U. S. 228, 237, 41 L. Ed. 140. See Turner *v.* Williams, 194 U. S. 279, 291, 48 L. Ed. 979.

20. Lees *v.* United States, 150 U. S. 476, 480, 37 L. Ed. 1150. See post, "Detention and Expulsion or Deportation," V, C, 3; "Liability of Persons Bringing in Immigrants Not Permitted to Land," V, D.

prevent the introduction into this country of classes of persons excluded by immigration laws.[21] But it should not be construed to modify or annul a treaty made with another nation, unless its words clearly and plainly point to such construction.[22] But if penal, it must be strictly construed.[23]

7. Powers of States.—Except to guard its citizens against diseases and paupers, the municipal power of a state cannot prohibit the introduction of foreigners brought into this country under the authority of congress. It may deny them a residence, unless they shall give security to indemnify the public should they become paupers.[24] The states have also reserved the police right to turn off from their territories paupers, vagabonds, and fugitives from justice. And the state having slavery had the right to exclude all such as were, from a common ancestry and country, of the same class of men.[25]

B. Classes Excluded—1. Paupers, Criminal and Diseased Persons.—The exclusion of paupers, criminals and persons afflicted with incurable diseases, for which statutes have been passed, is only an application of the same power to

21. Reasonably interpreted to effect purpose.—Hackfeld Co. *v.* United States, 197 U. S. 442, 452, 49 L. Ed. 826.

22. Lem Moon Sing *v.* United States, 158 U. S. 538, 549, 39 L. Ed. 1082.

23. That section of the act of March 3, 1891, imposing a penalty for neglecting to return to the port whence they came, immigrants excluded from landing and entry, upon the person bringing them to this country, is a highly penal statute and to be strictly construed. Hackfeld Co. *v.* United States, 197 U. S. 442, 49 L. Ed. 826.

24. Power of state to exclude.—Passenger Cases (per McClean, J.), 7 How. 283, 406, 12 L. Ed. 702.

25. Police powers.—Passenger Cases (per Wayne, J.), 7 How. 283, 406, 410, 424, 12 L. Ed. 702.

By the police power in the states they have reserved the right to be informed of the name and quality of every foreigner that arrives in the state. This, and no more than this, was Miln's Case, in 11 Pet. 102, 9 L. Ed. 648. But only after they have been landed, as is there said. Passenger Cases, 7 How. 283, 410, 424, 12 L. Ed. 702, per Wayne, J.

The case of the New York *v.* Miln, 11 Pet. 102, 103, 9 L. Ed. 648, decided no more than that the requirement from the master of a vessel of a catalogue of his passengers landed in the city, rendered to the mayor on oath, with a correct description of their names, ages, occupations, places of birth, and of last legal settlement, was a police regulation within the power of the state to enact, and not inconsistent with the constitution of the United States. Henderson *v.* New York, 92 U. S. 259, 23 L. Ed. 543.

"The states may meet such persons upon their arrival in port, and may put them under all proper restraints. They may prevent them from entering their territories, may carry them out or drive them off." Passenger Cases, 7 How. 283, 410, 426, 12 L. Ed. 702, per Wayne, J.

And see Gibbons *v.* Ogden, 9 Wheat. 1, 230, where Johnson, J., giving a separate opinion, said that § 9 of the federal constitution, while primarily meant to apply to the importation of slaves, was yet obviously calculated to comprise persons of all descriptions, and recognized in congress a power to prohibit, where the states permit, although they cannot permit where the states prohibit.

But see quære, in Henderson *v.* New York, 92 U. S. 259, 275, 23 L. Ed. 543, whether, in the absence of action by congress, the states can, or how far they can, by appropriate legislation, protect themselves against actual paupers, vagrants, criminals, and diseased persons, arriving in their territory from foreign countries.

"This court does not, in this case, undertake to decide whether or not a state may, in the absence of all legislation by congress on the same subject, pass a statute strictly limited to defending itself against paupers, convicted criminals, and others of that class, but is of opinion that to congress rightfully and appropriately belongs the power of legislating on the whole subject." Henderson *v.* New York, 92 U. S. 259, 260, 23 L. Ed. 543.

If the right of the states to pass statutes to protect themselves in regard to the criminal, the pauper, and the diseased foreigner, landing within their borders, exist at all, it is limited to such as are absolutely necessary for that purpose; and a mere police regulation cannot extend so far as to prevent or obstruct other classes of persons from the right to hold personal and commercial intercourse with the people of the United States. Chy Lung *v.* Freeman, 92 U. S. 275, 23 L. Ed. 550.

The statute of California (requiring an onerous bond of the master or owner for the future protection of the state, or the payment of an arbitrary sum, for each alien passenger of certain designated classes, hard to identify as such before they are permitted to land), in this respect, extends far beyond the necessity in which

particular classes of persons, whose presence is deemed injurious or a source of danger to the country. As applied to them, there has never been any question as to the power to exclude them. The power is constantly exercised; its existence is involved in the right of self-preservation.[26] And the alien, diseased child of a naturalized parent may be excluded.[27]

2. ANARCHISTS.—The 1903 alien immigration act is not unconstitutional so far as it provides for the exclusion of an alien because he is an anarchist.[28]

the right, if it exists, is founded, and invades the right of congress to regulate commerce with foreign nations, and is therefore void. Chy Lung *v.* Freeman, 92 U. S. 275, 23 L. Ed. 550.

The court said: "We are not called upon by this statute to decide for or against the right of a state, in the absence of legislation by congress, to protect herself by necessary and proper laws against paupers and convicted criminals from abroad; nor to lay down the definite limit of such right, if it exist. Such a right can only arise from a vital necessity for its exercise, and cannot be carried beyond the scope of that necessity." Chy Lung *v.* Freeman, 92 U. S. 275, 280, 23 L. Ed. 550. See ante, "In General," V, A, 1; "Mode of Exercise and Discretion," V, A, 2; post, "Classes Excluded," V, B.

26. Exclusion of paupers, criminals and diseased.—The Chinese Exclusion Case, 130 U. S. 581, 608, 32 L. Ed. 1068; Zartarian *v.* Billings, 204 U. S. 170, 27 L. Ed. 182.

Paupers or persons likely to become public charges.—As among the aliens forbidden to enter the United States are those of whatever country, who are "paupers or persons likely to become a public charge," aliens of that class have not been given by the treaty with Japan full liberty to enter or reside in the United States; for that instrument expressly excepts from its operation any ordinance or regulation relating to "police and public security." A statute excluding paupers or persons likely to become a public charge is manifestly one of police and public security. The Japanese Immigrant Case, 189 U. S. 86, 97, 47 L. Ed. 721.

Japanese.—Aside from that specific exception, it seems that the provision of the treaty with Japan that the citizens or subjects of each of the two countries should have "full liberty to enter, travel or reside in any part of the territories of the other contracting party," would have no reference to that class, in either country, who from their habits or condition are ordinarily or properly the object of police regulations designed to protect the general public against contact with dangerous or improper persons. The Japanese Immigrant Case, 189 U. S. 86, 97, 47 L. Ed. 721.

Porto Ricans.—The immigration act relates to foreigners as respects this country, to persons owing allegiance to a foreign government, and citizens or subjects thereof; and citizens of Porto Rico, whose permanent allegiance is due to the United States; who live in the peace of the dominion of the United States; the organic law of whose domicil was enacted by the United States, and is enforced through officials sworn to support the constitution of the United States, are not "aliens," and upon their arrival by water at the ports of our mainland are not "alien immigrants," within the intent and meaning of the act of 1891, and the immigrants cannot be excluded as persons likely to become a public charge. Gonzales *v.* Williams, 192 U. S. 1, 13, 48 L. Ed. 317.

27. Diseased child of naturalized parent.—Zatarian *v.* Billings, 204 U. S. 170, 27 L. Ed. 182.

Congress has not said that an alien child who has never dwelt in the United States, coming to join a naturalized parent, may land when afflicted with a dangerous contagious disease. Therefore such alien child is rightfully excluded, and cannot claim entry as a citizen under § 2172, Rev. Stat., U. S. Zartarian *v.* Billings, 204 U. S. 170, 27 L. Ed. 182.

28. Exclusion of Anarchists.—Turner *v.* Williams, 194 U. S. 279, 292, 48 L. Ed. 979.

The language of the act is "anarchists, or persons who believe in or advocate the overthrow by force or violence of the government of the United States or of all government or of all forms of law, or the assassination of public officials." If this should be construed as defining the word "anarchists" by the words which follow, or as used in the popular sense above given, it would seem that when an alien arrives in this country, who avows himself to be an anarchist, without more, he accepts the definition. And it is undeniable that this government has the power to exclude an alien who believes in or advocates the overthrow of the government or of all governments by force or the assassination of officials. Turner *v.* Williams, 194 U. S. 279, 293, 48 L. Ed. 979.

Even if the alien, though he did not so state to the board, only regarded the absence of government as a political ideal, yet when he sought to attain it by advocating, not simply for the benefit of workingmen, who are justly entitled to repel the charge of desiring the destruction of law and order, but "at any rate, as an anarchist," the universal strike to which

3. Chinese.—See the title Chinese Exclusion Acts.

4. Alien Contract Laborers.—See the title Contract Labor Law.

C. Procedure—1. Delegation to Inspectors and Other Officers, or a Department.—See ante, "Power of Congress and States," V, A.

a. *In General.*—Congress may commit the enforcement of such provisions, conditions and regulations exclusively to executive and subordinate officers, without judicial intervention.[29]

b. *Authority and Discretion.*—The determination of the facts on which citizen-

he referred, and by discourses on what he called "The legal murder of 1887," and by addressing mass meetings on that subject in association with Most, the inference was not unjustifiable either that he contemplated the ultimate realization of his ideal by the use of force, or that his speeches were incitements to that end. Turner *v.* Williams, 194 U. S. 279, 294, 48 L. Ed. 979.

"If the word 'anarchists' should be interpreted as including aliens whose anarchistic views are professed as those of political philosophers innocent of evil intent, it would follow that congress was of opinion that the tendency of the general exploitation of such views is so dangerous to the public weal that aliens who hold and advocate them would be undesirable additions to our population, whether permanently or temporarily, whether many or few, and, in the light of previous decisions, the act, even in this aspect, would not be unconstitutional, or as applicable to any alien who is opposed to all organized government." Turner *v.* Williams, 194 U. S. 279, 294, 48 L. Ed. 979.

As to the alien of June 25, 1798, 1 Stat. 570, c. 58, the controversy over that law (and the sedition law) and the opinions expressed at the time against its constitutionality have no bearing upon this case, which involves an act couched in entirely different terms and embracing an entirely different purpose. Turner *v.* Williams, 194 U. S. 279, 294, 48 L. Ed. 979. See The Chinese Exclusion Case, 130 U. S. 581, 610, 32 L. Ed. 1068.

29. Nishimura Ekiu *v.* United States, 142 U. S. 651, 35 L. Ed. 1146; Fong Yue Ting *v.* United States, 149 U. S. 698, 37 L. Ed. 905; Lem Moon Sing *v.* United States, 158 U. S. 538, 39 L. Ed. 1082; Wong Wing *v.* United States, 163 U. S. 228, 41 L. Ed. 140; Fok Young Yo *v.* United States, 185 U. S. 296, 305, 46 L. Ed. 917; United States *v.* Gue Lim, 176 U. S. 459, 464, 44 L. Ed. 544; The Japanese Immigrant Case, 189 U. S. 86, 97, 47 L. Ed. 721; Turner *v.* Williams, 194 U. S. 279, 289, 48 L. Ed. 979; Li Sing *v.* United States, 180 U. S. 486, 495, 45 L. Ed. 634; Chin Bak Kan *v.* United States, 186 U. S. 193, 46 L. Ed. 1121; United States *v.* Sing Tuck, 194 U. S. 161, 48 L. Ed. 917.

The supervision of the admission of aliens into the United States may be intrusted by congress either to the department of state, having the general management of foreign relations, or to the department of the treasury, charged with the enforcement of the laws regulating foreign commerce; and congress has often passed acts forbidding the immigration of particular classes of foreigners, and has committed the execution of these acts to the secretary of the treasury, to collectors of customs and to inspectors acting under their authority. Nishimura Ekiu *v.* United States, 142 U. S. 651, 659, 35 L. Ed. 1146. See The Japanese Immigrant Case, 189 U. S. 86, 97, 47 L. Ed. 721.

Whatever may be the ultimate rights of a person seeking to enter the country and alleging that he is a citizen, it is within the power of congress to provide at least for a preliminary investigation by an inspector, and for a detention of the person until he has established his citizenship in some reasonable way. If the person satisfies the inspector, he is allowed to enter the country without further trial. United States *v.* Sing Tuck, 194 U. S. 161, 168, 48 L. Ed. 917.

Act of 1903.—It is provided by § 24 of the act of 1903 that "every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry." The following section, § 25, directs the appointment of such boards as shall be necessary for the prompt determination of cases of aliens detained, to consist of three members to be selected from the immigrant officials in the service. "Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or be deported." They are to keep records, "and the decision of any two members of a board shall prevail and be final," subject to appeal by the alien or a dissenting member "through the commissioner of immigration at the port of arrival and the commissioner general of immigration, to the secretary of the treasury (now the secretary of commerce and labor, act of February 14, 1903, ch. 552, §§ 4, 7, 10, 32 Stat. 826, 828, 829), whose decision shall then be final." Pearson *v.* Williams, 202 U. S. 281, 283, 50 L. Ed. 1029.

On the other hand it is provided by § 21 "That in case the secretary of the

ship and the authority to exclude or expel aliens depend, may be intrusted to a United States commissioner.[30] But the fundamental principles of due process of law must be observed by administrative officers in executing such laws.[31] Such delegation necessarily implies the power to take and weigh evidence on the questions arising as the right of aliens to enter or remain. But the exercise thereof is not essential to the jurisdiction of the officer.[32]

treasury (now secretary of commerce and labor) shall be satisfied that an alien has been found in the United States in violation of this act he shall cause such alien, within the period of three years after landing or entry therein, to be taken into custody and returned to the country whence he came," with details as to the method. Pearson *v.* Williams, 202 U. S. 281, 283, 50 L. Ed. 1029. See ante, "Mode of Exercise and Discretion," V, A, 2.

The act of 1891 manifestly contemplates and intends that the inspectors of immigration shall be appointed by the secretary of the treasury; and appointments of such officers by the superintendent of immigration could be upheld only by presuming them to be made with the concurrence or approval of the secretary of the treasury, his official head. Nishimura Ekiu *v.* United States, 142 U. S. 651, 663, 35 L. Ed. 1146.

30. United States commissioner.—It is competent for congress to empower a United States commissioner to determine the various facts on which citizenship depends under the decision in United States *v.* Wong Kim Ark, 169 U. S. 649, 42 L. Ed. 890, and the same reasoning in respect to the authority to exclude applies to the authority to expel. Chin Bak Kan *v.* United States, 186 U. S. 193, 200, 46 L. Ed. 1121. See ante, "Mode of Exercise and Discretion," V, A, 2.

31. Due process of law.—Administrative officers, when executing the provisions of a statute involving the liberty of persons, may not disregard the fundamental principles that inhere in "due process of law" as understood at the time of the adoption of the constitution. One of these principles is that no person shall be deprived of his liberty without opportunity, at some time, to be heard, before such officers, in respect to the matters upon which that liberty depends—not necessarily an opportunity upon a regular, set occasion, and according to the forms of judicial procedure, but one that will secure the prompt, vigorous action contemplated by congress, and at the same time be appropriate to the nature of the case upon which such officers are required to act. The Japanese Immigrant Case, 189 U. S. 86, 100, 47 L. Ed. 721.

It is not competent for the secretary of the treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien, who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the question involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized. The Japanese Immigrant Case, 189 U. S. 86, 101, 47 L. Ed. 721.

Notice and opportunity to be heard sufficient.—Where the alien had notice, although not a formal one, of the investigation instituted for the purpose of ascertaining whether she was illegally in this country, and the traverse to the return made by the immigration inspector shows upon its face that she was before that officer pending the investigation of her right to be in the United States, and made answers to questions propounded to her, objections to the form and conduct of the investigation which were not, but could have been presented to the officer having primary control of such a case, as well as upon an appeal to the secretary of the treasury, who had power to order another investigation if that course was demanded by law or by the ends of justice, cannot justify the intervention of the courts. Whether further investigation should have been ordered was for the officers, charged with the execution of the statutes, to determine. Their action in that regard is not subject to judicial review. The Japanese Immigrant Case, 189 U. S. 86, 101, 47 L. Ed. 721.

Judicial trial not essential.—Assuming that the fifth amendment applies to one seeking entrance into this country and that to deny entrance to a citizen is to deprive him of liberty, nevertheless with regard to him due process of law does not require a judicial trial. That is the result of various cases and the almost necessary result of the power of congress to pass exclusion laws. That the decision may be entrusted to an executive officer and that his decision is due process of law was affirmed and explained in Nishimura Ekiu *v.* United States, 142 U. S. 651, 660, 35 L. Ed. 1146, and in Fong Yue Ting *v.* United States, 149 U. S. 698, 713, 37 L. Ed. 905, United States *v.* Ju Toy, 198 U. S. 253, 263, 49 L. Ed. 1040. See post, "Due Process of Law," V, C, 5.

32. Taking and weighing evidence.—Where jurisdiction is given to the officer over the right of the alien to land, necessarily jurisdiction is given to pass on

c. *Finality of Decision and Court Review.*—See ante, "Power of Congress," V, A; "In General," V, C, 1, a. See post, "Right to Habeas Corpus," V, C, 4.

The determination of such executive officers may be made final by Congress,[33] Although congress may, if it sees fit, authorize the courts to investigate and the evidence presented to establish that right. He may determine the validity of the evidence, or receive testimony to controvert it, and an officer or tribunal, invested with jurisdiction of a matter, loses not that jurisdiction by not giving sufficient weight to evidence, or by rejecting proper evidence, or by admitting that which is improper. Lee Lung *v.* Patterson, 186 U. S. 168, 176, 46 L. Ed. 1108. See Turner *v.* Williams, 194 U. S. 279, 48 L. Ed. 979.

The statute (act of 1891) does not require inspectors to take any testimony at all, and allows them to decide on their own inspection and examination the question of the right of any alien immigrant to land. The provision relied on merely empowers inspectors to administer oaths and to take and consider testimony, and requires only testimony so taken to be entered of record. Nishimura Ekiu *v.* United States, 142 U. S. 651, 663, 35 L. Ed. 1146.

33. Finality of decision.—Nishimura Ekiu *v.* United States, 142 U. S. 651, 35 L. Ed. 1146; Lem Moon Sing *v.* United States, 158 U. S. 538, 39 L. Ed. 1082; Fok Young Yo *v.* United States, 185 U. S. 296, 46 L. Ed. 917; Lee Gon Yung *v.* United States, 185 U. S. 306, 46 L. Ed. 921; Lee Lung *v.* Patterson, 186 U. S. 168, 175, 46 L. Ed. 1108; The Japanese Immigrant Case, 189 U. S. 86, 97, 47 L. Ed. 721.

It was decided in Nishimura Ekiu's Case, 142 U. S. 651, 35 L. Ed. 1146, that congress might entrust to an executive officer the final determination of the facts upon which an alien's right to land in the United States was made to depend, "and that if it did so, his order was due process of law, and no other tribunal, unless expressly authorized by law to do so, was at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency." This doctrine was affirmed in Lem Moon Sing *v.* United States, 158 U. S. 538, 39 L. Ed. 1082, and at the present term in Fok Young Yo *v.* United States, 185 U. S. 296, 46 L. Ed. 917, and Lee Gon Yung *v.* United States, 185 U. S. 306, 46 L. Ed. 921. Lee Lung *v.* Patterson, 186 U. S. 168, 175, 46 L. Ed. 1108. The Japanese Immigrant Case, 189 U. S. 86, 97, 47 L. Ed. 721. But see Chin Bak Kan *v.* United States, 186 U. S. 193, 200, 46 L. Ed. 1121.

And in the case of Lem Moon Sing *v.* United States, 158 U. S. 538, 547, 39 L. Ed. 1082, it was held, expounding the act of August 18, 1894, that the decision of the appropriate immigration or custom officers, excluding an alien from admission into the United States under any law or treaty, is made final in every case, unless, on appeal to the secretary of the treasury, it be reversed. But it is obvious that it is only when the decision of the customs officer excludes an alien from admission that his decision is final. When his decision admits the alien, then the provisions of the act of July 5, 1884, are still applicable, which provide that, notwithstanding the contents of the certificate exhibited to the collector of customs, and their prima facie effect, "said certificate may be controverted and the facts therein stated disproved by the United States authorities." Li Sing *v.* United States, 180 U. S. 486, 490, 45 L. Ed. 634; United States *v.* Sing Tuck, 194 U. S. 161, 168, 48 L. Ed. 917; Fok Young Yo *v.* United States, 185 U. S. 296, 304, 46 L. Ed. 917.

The decisions of the inspection officers adverse to the right to land are made final unless an appeal is taken to the superintendent of immigration, whose action is subject to review by the secretary of the treasury; and all aliens who unlawfully come into the United States in violation of law shall be immediately, if practicable, sent back, or may be returned as by law provided. Gonzales *v.* Williams, 192 U. S. 1, 13, 48 L. Ed. 317; The Japanese Immigrant Case, 189 U. S. 86, 102, 47 L. Ed. 271. See post, "Due Process of Law," V, C, 5.

The act of August 18, 1894, purports to make the decisions of the department final, whatever the ground on which the right to enter the country is claimed—as well when it is citizenship as when it is domicil and the belonging to a class excepted from the exclusion acts. United States *v.* Sing Tuck, 194 U. S. 161, 167, 48 L. E. 917; Lem Moon Sing *v.* United States, 158 U. S. 538, 546, 547, 39 L. Ed. 1082. It is also established by the former case and others which it cites that the relevant portion of the act of August 18, 1894, ch. 301, is not void as a whole. The statute has been upheld and enforced. But the relevant portion being a single section, accomplishing all its results by the same general words, must be valid as to all that it embraces, or altogether void. An exception of a class constitutionally exempted cannot be read into those general words merely for the purpose of saving what remains. That has been decided over and over again. It necessarily follows that when such words are sustained they are sustained to their full extent. United States *v.* Ju Toy, 198 U. S. 253, 262, 49 L. Ed. 1040.

The act of March 3, 1891, § 551, is constitutional and valid, in excluding certain

ascertain the facts on which the right to land depends,[34] it is not within the province of the judiciary to order that foreigners who have never been naturalized, nor acquired any domicil or residence within the United States, nor even been admitted into the country pursuant to law, shall be permitted to enter, in opposition to the constitutional and lawful measures of the legislative and executive branches of the national government. As to such persons, the decisions of executive or administrative officers, acting within powers expressly conferred by congress, are due process of law, whether as to exclusion or expulsion.[35]

2. Provisions for Registration and Identification.—Congress, having the right, as it may see fit, to expel aliens of a particular class, or to permit them to remain, has undoubtedly the right to provide a system of registration and identification of the members of that class within the country, and to take all proper means to carry out the system which it provides.[36]

3. Detention and Expulsion or Deportation.—See ante, "Power of Con-

classes of aliens from admission to the United States. The inspector of immigration was duly appointed; his decision against the petitioner's right to land in the United States was within the authority conferred upon him by that act; no appeal having been taken to the superintendent of immigration, that decision was final and conclusive; the petitioner is not unlawfully restrained of her liberty; and the order of the circuit court is affirmed. Nishimura Ekiu *v.* United States, 142 U. S. 651, 664, 35 L. Ed. 1146.

34. Nishimura Ekiu *v.* United States, 142 U. S. 651, 660, 35 L. Ed. 1146; Fong Yue Ting *v.* United States, 149 U. S. 698, 713, 37 L. Ed. 905; Lau Ow Bew *v.* United States, 144 U. S. 47, 36 L. Ed. 340; Lem Moon Sing *v.* United States, 158 U. S. 538, 548, 39 L. Ed. 1082; United States *v.* Jung Ah Lung, 124 U. S. 621, 31 L. Ed. 591.

35. Province of judiciary.—Nishimura Ekiu *v.* United States, 142 U. S. 651, 660, 35 L. Ed. 1146; Fok Young Yo *v.* United States, 185 U. S. 296, 305, 46 L. Ed. 917; The Japanese Immigrant Case, 189 U. S. 86, 98, 47 L. Ed. 721.

The findings of the commissioner and in the district court in cases of this character should ordinarily be followed in the supreme court, and will only be reconsidered when it is clear that an incorrect conclusion has been reached. Chin Bak Kan *v.* United States, 186 U. S. 193, 201, 46 L. Ed. 1121; Tom Hong *v.* United States, 193 U. S. 517, 522, 48 L. Ed. 772.

The same reasoning in respect to the authority to exclude applies to the authority to expel, and the policy of the legislation in respect to exclusion and expulsion is opposed to numerous appeals. Chin Bak Kan *v.* United States, 186 U. S. 193, 201, 46 L. Ed. 1121.

Where an alien was arrested, under a warrant issued by the secretary of the department of commerce and labor of the United States, and was taken to the Ellis Island immigration station, where he was examined by a board of special inquiry, duly constituted according to law, upon his right to remain in this country, and said alien was by said board found to be an alien anarchist, and was by unanimous decision of said board ordered to be deported to the country from whence he came as a person within the United States in violation of law, appealed from the said decision of the board of special inquiry to the secretary of commerce and labor, who dismissed the appeal and directed that said alien be deported to the country from whence he came upon the ground that said alien is an anarchist and a person who disbelieves in and who is opposed to all organized government and was found to be in the United States in violation of law, there being evidence before them to support this conclusion, such decision and order will not be reviewed on the facts. Turner *v.* Williams, 194 U. S. 279, 281, 48 L. Ed. 979.

Res adjudicata.—The board of special inquiry provided by § 25 of the act of 1903 (32 Stat. 1218, 1220) for determining whether a detained alien shall be allowed to land or be deported, is an instrument of the executive power, not a court, and its decisions are those of the executive department, and cannot constitute res adjudicata in a technical sense. Pearson *v.* Williams, 202 U. S. 281, 284, 50 L. Ed. 1029.

The finality given to a decision of this board is only a finality consistent with and subject to § 21, and does not prevent the secretary of commerce and labor from directing a second hearing and making an order of deportation under § 21, after such board has decided in favor of the alien. It was intended to be final on the courts. Here the personel of the boards was the same in each inquiry. Pearson *v.* Williams, 202 U. S. 281, 50 L. Ed. 1029.

36. Fong Yu Ting *v.* United States, 149 U. S. 698, 714, 37 L. Ed. 905; Wong Wing *v.* United States, 163 U. S. 228, 231, 237, 41 L. Ed. 140. And see the title CHINESE EXCLUSION ACTS.

gress and States," V, A; "Delegation to Inspectors and Other Officers or a Department," V, C, 1.

The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps towards becoming citizens of the country, rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country.[37] The power of congress to expel may be exercised entirely through executive officers; or congress may call in the aid of the judiciary to ascertain any contested facts on which an alien's right to be in the country has been made by congress to depend.[38] And detention or temporary confinement may be employed as a necessary means to the end.[39]

37. Fong Yue Ting *v.* United States, 149 U. S. 698, 707, 713, 37 L. Ed. 905. See United States *v.* Wong Kim Ark, 169 U. S. 649, 726, 42 L. Ed. 890, dissenting opinion; Wong Wing *v.* United States, 163 U. S. 228, 231, 41 L. Ed. 140; Li Sing *v.* United States, 180 U. S. 486, 495, 45 L. Ed. 634.

"Deportation" is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken. It differs from "transportation" and "extradition," although each has the effect of removing a person from the country. Fong Yue Ting *v.* United States, 149 U. S. 698, 709, 37 L. Ed. 905.

In England, the only question that has ever been made in regard to the power to expel aliens has been whether it could be exercised by the king without the consent of parliament. It was formerly exercised by the king, but in later times by parliament, which passed several acts on the subject between 1793 and 1848. Fong Yue Ting *v.* United States, 149 U. S. 698, 709, 37 L. Ed. 905.

See, however, the dissenting opinions of Brewer and Field, JJ., in Fong Yue Ting *v.* United States, 149 U. S. 698, 707, 738, 746, 37 L. Ed. 905, saying: "The power to remove resident aliens is, confessedly, not expressed (in the constitution). Even if it be among the powers implied, yet still it can be exercised only in subordination to the limitations and restrictions imposed by the constitution;" and: "The power of the government to exclude foreigners from this country—that is, to prevent them from entering it, whenever the public interests in its judgment require such exclusion—has been repeatedly asserted by the legislative and executive departments of our government and never denied; but its power to deport from the country persons lawfully domiciled therein by its consent, and engaged in the ordinary pursuits of life, has never been asserted by the legislative or executive departments except for crime, or as an act of war in view of existing or anticipated hostilities, unless the alien act of June 25, 1798, can be considered as recognizing that doctrine." Field, J., dissenting. Fong Yue Ting *v.* United States, 149 U. S. 698, 746, 37 L. Ed. 905.

38. Delegation to executive officers.— Fong Yue Ting *v.* United States, 149 U. S. 698, 713, 37 L. Ed. 905: See ante, "Delegation to Inspectors or Other Officers or a Department," V, C, 1.

39. Detention, or temporary confinement, as part of the means necessary to give effect to the provisions for the exclusion or expulsion of aliens would be valid. Proceedings to exclude or expel would be vain if those accused could not be held in custody pending the inquiry into their true character and while arrangements were being made for their deportation. Detention is a usual feature of every case of arrest on a criminal charge, even when an innocent person is wrongfully accused; but it is not imprisonment in a legal sense. Wong Wing *v.* United States, 163 U. S. 228, 235, 41 L. Ed. 140; Turner *v.* Williams, 194 U. S. 279, 294, 48 L. Ed. 979. United States *v.* Sing Tuck, 194 U. S. 161, 168, 48 L. Ed. 917.

Such a provision has no reference to an establishment of religion nor does it prohibit the free exercise thereof; nor abridge the freedom of speech or the press; nor the right of the people to assemble and petition the government for a redress of grievances. It is, of course, true that if an alien is not permitted to enter this country, or, having entered contrary to law, is expelled, he is in fact cut off from worshipping or speaking or publishing or petitioning in the country, but that is merely because of his exclusion therefrom. He does not become one of the people to whom these things are secured by our constitution by an attempt to enter forbidden by law. Turner *v.* Williams, 194 U. S. 279, 292, 48 L. Ed. 979.

The detention during the time necessary for investigation was not unlawful, even if all of these parties were citizens of the United States and were not attempting to upset the inspection machinery by a transparent device. Wong Wing *v.* United States, 163 U. S. 228, 235, 41 L. Ed. 140; United States *v.* Sing Tuck, 194 U. S. 161, 169, 48 L. Ed. 917. See ante, "In General," V, C, 1, a.

Hard labor clause unconstitutional.— But so much of the act of 1892 as provided for imprisonment at hard labor

And the deportation of an alien who is found to be here in violation of law is not a deprivation of liberty without due process of law, and the provisions of the constitution securing the right of trial by jury have no application.[40]

4. RIGHT TO HABEAS CORPUS.—See ante, "Delegation to Inspectors or Other Officers or a Department," V, C, 1; "Right to Protection of Laws," III, B.

An alien immigrant, prevented from landing by any officer claiming authority to do so under an act of congress, and thereby restrained of his liberty, is doubtless entitled to a writ of habeas corpus to ascertain whether the restraint is lawful.[41] But the petitioner must make out a prima facie case of illegal detention.[42]

Of Alien in Transit.—See post, "Privilege of Transit," V, E.

without a judicial trial was held to be unconstitutional. The cases of Chae Chan Ping, Fong Yue Ting and Lem Moon Sing were carefully considered and applied. Turner *v.* Williams, 194 U. S. 279, 291, 48 L. Ed. 979. See ante, "To Punish Criminally Illegal Entry and Residence," V, A, 5.

"In the case of Fong Yue Ting *v.* United States, 149 U. S. 698, 730, 37 L. Ed. 905; Mr. Justice Gray used the following significant language: 'The proceeding before a United States judge, as provided for in § 6 of the act of 1892, is in no proper sense a trial and sentence for a crime or offense. It is simply the ascertainment, by appropriate and lawful means, of the fact whether the conditions exist upon which congress has enacted that an alien of this class may remain within the country. The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures, and cruel and unusual punishments, have no application.'" Wong Wing *v.* United States, 163 U. S. 228, 236, 41 L. Ed. 140. See, also, Li Sing *v.* United States, 180 U. S. 486, 494, 45 L. Ed. 634.

40. The Chinese Exclusion Case, 130 U. S. 581, 32 L. Ed. 1068; Nishimura Ekiu *v.* United States, 142 U. S. 651, 35 L. Ed. 1146; Fong Yue Ting *v.* United States, 149 U. S. 698, 37 L. Ed. 905; Lem Moon Sing *v.* United States, 158 U. S. 538, 39 L. Ed. 1082; Wong Wing *v.* United States, 163 U. S. 228, 41 L. Ed. 140; Fok Young Yo *v.* United States, 185 U. S. 296, 46 L. Ed. 917; The Japanese Immigrant Case, 189 U. S. 86, 47 L. Ed. 721; Chin Bak Kan *v.* United States, 186 U. S. 193, 46 L. Ed. 1121; United States *v.* Sing Tuck, 194 U. S. 161, 48 L. Ed. 917; Turner *v.* Williams, 194 U. S. 279, 289, 48 L. Ed. 979.

The petitioner, although physically within our boundaries, is to be regarded as if he had been stopped at the limit of our jurisdiction and kept there while his right to enter was under debate. United States *v.* Ju Toy, 198 U. S. 253, 263, 49 L. Ed. 1040; The Japanese Immigrant Case, 189 U. S. 86, 100, 47 L. Ed. 721. See ante, "Conditional Admission," V, A, 4.

41. Nishimura Ekiu *v.* United States, 142 U. S. 651, 660, 35 L. Ed. 1146; Chew Heong *v.* United States, 112 U. S. 536, 28 L. Ed. 770; United States *v.* Jung Ah Lung, 124 U. S. 621, 31 L. Ed. 591; Wan Shing *v.* United States, 140 U. S. 424, 35 L. Ed. 503; Ex parte Lau Ow Bew, 141 U. S. 583, 35 L. Ed. 868. See the title HABEAS CORPUS.

42. Even if it is beyond the power of congress to make the decision of the department final upon the question of citizenship, a petition for habeas corpus ought not to be entertained, unless the court is satisfied that the petitioner can make out at least a prima facie case. A mere allegation of citizenship is not enough. But, before the courts can be called upon, the preliminary sifting process provided by the statutes must be gone through with. Whether, after that, a further trial may be had, not decided. United States *v.* Sing Tuck, 194 U. S. 161, 168, 170, 48 L. Ed. 917.

The decision of the inspector of immigration being in conformity with the act of 1891, there can be no doubt that it was final and conclusive against the petitioner's right to land in the United States. The words of § 8 are clear to that effect, and were manifestly intended to prevent the question of an alien immigrant's right to land, when once decided adversely by an inspector, acting within the jurisdiction conferred upon him, from being impeached or reviewed, in the courts or otherwise, save only by appeal to the inspector's official superiors, and in accordance with the provisions of the act. It cannot be reviewed on habeas corpus. Nishimura Ekiu *v.* United States, 142 U. S. 651, 663, 35 L. Ed. 1146.

5. Due Process of Law.—While it may well be doubted whether an alien clandestinely within this country can invoke the due process clause of the constitution,[43] it has been settled that the power to exclude or expel aliens belongs to the political department of the government, and that the order of an executive officer, invested with the power to determine finally the facts upon which an alien's right to enter this country, or remain in it, depends, is due process of law, and no other tribunal, unless expressly authorized by law to do so, is at liberty to re-examine the evidence on which he acted, or to controvert its sufficiency.[44]

D. Liability of Person Bringing in Immigrants Not Permitted to Land.—The statute imposes upon one who has brought immigrants into the United States not permitted to land here, the duty of returning them to the place from whence they came, with a penalty by fine in case the duty is neglected. By this requirement, it was not intended to make the ship owner or master an insurer of the absolute return of the immigrant, at all hazards, except when excused by vis major or inevitable accident. This statute imports a duty, and in the absence of a requirement that it shall be performed at all hazards, no more ought to be required than a faithful and careful effort to carry out the duty imposed.[45]

E. Privilege of Transit.—The privilege of transit, although it is one that should not be withheld without good cause, is nevertheless conceded only on such terms as the particular government prescribes in view of the well-being of its own people. If, then, these regulations have the force of law, they bind the courts, and should not be interfered with by habeas corpus proceedings.[46]

F. Chinese Exclusion Acts.—See the title Chinese Exclusion Acts.

G. Alien Contract Labor Laws.—See the title Contract Labor Law.

H. Head Money Laws and Taxes on Immigration.—See the titles Commerce; Taxation. Recovery of same after payment, see the title Assumpsit.

ALIMONY.—See the title Divorce.

ALL.—All is a word of most comprehensive meaning,[1] but may be given a

43. Due process of law.—Quære, whether an alien can rightfully invoke the due process clause of the constitution, who has entered the country clandestinely, and who has been here for too brief a period to have become, in any real sense, a part of our population, before his right to remain is disputed. The Japanese Immigrant Case, 189 U. S. 86, 100, 47 L. Ed. 721.

44. The Japanese Immigrant Case, 189 U. S. 86, 100, 47 L. Ed. 721; Fong Yue Ting *v.* United States, 149 U. S. 698, 713, 37 L. Ed. 905; Nishimura Ekiu *v.* United States, 142 U. S. 651, 659, 35 L. Ed. 1146; Lem Moon Sing *v.* United States, 158 U. S. 538, 547, 39 L. Ed. 1082. See ante, "Right to Protection of Laws," III, B; "Authority and Discretion," V, C, 1, b; "Finality of Decision and Court Review," V, C, 1, c; "Detention and Expulsion or Deportation," V, C, 3.

45. Liability for unlawfully introducing immigrant. Hackfeld *v.* United States, 197 U. S. 442, 450, 49 L. Ed. 826.

The true rule does not make the shipowner the insurer at all hazards of the safe return of the immigrant, but does require every precaution to detain him and prevent escape. Hackfeld *v.* United States, 197 U. S. 442, 452, 49 L. Ed. 826. See ante, "To Punish Criminally Illegal Entry and Residence," V, A, 5.

46. Privilege of transit and regulation thereof.—Fok Young Yo *v.* United States, 185 U. S. 296, 302, 46 L. Ed. 917; United States *v.* Ju Toy, 198 U. S. 253, 261, 49 L. Ed. 1040; The Japanese Immigrant Case, 189 U. S. 86, 97, 47 L. Ed. 721.

Congressional action has placed the final determination of the right of admission in executive officers, without judicial intervention, and this has been for many years the recognized and declared policy of the country. The regulations to prevent abuse of privilege of transit have been and are intended to effectuate the same policy, and recourse to the courts by habeas corpus to determine the existence of such abuse appears equally inadmissible. Fok Young Yo *v.* United States, 185 U. S. 296, 305, 46 L. Ed. 917.

In Fok Young Yo *v.* United States, 185 U. S. 296, 304, 305, 46 L. Ed. 917, it was held, that the decision of the collector of customs on the right of transit across the territory of the United States was conclusive. United States *v.* Ju Toy, 198 U. S. 253, 261, 49 L. Ed. 1040. See ante, "Right to Habeas Corpus," V, C, 4.

1. All is a word of most comprehen-

more limited construction to effectuate the plain intent.[2]

sive meaning. United States *v.* Powell, 14 Wall. 493, 501, 20 L. Ed. 729.

All my estate.—A devise of **all** my estate held to convey the fee. Lambert *v.* Paine, 3 Cranch 97, 138, 2 L. Ed. 377.

All the estate, etc.—A statute used the words **all** the estate, property, moneys, stocks and effects. To these words, the court said: "The description of property thus made liable to seizure is as broad as possible. It covers the estate of the owner—**all** his estate or ownership." Wallach *v.* Van Riswick, 92 U. S. 202, 207, 23 L. Ed. 473.

Referring to the language of the bankruptcy act of 1800, it is said in Comegys *v.* Vasse, 1 Pet. 193, 218, 7 L. Ed. 108: "**All** the estate, real and personal, of every nature and description, in law or equity, are broad enough to cover every description of vested right and interest attached to and growing out of property. Under such words the whole property of a testator would pass to his devisee. Whatever the administrator would take, in case of intestacy, would seem capable of passing by such words." See, also, Williams *v.* Heard, 140 U. S. 529, 543, 35 L. Ed. 550.

All cases.—The constitution confers jurisdiction upon the United States courts in **all** cases in law and equity. **All** cases apply to criminal as well as civil cases. Tennessee *v.* Davis, 100 U. S. 257, 270, 25 L. Ed. 648, citing Martin *v.* Hunter, 1 Wheat. 304, 4 L. Ed. 97; Cohens *v.* Virginia, 6 Wheat. 264, 5 L. Ed. 257; Nashville *v.* Cooper, 6 Wall. 247, 18 L. Ed. 851.

In Capital Traction Co. *v.* Hof, 174 U. S. 1, 37, 43 L. Ed. 873, it is said: "By § 7 of the act of 1823, the right of appeal to a court of record was expressly given 'in **all** cases where the debt or demand doth exceed the sum of five dollars, and either plaintiff or defendant shall think him or herself aggrieved by the judgment of any justice of the peace.' The words 'in **all** cases,' in their natural meaning, include cases which have been tried by a jury before the justice of the peace, as well as those tried by him without a jury; and we perceive no necessity and no reason for restricting their application to the latter class of cases."

All children.—In Minor *v.* Happersett, 21 Wall. 162, 168, 22 L. Ed. 627, it is said: "It is sufficient for everything we have now to consider that **all** children born of citizen parents within the jurisdiction are themselves citizens. The words 'all children' are certainly as comprehensive when used in this connection, as 'all persons,' and if females are included in the last they must be in the first. That they are included in the last is not denied. In fact, the whole argument of the plaintiffs proceeds upon that idea."

All goods, etc.—The 48th section of the internal revenue act of June 30th, 1864, as amended by the act of 1866, which forfeits 'all goods, wares, merchandise, articles or objects,' if found in possession of any person in fraud of the internal revenue laws, etc., is applicable to distilled spirits notwithstanding the forfeiture of spirits is provided for in a distinct series of sections relating thereto in the same law, or in a supplementary law. The court said: "The act of 1868, which revises the entire revenue law relating to spirits and tobacco, furnishes a striking instance of this. After providing for a large number of specific forfeitures, or forfeitures for specific breaches of the law, it follows up the subject by sections of the most general nature, so framed as not to admit of any possible escape or evasion, and which necessarily include most of the cases before specifically provided for." The Distilled Spirits, 11 Wall. 356, 365, 20 L. Ed. 167.

2. Limited meaning.—In United States *v.* Howland, 4 Wheat. 108, 116, 4 L. Ed. 526, it is said: "It is contended for the United States, that the clause which gives the power to sell, by using the words 'all the property of them, the said Shoemaker & Travers, and Jacob Shoemaker;' indicate clearly that this deed does convey **all** their property. But these words are explained and limited by those which follow, so as to show that the word **all** is used in reference to the schedule, and means **all** the property in the schedule."

All manner of business.—If one person constitutes another his "general and special agent to do and transact **all** manner of business," this does not necessarily authorize the agent to sell stocks or other property of the principal. Hodge *v.* Combs, 1 Black 192, 195, 17 L. Ed. 157.

All creditors.—A statute provided that conveyances should be void as to "**all** creditors and subsequent purchasers" unless the same were acknowledged and recorded. In construing this provision, the court, in Pierce *v.* Turner, 5 Cranch 154, 165, 3 L. Ed. 64, said: "This argument proceeds upon the ground, that by the words '**all** creditors and subsequent purchasers,' is meant as well as the creditors of the grantee and subsequent purchasers from him, as those who might derive title under the grantor. Although the words are certainly broad enough to comprehend the whole, it is believed by a majority of the court, that the construction should be such as to limit the application of them to the creditors of, and subsequent purchasers from, the grantor." See, generally, the titles

ALLEGATA AND PROBATA.—See the title VARIANCE.

ALLEGIANCE.—By allegiance is meant the obligation of fidelity and obedience which the individual owes to the government under which he lives, or to his sovereign in return for the protection he receives. It may be an absolute and

FRAUDULENT AND VOLUNTARY CONVEYANCES; RECORDING ACTS.

All the goods.—In American Fur. Co. *v.* United States, 2 Pet. 358, 367, 7 L. Ed. 450, it is said: "The expression 'all the goods of the said traders,' in the second section of the last act, although general enough, if they stood alone, unexplained by the context, to embrace all the goods belonging to the trader wherever they might be found; are clearly restrained by the provision which immediately precedes them, so as to mean those goods only which might be found in company, though not in contact with, the interdicted article."

All lands.—All lands confined to lands specifically described, see Gibbs *v.* Diekma, 131 U. S. 186, 26 L. Ed. 177, 178.

All my lands.—In Lane *v.* Vick, 3 How. 464, 473, 11 L. Ed. 681, it is said: "The words 'all of my lands,' unless restricted by words with which they stand connected, or by some other part of the will, cover the entire real estate of the testator. But these words are restricted by the part of the sentence which follows them, and also in other parts of the will." See, generally, the title WILLS.

All other property.—A railroad company granted a mortgage "on the telegraph line and telegraph offices along the line of said road belonging to said company; also on the machine shops and all other property in the state and in Georgia, Tennessee and Mississippi belonging to said company; also on all coal mines now opened or hereafter to be opened and worked, belonging to said company; also upon all iron or other mineral lands, and all iron manufacturing establishments now in operation and hereafter to be constructed." It was held that the words "all other property" did not cover everything in the four states which the company owned, especially all its land, but were to be confined to the property of the company about which a doubt would arise whether it was a part of those telegraph offices, machine shops, mines and manufacturing establishments mentioned in the mortgage. Alabama *v.* Montague, 117 U. S. 602, 29 L. Ed. 1000.

In Pennock *v.* Coe, 23 How. 117, 126, 16 L. Ed. 436, it is said: "The description begins by conveying 'all the following present and future acquired property of the said parties of the first part;' and after specifying the road and the several parts of it, together with the rolling stock, there is added, 'and all other personal property, right thereto, and interest therein.' This clause, probably from the connection in which it is found, was intended to refer to property appurtenant to the road, and employed in its operation, and which had not been enumerated; and if so, the better opinion, perhaps is, that it would be bound by the mortgage even as against judgment creditors."

All debts.—A debt due to the United States, though it be by one who owes it as a surety, is not barred by a release in bankruptcy from all debts, etc. United States *v.* Herron, 20 Wall. 251, 260, 22 L. Ed. 275.

All the rest.—A devise of all the rest of testator's land and tenements has been held not to convey the fee. Wright *v.* Page, 10 Wheat. 204, 232, 6 L. Ed. 303.

All faults.—In Smith *v.* Richards, 13 Pet. 26, 41, 10 L. Ed. 42, it is said: "'The words,' that is, with all faults, as they lie, 'are very large to exclude the buyer from calling upon the seller for any defect in the things sold; but if the seller was guilty of any positive fraud in the case, these words will not protect him,'" quoting Mansfield, C. J., in Schneider *v.* Heath, Campbell 505. See, generally, the titles SALES; WARRANTY.

All possible dispatch.—In Lowber *v.* Bangs, 2 Wall. 728, 755, 17 L. Ed. 768, it is said: "None will pretend, I suppose, that the phrase 'with all possible dispatch' is more intensified than the phrase 'as soon as possible,' which is one of daily use."

All burlaps.—See BURLAPS.

All the coast.—In Chouteau *v.* Molony, 16 How. 203, 227, 14 L. Ed. 905, it is said: "The words, that they sell and abandon to him all the coast, and the contents of the mine discovered by the wife of Peosta, are the only words from which it can be implied that they were selling land. Admitting that they do so, the words 'all the coast' of the mine Peosta cannot be enlarged to mean more than the land which covered its ramifications and the land contiguous to them, which was necessary for the operations of the miners and for their support."

Transposition of the term.—In Finlay *v.* King, 3 Pet. 349, 382, 7 L. Ed. 703, it is said: "The words used by the testator to show that nothing was further from his mind than a partial intestacy. He says, he has thought proper to make his will, 'leaving and bequeathing his worldly estate in manner following.' After making a considerable provision for his wife, and devising to others, during her life, he gives 'all his real estate at her death' to his nephew, on condition, and on failure to perform the condition, gives 'the said estate' over. Being about

permanent obligation, or it may be a qualified and temporary one. The citizen or subject owes an absolute and permanent allegiance to his government or sovereign, or at least until, by some open and distinct act, he renounces it and becomes a citizen or subject of another government or another sovereign. The alien, whilst domiciled in the country, owes a local and temporary allegiance, which continues during the period of his residence.[1]

ALLEYS.—See the titles DEDICATION; DEEDS; MUNICIPAL CORPORATIONS; PARTITION; STREETS AND HIGHWAYS.

ALLOCATUR.—See the title APPEAL AND ERROR.

ALLOT.—See note 2.

ALLOW—ALLOWANCE.—See note 3. As to allowance to widow and minor children, see the title EXECUTORS AND ADMINISTRATORS.

to devise all his estate to his nephew, and knowing that his wife and others would hold a large part of it for her life, it was obvious, that his nephew could not take all, till her death. But if he divised the whole estate, that which could not be taken by the wife, or by others for her life, would pass to the nephew, if a clear intention appears in the whole will, to intercept the descent to the heir; although the clause, taken literally, would postpone the possession, even of that part in which the wife has no interest, till her death. To effect this intention, the court will vary the strict meaning of words, and sometimes transpose them. 1 Call 132. The word 'all' may be transposed, so that the clause may read, 'in case of having no children, I then leave my real estate, all, at the death of my wife, to William King,' etc."

1. **Allegiance.**—Carlisle *v.* United States, 16 Wall. 147, 154, 21 L. Ed. 426. See, also, Englis *v.* Sailors' Snug Harbor, 3 Pet. 99, 155, 7 L. Ed. 617. And see the title ALIENS, ante, p. 210.

In United States *v.* Wong Kim Ark, 169 U. S. 649, 659, 42 L. Ed. 890, it is said: "'Allegiance is nothing more than the tie or duty of obedience of a subject to the sovereign under whose protection he is; and allegiance by birth is that which arises from being born within the dominions and under the protection of a particular sovereign. Two things usually concur to create citizenship: First, birth locally within the dominions of the sovereign; and, secondly, birth within the protection and obedience or, in other words, within the ligeance of the sovereign. That is, the party must be born within a place where the sovereign is at the time in full possession and exercise of his power, and the party must also at his birth derive protection from, and consequently owe obedience or allegiance to, the sovereign, as such, de facto."

2. **Allot.**—In Worcester *v.* Georgia, 6 Pet. 515, 582, 8 L. Ed. 482, it is said: "The language used in treaties with the Indians should never be construed to their prejudice. If words be made use of, which are susceptible of a more extended meaning than their plain import, as connected with the tenor of the treaty, they should be considered as used only in the latter sense. To contend, that the word allotted in reference to the land guarantied to the Indians, in certain treaties, indicates a favor conferred, rather than a right acknowledged, would, it would seem to me, do injustice to the understanding of the parties." See, also, Minnesota *v.* Hitchcock, 185 U. S. 373, 396, 46 L. Ed. 954.

Allotted and marked out.—In Worcester *v.* Georgia, 6 Pet. 515, 552, 8 L. Ed. 483, it is said: "Is it reasonable to suppose, that the Indians, who could not write, and most probably could not read, who certainly were not critical judges of our language, should distinguish the word allotted from the words 'marked out?'"

3. **Allow.**—In Brashier *v.* Gratz, 6 Wheat. 528, 536, 5 L. Ed. 322, it is said: "The parties stipulate that for every acre which the survey shall show the tract to contain less than 302 acres, Gratz 'shall pay or allow' to Brashier the sum of $22.50. That is, shall 'pay him, if the notes shall have been received, shall 'allow to him, if the deficiency shall appear before payment of the notes."

Allowance.—A soldier by desertion forfeited his pay and allowances upon the meaning of allowance in this connection: "The bounty which the petitioner claimed was included in the allowances forfeited. Under the term allowances everything was embraced which could be recovered from the government by the soldier in consideration of his enlistment and services, except the stipulated monthly compensation designated as pay." United States *v.* Landers, 92 U. S. 77, 80, 23 L. Ed. 603.

ALLUVION.—See the title ACCESSION, ACCRETION AND RELICTION, ante, p. 51. Alluvion is an addition of soil to land by a river, so gradual, that in short periods the change is imperceptible; or, to use a common expression, a latent addition.[1]

ALONG.—See note 2.

1. Jefferis *v.* East Omaha Land Co., 134 U. S. 178, 192, 33 L. Ed. 872.

2. **Along the bank.**—Where a state ceded land on the west of a certain river, making the boundary line a line "along the bank" of the river, it was held, that the words "along the bank" were strong and definite enough to exclude the idea that any part of the river or its bed was granted, or that a line was to be traced at the edge of the water as that may be at one or another time or at low water, or the lowest low water, and that the meaning of the call was that the line should be the fast land which confined the water of the river in its channel or bed in its whole width. Howard *v.* Ingersoll, 13 How. 381, 416, 14 L. Ed. 189. See, generally, the title BOUNDARIES.

Along its route.—Where a statute provided that, "when an injury is done to a building or other property by fires communicated by a locomotive engine of any railroad corporation, the said corporation shall be responsible in damages for such injury," and have an insurable interest in such property "along its route;" held, that the phrase "along its route" means in proximity to the rails upon which the locomotive engines run; and that the corporation is liable for such an injury to buildings or other property along its route, whether they are outside of the lines of its roadway, or lawfully within those lines. Grand Trunk R. Co. *v.* Richardson, 91 U. S. 454, 23 L. Ed. 356. See, generally, the title FIRES.

ALTERATION OF INSTRUMENTS.

BY JAMES F. MINOR.

I. Material and Immaterial Alterations, 262.
- A. What Constitutes a Material or Immaterial Alteration Generally, 262.
  - 1. As Question of Law or Fact, 262.
  - 2. Alteration in Excess of Authority, 262.
  - 3. General Rule as to Materiality, 262.
- B. Instances of Material Alteration, 262.
- C. Instances of Immaterial Alteration, 263.
- D. Effect of Material Alteration, 263.
  - 1. In General, 263.
  - 2. By Stranger, 264.
  - 3. On Commercial Paper Generally, 264.
  - 4. On Deed, 264.
  - 5. On Bond, 265.
  - 6. On Patent for Land, 266.
- E. Effect of Immaterial Alteration, 266.

II. Consent Rule, 266.
- A. Evidence or Inference of Consent, 266.
- B. Rule Stated, 266.
- C. Parol Authority, 267.

III. Filling Blanks, 267.
- A. By Parol Authority, 267.
- B. By Implied Authority, 267.
- C. Perfecting Incomplete Instrument, 268.
  - 1. Negotiable Paper, 268.
  - 2. Deeds, 269.
  - 3. Bonds, 269.

IV. Evidence, 269.
- A. Burden of Proof, 269.
  - 1. As to Forgery or Alteration, 269.
  - 2. As to Violation of Agreement as to Filling Blanks, 270.
- B. Questions of Law and Fact, 270.
- C. Presumptions, 270.
  - 1. As to Time of Alteration and by Whom Made, 270.
  - 2. As to Alteration in Course of Official Duty, 271.
  - 3. As to Consent to Alteration, 271.
- D. Admissibility, 271.
- E. Weight and Sufficiency, 271.
  - 1. Lapse of Time and Acquiescence, 271.
  - 2. Evidence of Consent to Alteration, 271.

V. Pleading and Practice, 272.
- A. Pleas, 272.
- B. Instructions, 272.

CROSS REFERENCES.

See the titles AMENDMENTS; BILLS, NOTES and CHECKS; BONDS; DEEDS; FORGERY AND COUNTERFEITING; TELEGRAPHS AND TELEPHONES. As to alteration of agreements in general, see the titles CONTRACTS; SALES; VENDOR AND PURCHASER.

As to alteration of certificate of acknowledgment, see the title ACKNOWLEDGMENTS, ante, p. 75. As to alteration of contract of bail, see the title

BAIL. As to alteration of patent, see the title PATENTS. As to alteration of records, see the title RECORDS. As to alteration of surety's contract, see the title SURETYSHIP. As to alterations of wills by testator, see the title WILLS. As to altered documents as evidence, see the title EVIDENCE. As to effect and consequences of altering negotiable instruments, see the titles BANKS AND BANKING; BILLS, NOTES AND CHECKS. As to rights of bona fide purchasers of altered negotiable paper, see the title BILLS, NOTES AND CHECKS.

I. Material and Immaterial Alterations.

A. What Constitutes a Material or Immaterial Alteration Generally.—1. AS QUESTION OF LAW OR FACT.—See post, "Questions of Law and Fact," IV, B.

2. ALTERATION IN EXCESS OF AUTHORITY.—See post, "Perfecting Incomplete Instrument," III, C.

3. GENERAL RULE AS TO MATERIALITY.—An alteration is material or immaterial, as, upon a sound construction of the whole instrument, it will or will not alter or change its operation and effect.[1] Any change that alters the defendant's contract, whether increasing or diminishing his liability, is material.[2] Such as the placing of seals upon an instrument after its execution.[3]

B. Instances of Material Alteration.—The following have been held material alterations: Change in instrument appointing to office extending liability upon the officer's bond, which refers thereto, without surety's consent;[4] an alteration of date as to time of payment;[5] the addition of a new person as maker to a promissory note;[6] the erasure of the name of one of several ob-

1. Operation and effect of alteration the test.—Steele *v.* Spencer, 1 Pet. 552, 561, 7 L. Ed. 259; Miller *v.* Stewart, 9 Wheat. 680, 717, 6 L. Ed. 189. See Gordon *v.* Third Nat. Bank, 144 U. S. 97, 36 L. Ed. 360; Dartmouth College *v.* Woodward, 4 Wheat. 518, 662, 4 L. Ed. 629.

2. Change in liability.—Mersman *v.* Werges, 112 U. S. 139, 141, 28 L. Ed. 641; Wood *v.* Steele, 6 Wall. 80, 18 L. Ed. 725.

3. Placing seals on instrument after execution.—"The placing of the seals thereon after the execution of the instrument was a material alteration of it, but if done by a stranger, and the instrument was valid without the seals and was declared on as such instrument, the action upon it could be maintained," as said in Moses *v.* United States, 166 U. S. 571, 583, 41 L. Ed. 1119. See post "Rule Stated," II, B; "As to Consent to Alteration," IV, C, 3.

A razure must make a deed void, or it is immaterial.—Miller *v.* Stewart, 9 Wheat. 680, 715, 6 L. Ed. 189 (dissenting opinion).

As expressed in the dissenting opinion of Johnson and Todd, JJ., in Miller *v.* Stewart, 9 Wheat. 680, 716, 6 L. Ed. 189: "As to the principle upon which a razure avoids a deed, it is not too much to say, that the law of the subject appears to have got into some confusion. Modern decisions, particularly of our own courts, lean against the excessive rigor with which some writers and some cases disfigure it. In the case of Cutts *v.* United States (1 Gallis, 69), a bond had been canceled and mutilated, the seal torn away by the joint act of the defendant and the plaintiff's bailee, and was still held, and rightly held, to be sustainable as the deed of the party. In the case of Speake *v.* United States, 9 Cranch 28, 3 L. Ed. 645, a bond was sustained, notwithstanding the striking out of one joint and several co-obligor, in the absence of the others, and the insertion of another."

4. Alteration enlarging liability on instrument.—Where a bond is given, conditioned for the faithful performance of the duties of the office of deputy collector of direct taxes for eight certain townships, and the instrument of the appointment, referred to in the bond, was afterwards altered, so as to extend to another township, without the consent of the surety, it was held, that the surety was discharged from his responsibility for moneys subsequently collected by his principal. (Johnson & Todd, JJ. dissenting.) Miller *v.* Stewart, 9 Wheat. 680, 6 L. Ed. 189. See, also, United States *v.* Freel, 186 U. S. 309, 316, 46 L. Ed. 1177; Leggett *v.* Humphreys, 21 How. 66, 16 L. Ed. 50.

5. Alteration of date.—The alteration of the date, whether it hasten or delay the time of payment, has been uniformly held to be material. Wood *v.* Steele, 6 Wall. 80, 83, 18 L. Ed. 725; Mersman *v.* Werges, 112 U. S. 139, 141, 28 L. Ed. 641.

6. Addition of new maker to note.—The addition of a new person as a principal maker of a promissory note, rendering all the promisors apparently jointly

ligors;[7] change of name of grantee in deed after execution.[8]

C. Instances of Immaterial Alteration.—See ante, "What Constitutes a Material or Immaterial Alteration Generally," I, A.

Where the legal force of the instrument is unchanged as to the person sought to be charged, the alteration is immaterial.[9] And the addition of the name of a surety, before or after first negotiation of a note, is not a material alteration as to the maker.[10]

D. Effect of Material Alteration.—1. In general.—The rule is universal

and equally liable, not only to the holder, but also as between themselves, and so far tending to lessen the ultimate liability of the original maker or makers, has been held in the courts of some of the states to be a material alteration. Mersman *v.* Werges, 112 U. S. 139, 141, 28 L. Ed. 641.

7. Erasure of name of co-obligor.—"An erasure of the name of one of several obligors is a material alteration of the contract of the others, because it increases the amount which each of them may be held to contribute. Martin *v.* Thomas, 24 How. 315, 16 L. Ed. 689; Smith *v.* United States, 2 Wall. 219, 17 L. Ed. 788." Mersman *v.* Werges, 112 U. S. 139, 141, 28 L. Ed. 641.

8. Substitution of grantee in deed.—"If the name of William Steele was inserted in the deed as grantee, after its full execution and attestation, instead of the name of some other grantee, which was stricken out, no doubt, the alteration was very material, and nothing could in that case pass by the deed to William Steele." Steele *v.* Spencer, 1 Pet. 552, 561, 7 L. L. Ed. 259.

"The two other alterations supposed, in the words 'Ross' and 'Ohio,' in the description of the grantee's residence, may have been either material or immaterial, as, upon a sound construction of the whole instrument, they would or would not alter or change its operation and effect." Steele *v.* Spencer, 1 Pet. 552, 561, 7 L. Ed. 259.

Unnoted change explained.—An unnoted erasure of one name as grantee and the substitution of another, the change being merely in the given name, is explained by proof of the identity of the two as one and the same person. Hanrick *v.* Patrick, 119 U. S. 156, 172, 30 L. Ed. 396. See, generally, ante, "General Rule as to Materiality," I, A, 3.

9. Legal effect of instrument unchanged.—Gordon *v.* Third Nat. Bank, 144 U. S. 97, 36 L. Ed. 360; Mersman *v.* Werges, 112 U. S. 139, 143, 28 L. Ed. 641.

The stamping of a waiver of demand and protest and guarantee of payment, upon the back of a promissory note, when it fell due, at the instance and request of the indorsers, although by inadvertence they were placed above the name of the maker (also appearing on the back for negotiation) as well as the indorser's name, does not constitute a material alteration, so far as the maker is concerned, as they do not affect his rights, no such waiver being needed to hold him liable. Gordon *v.* Third Nat. Bank, 144 U. S. 97, 36 L. Ed. 360.

Where a note, though in form made by the husband to his partner, and indorsed by him, was without consideration as between them, and was in fact signed by both of them for the benefit of the partnership, and the mortgage of the wife's land was executed and delivered by her and her husband to the partner for the same purpose, and the name of the wife was signed to the note by the partner, or by his procurement, before it was negotiated for value, the plaintiff receiving the note and mortgage from the partner and advancing his money upon the security thereof, in good faith and in ignorance that the note had been altered, if the wife had herself signed the note, she would have been an accommodation maker, and, in equity at least, a surety for the other signors; and neither the liability of the husband as maker of the note, nor the effect of the mortgage executed by the wife, as well as by the husband to secure the payment of that note, would have been materially altered by the addition of her signature. There appears, therefore, to be no reason why the plaintiff, as indorsee of the note, seeking no decree against the wife personally, should not enforce the note against the husband, and the mortgage against the land of the wife. Mersman *v.* Werges, 112 U. S. 139, 143, 28 L. Ed. 641.

10. Addition of surety or guarantor.—See post, "Effect of Immaterial Alteration," I, E.

"Where the signature added, although in form that of a joint promisor, is in fact that of a surety or guarantor only, the original maker is, as between himself and the surety, exclusively liable for the whole amount, and his ultimate liability to pay that amount is neither increased nor diminished; and, according to the general current of the American authorities, the addition of the name of a surety, whether before or after the first negotiation of the note, is not such an alteration as discharges the maker." Mersman *v.* Werges, 112 U. S. 139, 142, 28 L. Ed. 641.

Filling blanks in incomplete instrument.—See post, "Perfecting Incomplete Instrument," III, C.

that the alteration of an instrument in a material point by the party claiming under it, as by inserting or striking out names without the authority or consent of the other parties concerned, renders the instrument void, unless subsequently approved or ratified.[11] And the rules, that where one of two innocent persons must suffer, he who has put it in the power of another to do the wrong must bear the loss, and that the holder of commercial paper taken in good faith and in the ordinary course of business is unaffected by any latent infirmities of the security, have no application in this class of cases.[12]

2. By Stranger.—An alteration made by a stranger to the instrument will not avoid the same.[13]

3. On Commercial Paper Generally.—It is now settled, in both English and American jurisprudence, that a material alteration in any commercial paper, without the consent of the party sought to be charged, extinguishes his liability.[14]

4. On Deed.—A deed may be avoided or rendered of no effect by razure, addition, interlining or other alteration, in any material part, if done after its execution.[15] And every erasure and interlineation in the deed, by the obligee or ap-

11. Material alteration by party avoids.—Smith *v.* United States, 2 Wall. 219, 234, 17 L. Ed. 788; Angle *v.* Northwestern Life Ins. Co. 92 U. S. 330, 23 L. Ed. 556.

"Every material alteration of a written instrument, according to the old decisions, whether made by a party or by a stranger, was fatal to its validity if made after execution, and while the instrument was in the possession and under the control of the party seeking to enforce it, and without the privity of the party to be affected by the alteration." Smith *v.* United States, 2 Wall. 219, 232, 17 L. Ed. 788.

"A material alteration of a written contract by a party to it, discharges a party who does not authorize or consent to the alteration, because it destroys the identity of the contract, and substitutes a different agreement for that into which he entered. In the application of this rule, it is not only well settled that a material alteration of a promissory note by the payee or holder discharges the maker, even as against a subsequent innocent indorsee for value; but it has been adjudged by this court that a material alteration of a note, before its delivery to the payee by one of two joint makers, without the consent of the other, makes it void as to him." Mersman *v.* Werges, 112 U. S. 139, 141, 28 L. Ed. 641, citing Wood *v.* Steele, 6 Wall. 80, 18 L. Ed. 725. See, also, Angle *v.* Northwestern Life Insurance Co., 92 U. S. 330, 23 L. Ed. 556.

Any unauthorized variation in an agreement which a surety has signed, that may prejudice him, or may substitute an agreement different from that which he came into, discharges him. Smith *v.* United States, 2 Wall. 219, 17 L. Ed. 788.

12. Inapplicability of equitable rules.—Wood *v.* Steele, 6 Wall. 80, 82, 18 L. Ed. 725.

"The law regards the security, after it is altered, as an entire forgery with respect to the parties who have not consented, and so far as they are concerned, deals with it accordingly." Wood *v.* Steele, 6 Wall. 80, 83, 18 L. Ed. 725.

Common law governs.—The effect of an alteration or interlineation of a deed is to be decided by the principles of the common law. Miller *v.* Stewart, 9 Wheat. 680, 708, 6 L. Ed. 189.

13. Alteration by stranger ineffectual.—United States *v.* Linn, 1 How. 104, 109, 11 L. Ed. 64. See Smith *v.* United States, 2 Wall. 219, 232, 17 L. Ed. 788.

The placing of seals upon an (official) bond after the execution of the instrument is a material alteration of it, but if done by a stranger and the instrument was valid without the seals and was declared on as such an instrument, the action upon it could be maintained. Moses *v.* United States, 166 U. S. 571, 583, 41 L. Ed. 1119; United States *v.* Linn, 15 Pet. 290, 311, 10 L. Ed. 742.

14. Effect on commercial paper.—Wood *v.* Steele, 6 Wall. 80, 82, 18 L. Ed. 725; Mersman *v.* Werges, 112 U. S. 139, 141, 28 L. Ed. 641.

The alteration of the date in any commercial paper—though the alteration delay the time of payment—is a material alteration, and, if made without the consent of the party sought to be charged, extinguishes his liability. The fact that it was made by one of the parties signing the paper before it had passed from his hands, does not alter the case as respects another party (a surety), who had signed previously. Wood *v.* Steele, 6 Wall. 80, 18 L. Ed. 725. See the title BILLS, NOTES AND CHECKS.

15. Effect as avoiding deed.—Vanhorne *v.* Dorrance, 2 Dall. 304, 305, 1 L. Ed. 391; Moelle *v.* Sherwood, 148 U. S. 21, 27, 37 L. Ed. 350; Steele *v.* Spencer, 1 Pet. 552, 7 L. Ed. 259; Speake *v.* United States, 9 Cranch 28, 38, 3 L. Ed. 645, dissenting opinion of Livingston, J. See the title DEEDS.

"By the common law, the alteration or interlineation of a deed, in a material part,

pointee, without consent, is a surrender; and a revocation may be implied by law. It need not be by an instrument to that effect.[16] But it must be shown to have been made under circumstances that the law does not warrant.[17]

5. On Bond.—The interlineation in an appeal bond of a new obligor's name, without the surety's knowledge,[18] or the erasure from an official bond, before acceptance, of the name of one of several sureties without the knowledge of the others;[19] or the erasure of the name of the principal in a replevin bond, by him without sureties' consent, invalidate the respective bonds, as to the sureties affected thereby.[20]

at least, by the holder, without the consent of the other party, ipso facto avoids the deed." Miller *v.* Stewart, 9 Wheat. 680, 706, 6 L. Ed. 189.

"An alteration in the description of property embraced in a deed, so as to make the instrument cover property different from that originally embraced, whether or not it destroys the validity of the instrument as a conveyance of the property originally described, certainly does not give it validity as a conveyance of the property of which the new description is inserted." Moelle *v.* Sherwood, 148 U. S. 21, 27, 37 L. Ed. 350.

Even if the deed, as altered in its description of the property conveyed, be deemed valid as between the parties from the time of the alteration, though not re-executed, it could not take effect and be in force as to subsequent purchasers without notice, whose deeds were already recorded, but as to them, by the statute of Nebraska, it was void. Moelle *v.* Sherwood, 148 U. S. 21, 27, 37 L. Ed. 350.

16. Equivalent to surrender or revocation.—Miller *v.* Stewart, 9 Wheat. 680, 708, 6 L. Ed. 189.

17. Circumstances must be such as do not warrant it.—Speake *v.* United States, 9 Cranch 28, 37, 3 L. Ed. 645.

"The fact, that there is an erasure or interlineation, apparent on the face of the deed, does not, of itself, avoid it. To produce this effect, it must be shown to have been made under circumstances that the law does not warrant." Speake *v.* United States, 9 Cranch 28, 37, 3 L. Ed. 645.

18. Insertion of new obligor.—Oneale *v.* Long, 4 Cranch 60, 2 L. Ed. 550.

If a bond be executed by O., as a surety for S., to obtain an appeal from the judgment of a justice of the peace, in Maryland, and the bond is rejected by the justice, and afterwards, without the knowledge of O., the name of W. be interlined as an obligor, who executes the bond, and the justice then accepts it, it is void as to O. Oneale *v.* Long, 4 Cranch 60, 2 L. Ed. 550.

"The judges did not all agree upon the same grounds, some being of opinion, that the bonds were void, by reason of the interlineation, and others, that they were vacated by the rejection of them by the magistrate, and could not be set up again, without a new delivery." Oneale *v.* Long, 4 Cranch 60, 62, 2 L. Ed. 550.

19. Erasure of surety's name.—Smith *v.* United States, 2 Wall. 219, 17 L. Ed. 788.

Where several persons sign a bond to the government as surety for a government officer, which bond statute requires shall be approved by a judge, before the officer enters on the duties of his office, an erasure by one of the sureties of his name from the bond—though such erasure be made before the instrument is submitted to the judge for approval, and, therefore, while it is uncertain whether it will be accepted by the government, or ever take effect—avoids the bond, after approval, as respects a surety who had not been informed that the name was thus erased; the case being one where, as the court assumed, the tendency of the evidence was, that the person whose name was erased signed the bond before or at the same time with the other party, the defendant. Smith *v.* United States, 2 Wall. 219, 17 L. Ed. 788.

Support to the proposition, that inasmuch as the erasure was made before the bond was approved by the district judge, it left the liability of all concerned precisely as it would have stood, if the person whose name was erased had only promised to sign and had not fulfilled his engagement, is attempted to be drawn from the case of United States *v.* Linn, 1 How. 104, 11 L. Ed. 64; S. C., 15 Pet. 290, 10 L. Ed. 742; and "it must be confessed that there are expressions in the opinion of the majority of the court which give some countenance to that view of the law. Question in that case arose upon the demurrer of the plaintiffs to the plea of the defendants, and the judgment of the court was in fact based upon the ground that the allegations of the plea were insufficient to establish the defense. Alteration charged in that case was that the seals had been attached to the signatures after the instrument was signed and before it was delivered, and the allegations of the plea were, that the alteration was made without the consent, direction, or authority of the surety, but it was not alleged that it was done without his knowledge, or by whom it was done." Smith *v.* United States, 2 Wall. 219, 230, 17 L. Ed. 788.

20. Erasure of principal's name.—Where there was an action of replevin in Wis-

6. On Patent for Land.—Where a grant conveyed the legal title in 1842, and innocent purchasers paid for the property, and took legal conveyances for it, with an honest belief that they were dealing for and acquiring a legal title from the true owner, a claimant of the equity of the patent, on the ground that the patent was issued to the wrong person, after being altered as to the name of the patentee, cannot set it up to overthrow the purchase.[21] So, where a grant of land in California was genuine, and issued by the proper authority, a fraudulent attempt to alter it by erasures and interlineations for the purpose of enlarging the quantity, made after California had been ceded to the United States, will not vitiate the the original grant.[22] And the destruction or mutilation of a patent, after same was duly issued, by an officer of the land office, was nugatory.[23]

E. Effect of Immaterial Alteration.—It has been held, that an interlineation made after the execution of a deed, though in an immaterial point, will avoid it.[24]

II. Consent Rule.

A. Evidence or Inference of Consent.—See post, "Presumptions," IV, C; "Admissibility," IV, D; "Weight and Sufficiency," IV, E.

B. Rule Stated.—It is clear, at the common law, that an alteration or ad-

consin, by virtue of which the property was seized by the marshal, and a bond was given by the defendant in replevin, together with sureties, the object of which was to obtain the return of the property to the defendant; which bond was afterwards altered, by the principal defendant's erasing his name from the bond, with the knowledge and consent of the marshal but without the knowledge or consent of the sureties, the bond was thereby rendered invalid against the sureties. Martin *v.* Thomas, 24 How. 315, 16 L. Ed. 689. See the title BONDS. Perfecting incomplete bond, see post "Bonds," III, C, 3.

21. **Change in patentee's name.**—Lea *v.* Polk County Copper Co., 21 How. 493, 16 L. Ed. 203. See United States *v.* Galbraith, 2 Black 394, 406, 17 L. Ed. 449.

"There was nothing in the case to cause suspicion in the minds of these purchasers. Three letters were added in the patent to the middle initial of the original name of the patentee. But the register did this in the course of his official duty, and, as this court believe, honestly; if the purchasers had gone into the inquiry, the presumption would have been that the register did his duty, and these innocent purchasers might properly buy up an outstanding title." Lea *v.* Polk County Copper Co., 21 How. 493, 16 L. Ed. 203.

22. **Fraudulent alteration after issue.**—United States *v.* West, 22 How. 315, 16 L. Ed. 317. Case distinguished on facts in United States *v.* Galbraith, 2 Black 394, 406, 17 L. Ed. 449.

Where the date of a grant has been altered, while it was in the hands of the claimants and is produced to the court without evidence, to show how the alteration came to be made, this court cannot confirm the title. The case of United States *v.* West, 22 How. 315, 16 L. Ed. 317, reviewed, the facts stated from the original record, and all its features shown to be strikingly different from this case. United States *v.* Galbraith, 2 Black 394, 17 L. Ed. 449.

Where the clear weight of the proof is against the possession or occupation by the grantee of land in California, the date of the grant was altered without any explanation of the alteration, and the genuineness of the signature of the governor to a certificate of approval of the Departmental Assembly doubted, this court will reverse the decree of the court below confirming the claim, and remit it for further evidence and examination. United States *v.* Galbraith, 22 How. 89, 16 L. Ed. 321.

23. **Recall of patent.**—Bicknell *v.* Comstock, 113 U. S. 149, 151, 28 L. Ed. 962.

After a patent in due form had been executed, recorded and transmitted to the local land office for the patentee, its subsequent recall (nearly ten years later) by order of the commissioner of the general land office, who "tore off the seals and erased the president's name from said patent, and mutilated the record thereof in the general land office, all without the consent and against the protest of the grantees of said Bicknell," this action was utterly nugatory and left the patent of 1869 to Bicknell in as full force as if no such attempt to destroy or nullify it had been made. This is a necessary inference from the principles established by the court in the case of United States *v.* Schurz, 102 U. S. 378, 26 L. Ed. 167. That principle is that when the patent has been executed by the president and recorded in the general land office, all power of the executive department over it has ceased. Bicknell *v.* Comstock, 113 U. S. 149, 151, 28 L. Ed. 962.

24. **Effect of immaterial alteration.**—Morris *v.* Vanderen, 1 Dall. 64, 67, 1 L. Ed. 38. See ante, "Instances of Immate-

dition in a deed, as by adding a new obligor, or an erasure in a deed, as by striking out an old obligor, if done with the consent and concurrence of all the parties to the deed, does not avoid it. And this principle equally applies, whether the alteration or erasure be made in pursuance of an agreement and consent, prior or subsequent to the execution of the deed.[25] The consent to an alteration is, in law, equivalent to a redelivery.[26]

C. Parol Authority.—Although it was at one time doubted whether a parol authority was adequate to authorize an alteration or addition to a sealed instrument, the better opinion, at this day, is that the power is sufficient.[27]

III. Filling Blanks.

A. By Parol Authority.—In several states a parol authority from the grantor will empower another party to fill up a blank left for grantee's name in a signed and acknowledged deed.[28]

B. By Implied Authority.—See post, "Perfecting Incomplete Instrument," III, C.

rial Alterations," I, C; "In General," I, D, 1; "On Deed," I, D, 4.

In a patent, the obliteration of the consideration by tearing out same, does not make void the grant, no circumstances or suggestion of fraud existing. Polk *v.* Wendall, 9 Cranch 87, 97, 3 L. Ed. 665. See ante, "On Patent for Land," I, D, 6.

25. Alteration by consent does not avoid.—Speake *v.* United States, 9 Cranch 28, 37, 3 L. Ed. 645; United States *v.* Linn, 1 How. 104, 107, 11 L. Ed. 64. See post, "Filling Blanks," III.

The adding a scrawl by one of the obligors to his own name did not vitiate the instrument as to him; he had a right to add the seal, or at least, he can have no right to set up his own act in this respect to avoid his own deed. It was, therefore, his deed, and the plea of non est factum as to him is false. United States *v.* Linn, 1 How. 104, 107, 11 L. Ed. 64. See ante, "General Rule as to Materiality," I, A, 3.

The name of an obligor may be erased from a bond, and a new obligor inserted, by consent of all the parties, without making the bond void; such consent may be proved by parol evidence; and it is immaterial, whether the consent be given before or after the execution of the deed. Speake *v.* United States, 9 Cranch 28, 3 L. Ed. 645. (Livingston, J., dissenting as to the admissibility of parol evidence.)

As said in Smith *v.* United States, 2 Wall. 219, 230, 17 L. Ed. 788; "Liability cannot attach to the person whose name was erased before the instrument was approved, and all those who subsequently consented to remain liable, notwithstanding the alteration, are estopped under the circumstances to interpose any such objection. They have waived the effect which the alteration in the instrument would otherwise have had and consented to be bound, and therefore have suffered no injury. Volenti non fit injuria."

26. Equivalent to redelivery.—Miller *v.* Stewart, 9 Wheat. 680, 708, 6 L. Ed. 189.

Or re-execution.—When a grant of land, issued and delivered, is subsequently altered in the quantity granted by direction of the grantor, on the application of the grantee, and is then redelivered to the grantee, such redelivery is in legal effect a re-execution of the grant. Malarin *v.* United States, 1 Wall. 282, 17 L. Ed. 594.

If an original appointment is altered by the consent of the parties to the instrument, that very consent implies that something is added to or taken from it. The parties agree that it shall no longer remain as it was at first, but that the same instrument shall be, not what it was, but what the alteration makes it. It shall not constitute two separate and distinct instruments, but one consolidated instrument. Miller *v.* Stewart, 9 Wheat. 680, 703, 6 L. Ed. 189.

27. Parol authority.—Drury *v.* Foster, 2 Wall. 24, 33, 17 L. Ed. 780; Allen *v.* Withrow, 110 U. S. 119, 128, 28 L. Ed. 90. See post, "By Parol Authority," III, A.

28. Parol authority sufficient.—Allen *v.* Withrow, 110 U. S. 119, 128, 28 L. Ed. 90.

"It may be, and probably is, the law in Iowa, as it is in several states, that the grantor in a deed conveying real property signed and acknowledged, with a blank for the name of the grantee, may authorize another party, by parol, to fill up the blank." Allen *v.* Withrow, 110 U. S. 119, 128, 28 L. Ed. 90. See the title DEEDS. As to consent to alteration, see ante, "Consent Rule," II.

Limitations on power.—"But there are two conditions essential to make a deed thus executed in blank operate as a conveyance of the property described in it; the blank must be filled by the party authorized to fill it, and this must be done before or at the time of the delivery of the deed to the grantee named." Allen *v.* Withrow, 110 U. S. 119, 128, 28 L. Ed. 90. See post, "Deeds," III, C, 2.

Bonds issued by a railroad company in Massachusetts, payable in blank, no payee being inserted, and issued to a citizen of Massachusetts, which had passed through several intervening holders, could be filled up by a citizen of New Hampshire, payable to himself or order, and then suit could be maintained upon them in the circuit court of the United States for Massachusetts.[29]

C. Perfecting Incomplete Instrument—1. NEGOTIABLE PAPER.—Where a party to a negotiable instrument intrusts it to another for use as such with blanks not filled, it carries on its face an implied authority to complete it by filling them.[30] But it does not authorize him to do more, nor give him power to fill it up at pleasure,[31] or to vary or alter its material terms by erasing what is

29. Railroad bonds.—White *v.* Vermont, etc., R. Co., 21 How. 575, 16 L. Ed. 221. The usage and practice of railroad companies, and of the capitalists and business men of the country, and decisions of courts, have made this class of securities negotiable instruments. The later English authorities upon this point overruled. White *v.* Vermont, etc., R. Co., 21 How. 575, 16 L. Ed. 221.

30. Filling blanks in the negotiable paper.—Angle *v.* Northwestern Life Ins. Co., 92 U. S. 330, 23 L. Ed. 556; Michigan Bank *v.* Elred, 9 Wall. 544, 551, 19 L. Ed. 763; Davidson *v.* Lanter, 4 Wall. 447, 457, 18 L. Ed. 377; Bank *v.* Neal, 22 How. 96, 107, 16 L. Ed. 323; Violett *v.* Patton, 5 Cranch 142, 143, 3 L. Ed. 61; Goodman *v.* Simonds, 20 How. 343, 361, 15 L. Ed. 934.

"It is well settled law that where a party to a negotiable bill of exchange or promissory note containing blanks, intrusts it to the custody of another, whether the blanks are in the date or the amount of the note, and whether it be for the purpose of accomodating the person to whom it was intrusted, or to be used to raise money for his own benefit, such bill or note, especially if it be indorsed in blank, or is made payable to bearer, carries on its face an implied authority, in the person to whom it is so intrusted, to fill up the blanks in his discretion; and, as between such party to the bill or note and innocent third parties, holding the bill or note as transferees for value, in the usual course of business, the person to whom it is so intrusted must be deemed to be the agent of the party who committed such bill or note to his custody; and the legal conclusion is, that in filling up the blanks he acted under the authority of that party, and with his approbation and consent." Michigan Bank *v.* Eldred, 9 Wall. 544, 551, 19 L. Ed. 763. See, also, Bank *v.* Neal, 22 How. 96, 107, 16 L. Ed. 323; Angle *v.* Northwestern Life Ins. Co., 92 U. S. 330, 338, 23 L. Ed. 556.

And a bona fide holder of a negotiable instrument for a valuable consideration, without notice of facts which impeach its validity between the antecedent parties (as when the instrument was improperly filled out for his own benefit by the party entrusted therewith), if he takes it under an endorsement before the same becomes due, holds the title unaffected by these facts, and may recover thereon, although as between the antecedent parties the transaction may be without any legal validity. Goodman *v.* Simonds, 20 How. 343, 15 L. Ed. 934.

The case falls within the rule, that where one or two innocent parties must suffer, through the fraud or negligence of a third party, the loss shall fall upon him who gave the credit. Bank *v.* Neal, 22 How. 96, 16 L. Ed. 323. As to rights of holder generally, see the title BILLS, NOTES AND CHECKS.

Change of date.—The power to fill the blanks for dates implies, in favor of such holders, a power in the person trusted, to change the date, after the note has been written, and before it is negotiated. Michigan Bank *v.* Eldred, 9 Wall. 544, 19 L. Ed. 763.

A blank indorsement, upon a blank piece of paper, with intent to give a person credit, is, in effect, a letter of credit. And if a promissory note be afterwards written on the paper, the indorser cannot object that the note was written after the indorsment. Violett *v.* Patton, 5 Cranch 142, 3 L. Ed. 61.

Where a partnership is in the habit of indorsing negotiable paper, having blanks left for the date, and gives the paper so indorsed to a person to use—he to fill the blank when he wishs to use it—the firm is liable on the paper with the date filled in, when, thus complete, it has passed to the hands of innocent bona fide holders for value. Michigan Bank *v.* Eldred, 9 Wall. 544, 19 L. Ed. 763. See the title BILLS, NOTES AND CHECKS.

31. Limitations on power.—Davidson *v.* Lanier, 4 Wall. 447, 448, 18 L. Ed. 377. If there has been no agreement, the authority is general; if there has, it must be pursued. No person, unless authorized, either directly or by just inference from the nature of the transaction, can fill up a blank bill for his own benefit, nor can such a bill be enforced against the drawer and indorser in favor of anyone who takes it in bad faith; that is, with knowledge that it has been filled up without authority or in fraud. Davidson *v.* Lanier, 4 Wall. 447, 456, 18 L. Ed. 377.

written as part thereof, nor to pervert its scope or meaning by filling blanks with stipulations repugnant to what is plainly expressed in the instrument.[32]

2. DEEDS.—A paper, executed under seal for the husband's benefit, by husband and wife, acknowledged in separate form by the wife, and meant to be a mortgage of her separate lands, but with blanks left for the insertion of the mortgagor's name and the sum borrowed, and to be filled up by the husband, is no deed as respects the wife, when afterwards filled up by the husband and given to a lender of money, though one bona fide and without knowledge of the mode of execution. The mortgagee, on cross-bill to a bill of foreclosure, was directed to cancel her name.[33]

3. BONDS.—A bond, signed by principal and surety, and intrusted to the principal with blanks for names of two other sureties, dates and amount, may be filled up and completed by the principal so as to be valid, though he may have exceeded his actual authority.[34]

IV. Evidence.

A. Burden of Proof.—1. AS TO FORGERY OR ALTERATION.—The burden of proving a forgery is upon the person alleging same.[35] But where it is alleged that a written instrument has been altered, and any suspicion is raised as to its genuineness, the burden of removing same is upon the party producing and claiming under it.[36] Not so, however, when the alteration is averred by the opposite

32. Same.—Angle *v.* Northwestern Life Ins. Co., 92 U. S. 330, 23 L. Ed. 556.

Burden of proof as to violation of agreement.—See post, "As to Violation of Agreement as to Filling Blanks," IV, A, 2.

33. Deeds.—Drury *v.* Foster, 2 Wall. 24, 17 L. Ed. 780. See ante, "By Parol Authority," III, A.

34. Bonds completed by filling blanks.—Butler *v.* United States, 21 Wall. 272, 22 L. Ed. 614; Miller *v.* Stewart, 9 Wheat. 680, 717, 6 L. Ed. 189.

A person who signs, as surety, a printed form of government bond, already signed by another as principal, but the spaces in which for names, dates, amounts, etc., remain blank, and who then gives it to the person who has signed as principal, in order that he may fill the blanks with a sum agreed on between the two parties as the sum to be put there, and with the names of two sureties who shall each be worth another sum agreed on, and then have those two persons sign it, makes such person signing as principal his agent to fill up the blanks and procure the sureties, and if such person fraudulently fill up the blanks with a larger sum than that agreed on between the two persons and have the names of worthless sureties, inserted, and such sureties to sign the bond, and the bond thus filled up and signed be deliverd by the principal to the government, who accepts it in the belief that it has been properly executed, the party so wronged cannot, on suit on the bond, again set up the private understandings which he had with the principal. Butler *v.* United States, 21 Wall. 272, 22 L. Ed. 614; Miller *v.* Stewart, 9 Wheat. 680, 717, 6 L. Ed. 189. See ante, "On Bond," I, D, 5; "Rule Stated," II, B.

35. Burden of proving forgery on person alleging.—Sturm *v.* Boker, 150 U. S. 312, 340, 37 L. Ed. 1093.

Where it is admitted that the signatures to writings were genuine, but insisted that the writing above them was forged, the burden of proof was clearly upon the defendants to establish that the written part above the signatures was forged. Sturm *v.* Boker, 150 U. S. 312, 340, 37 L. Ed. 1093.

36. Burden of proving genuineness of suspicious instrument.—Smith *v.* United States, 2 Wall. 219, 232, 17 L. Ed. 788; United States *v.* Linn, 1 How. 104, 11 L. Ed. 64; S. C., 15 Pet. 290, 10 L. Ed. 742; Miller *v.* Stewart, 9 Wheat. 680, 717, 6 L. Ed. 189.

"General rule is, that where any suspicion is raised as to the genuineness of an altered instrument, whether it be apparent upon inspection, or is made so by extraneous evidence, the party producing the instrument and claiming under it, is bound to remove the suspicion by accounting for the alteration. Exceptions to the rule undoubtedly arise, as where the alteration is properly noted in the attestation clause, or where the alteration is against the interest of the party deriving title under the instrument." Smith *v.* United States, 2 Wall. 219, 232, 17 L. Ed. 788.

Where the alteration is apparent on the face of the instrument, the party offering it in evidence, and claiming under it, is bound to show that the alteration was made under such circumstances that it does not affect his right to recover. Smith *v.* United States, 2 Wall. 219, 233, 17 L. Ed. 788; United States *v.* Linn, 1 How. 104, 11 L. Ed. 64; S. C., 15 Pet.

party, and it does not appear upon the face of the instrument.[37]

2. As to Violation of Agreement as to Filling Blanks.—In a suit by the drawee upon negotiable paper filled up by authority by receiver, the burden of proof that an agreement as to filling up had been violated, is on the defendant, but if he can make the proof it will avail him.[38]

B. Questions of Law and Fact.—The materiality of the alteration is to be decided by the court; the question of fact is for the jury.[39]

C. Presumptions.—1. As to Time of Alteration and by Whom Made.—In the absence of any proof on the subject, the presumption is that the correction or erasure was made before the execution of the deed.[40] And the circumstances may be such as to raise the presumption that an altered instrument was

290, 10 L. Ed. 742. See ante, "Effect of Material Alteration," I, D.

Frauds and mutilations, to which the parties having the custody of deeds are privy cannot be taken too strongly against them. Miller *v.* Stewart, 9 Wheat. 680, 717, 6 L. Ed. 189.

Except where the alteration was made by a public officer in the course of official duty, in which case the burden of proof is on the party alleging invalidity. Oneale *v.* Long, 4 Cranch 60, 2 L. Ed. 550. See post, "As to Alteration in Course of Official Duty," IV, C, 2.

37. United States *v.* Linn, 1 How. 104, 11 L. Ed. 64; S. C., 15 Pet. 290, 10 L. Ed. 742. As to deed, see ante, "On Deed," I, D, 4.

38. Violation of agreement as to filling blanks must be proved.—Davidson *v.* Lanier, 4 Wall. 447, 448, 18 L. Ed. 337.

39. Materiality for court, fact of alteration for jury.—Wood *v.* Steele, 6 Wall. 80, 82, 18 L. Ed. 725; Steele *v.* Spencer, 1 Pet. 552, 560, 7 L. Ed. 259; Little *v.* Herndon, 10 Wall. 26, 19 L. Ed. 878; Vanhorne *v.* Dorrance, 2 Dall. 304, 305, 1 L. Ed. 391.

Whether erasures and alterations had been made in the deed or not, was a question of fact, proper to be referred to the jury; but whether the erasures and alterations were material or not, was a question of law which ought to have been decided by the court. Steele *v.* Spencer, 1 Pet. 552, 560, 7 L. Ed. 259.

On an objection to the admission of a deed because of an alleged erasure and interlineation apparent on its face, the court may properly admit the deed, leaving it to the jury to determine whether there was any alteration. Little *v.* Herndon, 10 Wall. 26, 19 L. Ed. 878.

"It is the province of the jury to determine, whether any such alteration was made, after the delivery of the deed." Vanhorne *v.* Dorrance, 2 Dall. 304, 305, 1 L. Ed. 391.

The construction of words belongs to the court, and the materiality of an alteration in a deed, is a question of construction. Steele *v.* Spencer, 1 Pet. 552, 7 L. Ed. 259.

A commercial house sent to a correspondent eight bills of exchange, four purporting to be the first and the other four the second of exchange, and the whole eight accepted on their face by that commercial house, and each of the four made payable to the order of their correspondent, but in blank as to the names of the drawers, and the address of the drawees, and as to date and amount and time and place of payment. Two of the four of the second of exchange were filled up, varying from the others, not only in dates and amounts, but also as to time and place of payment. These bills were discounted by a bank without any knowledge whatever that either had been perfected and filled up by the payee without authority, or of the circumstances under which they had been intrusted to his care, unless the words "second of exchange, first unpaid," can be held to have that import. Held, that the effect of these words was a question of law, and not of fact for the jury. Bank *v.* Neal, 22 How. 96, 16 L. Ed. 323.

Instructions.—See post, "Instructions," V, B.

40. Presumptively made before execution.—Little *v.* Herndon, 10 Wall. 26, 31, 19 L. Ed. 878; Hanrick *v.* Patrick, 119 U. S. 156, 172, 30 L. Ed. 396; Contra, Morris *v.* Vanderen, 1 Dall. 64, 67, 1 L. Ed. 38.

The presumption was that an erasure was made before the execution of the deed. Hanrick *v.* Patrick, 119 U. S. 156, 172, 30 L. Ed. 396; Little *v.* Herndon, 10 Wall. 26, 19 L. Ed. 878.

As to the presumption which the law raises as to the date of the alteration, the authorities are not uniform. Some of them hold, that where there are no particular circumstances of suspicion connected with the alteration, the presumption of law is that the alteration was made contemporaneously with the execution of the instrument, giving as the reason for the conclusion that a deed cannot be altered after its execution without fraud, which is never to be assumed without proof; other authorities hold the presumption to be the other way, and require an explanation of the alteration before the deed can be admitted in evidence. Malarin *v.* United States, 1 Wall. 282, 288, 17 L. Ed. 594.

Contra.—But in Morris *v.* Vanderen, 1

altered subsequently to its execution, and, if by design, by some one who had an interest in destroying it.[41]

2. As to Alteration in Course of Official Duty.—An alteration made by a public officer in the course of his official duty is presumed to have been honestly and properly made.[42]

3. As to Consent to Alteration.—Where an official bond, to the United States, conditioned in due form for faithful discharge of duties committed to officer's charge, duly signed by sureties, had been offered to the government and rejected as not bearing seals and was taken away by the principal, and returned with proper seals, the presumption is, in the absence of direct evidence, that the seals were attached with the consent of the sureties.[43]

D. Admissibility.—Parol evidence is admissible upon the question of the effect of an alteration or addition, either to show that it was made under circumstances not warranting it in law, to avoid it, or to prove the alteration or addition to have been made by consent.[44]

E. Weight and Sufficiency.—1. Lapse of Time and Acquiescence.—No suspicion on the subject of alteration having been suggested for eighteen years, is a circumstance of no little weight to show that no grounds for suspicion ever existed.[45]

2. Evidence of Consent to Alteration.—Where the evidence shows that the alteration was made without the knowledge of the defendant, and there is neither fact nor circumstance in the case from which to infer any subsequent assent, although he knew when he signed the bond that the law required that it should be approved by the district judge, his knowledge of the law in that behalf furnishes no ground of inference that he authorized the alteration, or that he

Dall. 64, 67, 1 L. Ed. 38, it had been held, that an interlineation in a deed is not to be presumed to have been made before its execution, but the presumption is the contrary unless otherwise proved.

41. Presumptive alteration by opposing interest, after execution.—Coulson *v.* Walton, 9 Pet. 62, 79, 9 L. Ed. 51.

Where certain alterations have been made since the death of the obligee, as is satisfactorily proved, and it is clear, that no one having any interest under the bond could have had a motive to alter it, as seems to have been done, and it is proved, that after the death of the obligee, the bond was in possession of those who claimed the land adversely to it, so that its destruction would have advanced their interests, it is fair, therefore, to presume, that if the alterations were made by design, they could not have been made by sign, they could not have been made by anyone claiming under the bond, but must have been made by someone who had an interest in destroying it. Coulson *v.* Walton, 9 Pet. 62, 79, 9 L. Ed. 51. See ante, "Effect of Material Alteration," I. D.

42. Sanction of official duty.—Lea *v.* Polk County Copper Co., 21 How. 493, 16 L. Ed. 203. See ante, "As to Forgery or Alteration," IV, A, 1.

43. Presumptive consent to affixing seals after execution.—Moses *v.* United States, 166 U. S. 571, 41 L. Ed. 1119, following United States *v.* Linn, 1 How. 104, 11 L. Ed. 64. See Dair *v.* United States, 16 Wall. 1, 21 L. Ed. 491; Butler *v.* United States, 21 Wall. 272, 22 L. Ed. 614.

44. Parol evidence admissible.—Speake *v.* United States, 9 Cranch 28, 3 L. Ed. 645 (Livingston, J., dissenting).

"No change whatever in a sealed instrument, after its execution, which may increase the liability, or be, in any way, to the prejudice of the party whose deed is (and such is the case here), should be palmed on him by parol testimony; and so, vice versa, * * * no alteration which may be, in any way, injurious to the grantee or obligee; should be set up by the other party; but * * * the terms in which the deed is originally executed should alone be binding, until alterations are introduced into it by the same solemnities which gave existence to the first." Speake *v.* United States, 9 Cranch 28, 37, 3 L. Ed. 645, dissenting opinion of Livingston, J.

45. Rebuttal by lapse of time and acquiescence.—Malarin *v.* United States, 1 Wall. 282, 290, 17 L. Ed. 594.

When a Mexican grant issued to the claimant is alleged to have been fraudulently altered after it was issued in the designation of the quantity granted, a record of judicial possession, delivered to the grantee soon after the execution of the grant, showing that the quantity of which possession was delivered was the larger quantity stated in the grant, is entitled to great consideration in determining the character of the alteration, particularly when there has been a long subse-

consented to be bound in any other manner, or to any greater extent, or under any other circumstances than what was expressed in the instrument.[46]

V. Pleading and Practice.

A. Pleas.—Non est factum is the proper plea to set up the razure of a deed.[47] But the plaintiff's knowledge of, or authority and direction for, the alteration, must be alleged in the plea.[48]

B. Instruction.—Where the instruction given refers the question of materiality to the jury, as well as the fact of alteration and erasure, it is erroneous.[49]

ALTERATION OF RECORDS.—See the title RECORDS.
ALTERNATIVE JUDGMENT.—See the title REPLEVIN.
ALTERNATIVE WRIT.—See the title MANDAMUS.

quent occupation of the premises. Malarin *v.* United States, 1 Wall. 282, 17 L. Ed. 594.

46. Inference of consent not authorized by knowledge of necessity.—Smith *v.* United States, 2 Wall. 219, 236, 17 L. Ed. 788.

47. Razure set up under non est factum.—Miller *v.* Stewart (dissenting opinion of Johnson and Todd, JJ.), 9 Wheat. 680, 715, 6 L. Ed. 189.

Notwithstanding some contrariety to dicta, it is now clearly settled, that a razure must make a deed void, or it is immaterial; and therefore, non est factum is held to be the proper plea. Dissenting opinion of Johnson & Todd, JJ., in Miller *v.* Stewart, 9 Wheat. 680 715, 6 L. Ed. 189.

48. Necessary averment.—United States *v.* Linn, 1 How. 104, 11 L. Ed. 64; S. C., 15 Pet. 290, 10 L. Ed. 742. See, also, Moses *v.* United States, 166 U. S. 571, 41 L. Ed. 1119.

A plea alleging merely that seals were affixed to a bond without the consent of the defendant, without also alleging that it was done with knowledge, or by the authority or direction of the plaintiffs, is not sufficient. (McClain, J., dissenting.) United States *v.* Linn, 1 How. 104, 11 L. Ed. 64; S. C., 15 Pet. 290, 10 L. Ed. 742, cited in Moses *v.* United States, 166 U. S. 571, 583, 41 L. Ed. 1119.

49. Instruction submitting materiality to jury erroneous.—Steele *v.* Spencer, 1 Pet. 552, 560, 7 L. Ed. 259. See ante, "Questions of Law and Fact," IV, B.

AMBASSADORS AND CONSULS.

BY J. N. CLAYBROOK.

I. **Definitions,** 274.
II. **Eligibility,** 275.
III. **Appointment,** 276.
IV. **Evidence as to Representative Character,** 276.
V. **Privileges and Immunities,** 276.
A. Diplomatic Representatives, 276.
1. Persons Entitled to Privileges and Immunities, 276.
2. Privileges from Arrest, 276.
a. Nature and Extent of Privilege, 276.
b. Reasons for Privileges, 277.
B. Consuls, 277.
1. In General, 277.
2. Consul Performing Diplomatic Duties, 277.
VI. **Powers, Duties and Liabilities,** 277.
A. Ambassadors and Ministers, 277.
B. Consuls or Vice Consuls, 278.
1. Powers, 278.
a. In General, 278.
b. Diplomatic Powers, 278.
c. Protection of Property of Citizens of Home Government, 279.
d. Exemption of Enemy Property from Capture, 279.
e. Trade or Business, 279.
f. Contracts in Conflict with Interest of Government Represented, 279.
g. Authentication of Foreign Laws or Judgments, 280.
h. Judicial Powers, 280.
i. Arrest and Imprisonment of Seamen, 280.
(1) Right to Arrest Seamen, 280.
(2) Mode of Making Arrest, 280.
(3) For What Length of Time Seamen May Be Held, 280.
j. Special Rules Applicable to Consuls to Mohammedan Countries, 280.
2. Liabilities, 281.
a. Liability on Bill of Exchange Drawn on Treasury of Home Government, 281
b. Accounting for Fees Derived from Office, 281.
c. Liability for Interest on Funds on Deposit, 281.
VII. **Salary and Fees,** 281.
A. Salary, 281.
1. Construction and Operation of Statutes in Regard to Salary, 281.
2. Salary of Vice Consuls, 282.
B. Fees, 282.
1. Right to Fees Derived from Office, 282.
a. What Fees Belong to Consul, 282.
b. What Fees Belong to Government, 282.
2. Recovery Back of Fees Paid to Government, 283.
VIII. **Consular Courts,** 283.
A. Jurisdiction, 283.

1. Jurisdiction as Dependent on Treaties, 283.
a. In General, 283.
b. Construction and Operation of Particular Treaties, 283.
2. Jurisdiction over Offenses Committed in Foreign Ports, 284.
3. Jurisdiction over Seamen, 284.
B. Trial, 284.
1. In General, 284.
2. Rights of Accused, 284.
a. In General, 284.
b. Indictment and Presentment, 284.
c. Jury Trial, 284.

IX. Punishment of Crimes against Foreign Ministers, 285.

X. Termination of Office, 285.

XI. Jurisdiction of Cases Affecting Ambassadors and Consuls, 285.
A. In General, 285.
B. Actions by or against Ambassadors and Ministers, 285.
1. Actions by Ambassadors or Ministers, 285.
2. Actions or Proceedings against Ambassadors or Ministers, 285.
C. Actions to Which a Consul or Vice Consul Is a Party, 286.
1. United States Courts, 286.
2. State Courts, 286.

CROSS REFERENCES.

See the titles COURTS; SEAMEN; TREATIES.

As to necessity of consent of foreign consul in order to give jurisdiction to court of admiralty of a suit between foreigners, such as disputes between seaman and master of vessel, see the title ADMIRALTY, ante, p. 119. Authentication of foreign judgments or proceedings, see the title FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS. Authentication of foreign laws by consuls, see the title FOREIGN LAWS. As to suspension of statute of limitations as to ambassadors or consuls beyond the seas, see the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION. Acknowledgment of wills before consuls or vice consuls, see the title WILLS.

I. Definitions.

Diplomatic Officer.—The term "diplomatic officer" includes ambassadors, envoys extraordinary, charges d'affaires, agents and secretaries of legation, and none others.[1]

Ministers—Public Minister.—The word "minister," as used in the Revised Statutes, relating to foreign relations, is to be understood to mean the person invested with, and exercising the principal diplomatic functions,[2] and the term "public ministers" as including ambassadors, envoys extraordinary, ministers plenipotentiary, ministers resident, commissioners, charges d'affaires, agents and secretaries of legation, and none others.[3]

Charges D'Affaires.—Charges d'affaires are persons orally invested with the charge of the embassy or legation by the ambassador or minister himself, to be exercised during his absence from the seat of his mission. They are accordingly announced in this character by him before his departure to the minister of foreign affairs of the court to which he is accredited.[4] Charges d'affaires ad hoc are representatives originally sent and accredited by their governments, while

1. **Meaning of "diplomatic officer."**—Rev. Stat., § 1674; Ex parte Baiz, 135 U. S. 403, 419, 34 L. Ed. 222.

2. **Meaning of "minister."**—Rev. Stat., § 4130; Ex parte Baiz, 135 U. S. 403, 419, 34 L. Ed. 222.

3. **Meaning of term "public minister."**—Ex parte Baiz, 135 U. S. 403, 419, 34 L. Ed. 222.

4. **Charges d'affaires defined.**—Ex parte Baiz, 135 U. S. 403, 423, 34 L. Ed. 222.

charges d'affaires per interim, are agents substituted in the place of the minister during his absence.[5] Charges d'affaires ad hoc on permanent mission are accredited by letters transmitted to the minister of foreign affairs. Charges d'affaires ad interim are presented as such by the minister of the first or second class when he is about to leave his position temporarily or permanently.[6] In the United States, secretaries of legation act ex officio as charges d'affaires ad interim, and in the absence of the secretary of legation the secretary of state may designate any competent person to act ad interim, in which case he is specifically accredited by letter to the minister for foreign affairs.[7]

Consuls.—A consul is an officer commissioned by his government for the protection of its interests and those of its citizens or subjects.[8]

Vice Consuls and Vice Commercial Agents.—Vice consuls and vice commercial agents are consular officers substituted, temporarily, to fill the places of consuls general, consuls or commercial agents, when they shall be temporarily absent or relieved from duty.[9]

II. Eligibility.

Diplomatic Agents.—In general, a government will not receive one of its citizens as a diplomatic agent of another government.[10] Of course the objection would not exist to the same extent in the case of designation for special purposes or temporarily, but is one purely for the receiving government to insist upon or waive at its pleasure.[11]

Consuls.—A citizen of the receiving government may be appointed consul of a foreign government.[12] And there is no presumption that a person is an alien because he represents a foreign government as consul.[13]

5. Charges d'affaires ad hoc and ad interim.—Ex parte Baiz, 135 U. S. 403, 423, 34 L. Ed. 222.

6. Mode of accrediting charges d'affaires.—Ex parte Baiz, 135 U. S. 403, 423, 34 L. Ed. 222.

7. Secretaries of legation ex officio charges d'affaires.—Ex parte Baiz, 135 U. S. 403, 423, 34 L. Ed. 222.

8. Consul defined.—Oscanyon *v.* Arms Co., 103 U. S. 261, 26 L. Ed. 539.

The word "consul" as used in the Revised Statutes, relating to foreign relations, is to be understood to mean any person invested by the United States with and exercising, the functions of consul general, vice consul general, consul or vice consul. Ex parte Baiz, 135 U. S. 403, 420, 34 L. Ed. 222.

9. Vice consuls and vice commercial agents defined.—Rev. Stat., 1674; United States *v.* Eaton, 169 U. S. 331, 336, 42 L. Ed. 767.

And this definition by congress of the nature of a vice consulship was not changed by the amendment to § 4130 of the Revised Statutes by the act of February 1, 1876, ch. 6, 19 Stat. 2, as the obvious purpose of that act was simply to provide that where the words "minister," "consul" or "consul general" were generally used, they should be taken also as embracing the subordinate officers, who were to represent the principals in case of absence. In other words, that where a delegation of authority was made to the incumbent of the office, the fact that the name of the principal alone was mentioned should not be considered as excluding the power to exercise such authority by the subordinate and temporary officer, when the lawful occasion for the performance of the duty by him arose. United States *v.* Eaton, 169 U. S. 331, 336, 42 L. Ed. 767.

10. Citizens of home government as diplomatic agents of foreign government.—Ex parte Baiz, 135 U. S. 403, 428, 34 L. Ed. 222.

"In many countries it is a state maxim that one of its own subjects or citizens is not to be received as a foreign diplomatic agent, and a refusal to receive, based on that objection, is always regarded as reasonable. The expediency of avoiding a possible conflict between his privileges as such and his obligations as a subject or citizen, is considered reason enough in itself." Ex parte Baiz, 135 U. S. 403, 427, 34 L. Ed. 222.

11. Citizens may act temporarily or for special purposes.—Ex parte Baiz, 135 U. S. 403, 428, 34 L. Ed. 222.

12. Citizen may act as consul for foreign government.—Bors *v.* Preston, 111 U. S. 252, 28 L. Ed. 419.

Neither the adjudged cases nor the practice of this government prevent an American citizen—not holding an office of profit or trust under the United States—from exercising in this country the office of consul of a foreign government. Bors *v.* Preston, 111 U. S. 252, 263, 28 L. Ed. 419.

13. Presumption as to citizenship of consul.—Bors *v.* Preston, 111 U. S. 252,

III. Appointment.

A statute conferring authority upon the president to appoint vice consuls is within the power of congress,[14] and the president may make appointments in accordance with its provisions.[15] And in case of emergency, a vice consul may be appointed by a minister resident and consul general.[16]

IV. Evidence as to Representative Character.

The decision of the executive in reference to the public character of a person claiming to be a foreign minister, is conclusive upon the courts.[17] Indeed, in order to entitle a charge d'affaires of a foreign government to exemption from arrest, the notoriety of his reception as such, by the president, is sufficient evidence of his diplomatic character, and no proof from the department of state is necessary.[18] The refusal of the government to allow a person free entry of goods imported for his use, is entitled to weight as showing that he was not a diplomatic agent at the time of the refusal, as this is a privilege usually accorded to all diplomatic representatives.[19]

V. Privileges and Immunities.

A. Diplomatic Representatives—1. PERSONS ENTITLED TO PRIVILEGES AND IMMUNITIES.—It is a well-settled principle that the person of a public minister is sacred and inviolable, and whoever offers any violence to him, not only affronts the sovereign he represents, but also hurts the common safety and well-being of nations and is guilty of a crime against the whole world.[20] The independence of a minister extends to all of his household,[21] including the secretary of the embassy.[1]

2. PRIVILEGE FROM ARREST—a. *Nature and Extent of Privilege.*—A minister is not amenable to the local jurisdiction for a crime committed during the continuance of his office, unless it be such a crime as to forfeit the privileges annexed to his character.[22] Where the office of a charge d'affaires is superseded

28 L. Ed. 419. See, generally, the titles ALIENS, ante, p. 210; CITIZENSHIP; PRESUMPTIONS AND BURDEN OF PROOF.

14. Validity of act empowering president to appoint vice consuls.—United States *v.* Eaton, 169 U. S. 331, 42 L. Ed. 767.

15. Appointment of vice consuls by president.—United States *v.* Eaton, 169 U. S. 331, 42 L. Ed. 767.

16. Emergency appointment of vice consul.—The fact that the minister resident and consul general to Siam had obtained a leave of absence from the president, and was sick and unable to discharge his duties, and that the vice consul previously appointed had not qualified, and was absent from Siam, created a vacancy within the meaning of the consular regulations and justified an emergency appointment of a vice consul by the minister resident and consul general. United States *v.* Eaton, 169 U. S. 331, 340, 42 L. Ed. 767.

17. Decision of executive as to representative character.—The court has the right to accept the certificate of the state department that a party is or is not a diplomatic representative, and as such a privileged person, and cannot properly be asked to proceed upon argumentative or collateral proof. Ex parte Baiz, 135 U. S. 403, 432, 34 L. Ed. 222; Ex parte Hitz, 111 U. S. 766, 28 L. Ed. 592.

18. Notoriety of reception as evidence of representative character.—Dupont *v.* Pichon, 4 Dall. 321, 1 L. Ed. 851.

19. Refusal to allow free importation of goods as evidence of want of diplomatic character.—Ex parte Hitz, 111 U. S. 766, 28 L. Ed. 592.

20. Privileges of ministers in general.—Respublica *v.* DeLongchamps, 1 Dall. 111, 116, 1 L. Ed. 59. See, generally, the title ARREST.

21. Privileges of members of minister's household.—Respublica *v.* DeLongchamps, 1 Dall. 111, 116, 1 L. Ed. 59.

1. Privileges of secretary of embassy.—Respublica *v.* DeLongchamps, 1 Dall. 111, 116, 1 L. Ed. 59.

The secretary to the embassy has his commission from the sovereign himself; he is the most distinguished character in the suit of a public minister and is, in some instances, considered as a kind of public minister himself, and is therefore entitled to the same privileges and immunities as the minister. Respublica *v.* DeLongchamps, 1 Dall. 111, 116, 1 L. Ed. 59.

22. Minister not amenable to local jurisdiction.—The Exchange *v.* McFaddon, 7 Cranch 116, 136, 3 L. Ed. 287.

by the appointment of a minister, the charge d'affaires is privileged from arrest until his return home, where he is detained in winding up his official business.[23]

b. *Reasons for Privilege.*—The assent of the sovereign to the very important and extensive exemptions from territorial juridiction which are admitted to attach to foreign ministers, is implied from the considerations, that, without such exemption, every sovereign would hazard his own dignity, by employing a public minister abroad. His minister would owe temporary and local allegiance to a foreign prince, and would be less competent to the objects of his mission.[24]

B. Consuls—1. In General.—Consuls are subject to the local law in the same manner with other foreign residents owing a temporary allegiance to the state.[25] A consul is subject to prosecution for violations of the criminal law of the country in which he resides.[26] And the fact that a member of a firm is a United States consul to a foreign country does not exempt the firm from process of foreign attachment, the other members of the firm not being entitled to an exemption.[27]

2. Consul Performing Diplomatic Duties.—When a consul is appointed charge d'affaires or is invested with authority to communicate matters of state, which are usually entrusted to a diplomatic representative, he has a double political capacity and though invested with full diplomatic powers, he does not thereby obtain the diplomatic privileges of a minister.[28]

VI. Powers, Duties and Liabilities.

A. Ambassadors and Ministers.—A minister cannot bind his government by acts beyond the scope of his employment, done without authority or in-

23. Continuance of privilege after termination of office.—Dupont *v.* Pichon, 4 Dall. 321, 1 L. Ed. 851.

24. Reasons for privilege.—A sovereign committing the interests of his nation with a foreign power, to the care of a person whom he has selected for that purpose, cannot intend to subject his minister in any degree to that power; and therefore, a consent to receive him implies a consent that he shall possess those privileges which his principal intended he should retain—privileges which are essential to the dignity of his sovereign, and to the duties he is bound to perform. The Exchange *v.* McFaddon, 7 Cranch 116, 139, 3 L. Ed. 287.

"Whatever may be the principle on which this immunity is established, whether we consider him as in the place of the sovereign he represents, or by a political fiction, suppose him to be extraterritorial, and therefore, in point of law, not within the jurisdiction of the sovereign at whose court he resides; still, the immunity itself is granted by the governing power of the nation to which the minister is deputed. This fiction of exterritoriality could not be erected and supported against the will of the sovereign of the territory; he is supposed to assent to it. This consent is not expressed. It is true, that in some countries, and in this, among others, a special law is enacted for the case. But the law obviously proceeds on the idea of prescribing the punishment of an act previously unlawful, not of granting to a foreign minister a privilege which he would not otherwise possess." The Exchange *v.* McFaddon, 7 Cranch 116, 138, 3 L. Ed. 287.

25. Consuls subject to local laws.—Coppell *v.* Hall, 7 Wall. 542, 553, 19 L. Ed. 244; Davis *v.* Packard, 7 Pet. 276, 8 L. Ed. 684; The Anne, 3 Wheat. 435, 4 L. Ed. 428; United States *v.* Ravara, 2 Dall. 297, 1 L. Ed. 388; United States *v.* Wong Kin Ark, 169 U. S. 649, 42 L. Ed. 890.

26. Prosecution of consul for violation of criminal law.—United States *v.* Ravara, 2 Dall. 297, 1 L. Ed. 388 (sending threatening letters); United States *v.* Wong Kin Ark, 169 U. S. 649, 42 L. Ed. 890.

27. Foreign attachment against firm one member of which is consul to foreign country.—Caldwell *v.* Barclay, 1 Dall. 306, 1 L. Ed. 149. See, generally, the title ATTACHMENT AND GARNISHMENT.

28. Consul performing diplomatic duties.—Ex parte Baiz, 135 U. S. 403, 424, 34 L. Ed. 222.

The consul general of Guatemala and Honduras resident in New York was appointed as a diplomatic representative of Honduras in the United States. The secretary of state informed him that he could not be accepted as the accredited diplomatic representative of a foreign power because a citizen of this country could not enjoy so anomalous a position, and informed him that he was not recognized in a diplomatic character, and later the secretary of state refused to recognize him as charge d'affaires ad hoc. Subsequently, the minister of Guate-

structions from his government.[29] A minister, or, in his absence, a charge d'affaires, may assert a claim for violation of the territorial jurisdiction of his country.[30]

B. Consuls or Vice Consuls—1. POWERS—a. *In General.*—A consul, though a public agent, is supposed to be clothed with authority only for commercial purposes.[31] It is the duty of a consul to take care of American property, either wrecked or belonged to deceased persons,[32] to aid his countrymen in scientific researches,[33] to transmit periodical advice on every thing beneficial to trade or the arts,[34] and in all emergencies among strangers, to act as the friend and agent of commercial visitors from his own country.[35] The departmental instructions publicly issued for the instruction and guidance of consuls are entitled to the highest respect in construing the statutes and treaties upon which their powers depend.[36]

b. *Diplomatic Powers.*—In general a consul is not considered as a minister, or diplomatic agent of his sovereign, intrusted, by virtue of his office, with authority to represent him in his negotiations with foreign states, or to vindicate his prerogatives.[37] There is no doubt that his sovereign may specially entrust him with such authority, but only in virtue of the right of a government to designate those who shall represent it in the conduct of international affairs;[38] and by statute, a consular officer of the United States may exercise diplomatic

mala. Salvador and Honduras addressed a note to the secretary of state advising him of his expected absence from the country and requested that the consul general of Guatemala in New York might communicate to the secretary of state "any matter whatever to the peace of Central America that should without delay be presented to the knowledge of your excellency." The secretary of state accordingly informed the consul general of Guatemala that he would have pleasure "in receiving any communications in relation to Central America of which you may be made the channel." It was held, that the consul general of Guatemala and Honduras was not a diplomatic representative during the minister's absence and therefore was not exempt from suit except in the supreme court as is the case with diplomatic agents. Ex parte Baiz, 135 U. S. 403, 34 L. Ed. 222.

29. Government not bound by ministers unauthorized acts.—Where the minister of the United States at the court of Madrid, to the government of Spain, assured that government that a debt due by it to a certain person in the United States would be paid by the United States if a treaty, the ratification of which had been suspended, was ratified, and which treaty was afterwards ratified, the assurance not having been given in pursuance of any instructions from the president or by virtue of any authority from the United States, was held to have been given without authority, and was therefore void. Meade *v.* United States, 9 Wall. 691, 692, 19 L. Ed. 687.

30. Claim by minister for violation of territorial jurisdiction of his country.—The Anne, 3 Wheat. 435, 4 L. Ed. 428.

It is admitted, that a claim by a public minister, or, in his absence, by a charge d'affaires, in behalf of his sovereign, would be good. But in making this admission, it is not to be understood, that it can be made in a court of justice, without the assent or sanction of the government in whose courts the cause is depending. That is a question of great importance, upon which the supreme court expressly reserve their opinion, until the point shall come directly in judgment. The Anne, 3 Wheat. 435, 446, 4 L. Ed. 428.

31. Consuls' authority generally confined to commercial purposes.—The Anne, 3 Wheat. 435, 4 L. Ed. 428. Ex parte Baiz, 135 U. S. 403, 424, 34 L. Ed. 222.

32. Duty to care for American property.—Harrison *v.* Vose, 9 How. 372, 382, 13 L. Ed. 179.

33. Duty to aid countrymen in scientific researches.—Harrison *v.* Vose, 9 How. 372, 382, 13 L. Ed. 179.

34. Transmission of advice as to trade or arts.—Harrison *v.* Vose, 9 How. 372, 382, 13 L. Ed. 179.

35. Duty to act as friend and agent of visiting countrymen.—Harrison *v.* Vose, 9 How. 372, 382, 13 L. Ed. 179.

36. Effect of instructions as aiding in determining nature and extent of powers.—Dainese *v.* Hale, 91 U. S. 13, 20, 23 L. Ed. 190.

37. Diplomatic powers of consul.—The Anne, 3 Wheat. 435, 445, 4 L. Ed. 428; Ex parte Baiz, 135 U. S. 403, 424, 34 L. Ed. 222; United States *v.* Wong Kin Ark, 169 U. S. 649, 678, 42 L. Ed. 890.

38. May be entrusted with diplomatic powers.—Ex parte Baiz, 135 U. S. 403, 423, 34 L. Ed. 222; Oscanyan *v.* Arms Co., 103 U. S. 261, 26 L. Ed. 539; The Anne, 3 Wheat. 435, 445, 4 L. Ed. 428; Harrison *v.* Vose, 9 How. 372, 382, 13 L. Ed. 179.

functions in a country where there is no diplomatic representative, when "expressly authorized by the president to do so."[39]

c. *Protection of Property of Citizens of Home Government.*—A consul has an undoubted right to interpose claims for the restitution of property belonging to the subjects of his own country,[40] and a special procuration from those for whose benefit he acts is not necessary for such purpose.[41] Restitution, however, cannot be decreed without proof of special authority,[42] and of the individual proprietary interest.[43] And it has been held, that a neutral consul cannot, without the special authority of his government, interpose a claim, on account of the violation of the territorial jurisdiction of his country.[44]

d. *Exemption of Enemy Property from Capture.*—A consul has no authority by virtue of his official station to grant any license or permit the exemption of a vessel of an enemy from capture and confiscation.[45] And a contract made by a consul of a neutral power, with the citizen of a belligerent state, that he will protect, with his neutral name, from capture by the belligerent, merchandise which such citizen has in the enemy's lines, is against public policy and void.[46]

e. *Trade or Business.*—A trading consul, in all that concerns his trade, is liable in the same way as a native merchant; the character of consul does not give any protection to that of merchant when they are united in the same person.[47]

f. *Contracts in Conflict with Interest of Government Represented.*—While a consul is sometimes allowed, in Christian countries, to engage in commercial pursuits, he is so far its public agent and commercial representative that he is precluded from undertaking any affairs or assuming any position in conflict with its interests or its policy.[48]

39. Authority from president to exercise diplomatic functions.—Rev. Stat., § 1738; United States *v.* Eaton, 169 U. S. 331, 345, 42 L. Ed. 767.

40. Right to interpose claim.—The Anne, 3 Wheat. 435, 445, 4 L. Ed. 428; Ex parte Baiz, 135 U. S. 403, 424, 34 L. Ed. 222; The Bello Corrunes, 6 Wheat. 152, 5 L. Ed. 229; Cohens *v.* Virginia, 6 Wheat. 264, 396, 5 L. Ed. 257.

"Foreign consuls frequently assert, in our prize courts, the claims of their fellow subjects. These suits are maintained by them, as consuls. The appellate power of this court has been frequently exercised in such cases, and has never been questioned." Cohens *v.* Virginia, 6 Wheat. 264, 397, 5 L. Ed. 257.

A vice consul, duly recognized by our government, is a competent party to assert or defend the rights of property of the individuals of his nation, in any court having jurisdiction of causes affected by the application of international law. To watch over the rights and interests of their subjects, wherever the pursuits of commerce may draw them, or the vicissitudes of human affairs may force them, is the great object for which consuls are deputed by their sovereigns; and in a country where laws govern, and justice is sought for in courts only, it would be a mockery, to preclude them from the only avenue through which their course lies to the end of their mission. The long and universal usage of the courts of the United States, has sanctioned the exercise of this right, and it is impossible, that any evil or inconvenience can flow from it. Whether the powers of the vice consul shall, in any instance, extend to the right to receive, in his national character, the proceeds of property libelled and transferred into the registry of a court, is a question resting on other principles. In the absence of specific powers given him by competent authority, such a right would certainly not be recognized. Much, in this respect, must ever depend upon the laws of the country from which, and to which, he is deputed. The Bello Corrunes, 6 Wheat. 152, 168, 5 L. Ed. 229.

41. Special appointment unnecessary.—The Bello Corrunes, 6 Wheat. 152, 5 L. Ed. 229.

42. Special appointment necessary before restitution can be decreed.—The Bello Corrunes, 6 Wheat. 152, 5 L. Ed. 229.

43. Proof of interest.—The Antelope, 10 Wheat. 66, 6 L. Ed. 268.

44. Claim for violation of territorial jurisdiction.—The Anne, 3 Wheat. 435, 4 L. Ed. 428.

45. Exemption of enemy property from capture.—The Benito Estenger, 176 U. S. 568, 575, 44 L. Ed. 592.

46. Contract to protect property from capture void.—Coppell *v.* Hall, 7 Wall. 542, 19 L. Ed. 244. See, generally, the title ILLEGAL CONTRACTS.

47. Rights of trading consul.—Coppell *v.* Hall, 7 Wall. 542, 553, 19 L. Ed. 244.

48. Contracts in conflict with interests of government.—Oscanyan *v.* Arms Co., 103 U. S. 261, 26 L. Ed. 539.

Where the consul general of the Turk-

g. *Authentication of Foreign Laws or Judgments.*—The power of ambassadors and consuls with respect to the certification of foreign laws and judgments are treated elsewhere in this work.[49]

h. *Judicial Powers.*—See post, "Consular Courts," VII.

i. *Arrest and Imprisonment of Seamen.*—(1) *Right to Arrest Seaman.*—By virtue of treaties, consuls, in some cases, have authority to cause the arrest of seamen of the country which they represent for the purpose of securing them during the time and under the circumstances provided for in the treaty, as concerning the internal order and discipline of the vessel.[51] The enforcement of such treaties has been held not in conflict with state constitutions, the detention being temporary and not pursuant to a conviction for a crime.[52]

(2) *Mode of Making Arrest.*—The proper mode of proceeding by a consul general to arrest seaman under a treaty giving him such right, is by requisition presented to the district court or judge, the arrest to be made by the marshal, but if the arrest is made by an unauthorized person, such as a city chief of police, the seaman may nevertheless be held by the district court, where, upon habeas corpus brought in that court, it appears that he is within the terms of the treaty, and the fact that the arrest was irregular does not entitle the seaman to be discharged.[53]

(3) *For What Length of Time Seaman May Be Held.*—Where a seaman has been arrested at the request of a consul under the treaty with France of 1853 he may be held for sixty days under Revised Statutes, § 4081, and is not entitled to his discharge against the protest of the consul merely because the ship upon which he was serving has left the port.[54]

j. *Special Rules Applicable to Consuls to Mohammedan Countries.*—Consuls to Mohammedan countries are usually clothed with greater powers and charged with greater duties than those to Christian states. Consuls to Mohammedan countries are sometimes clothed with diplomatic and even with judicial powers; they are restricted to the duties of their offices, are paid a stated salary, and prohibited from entering into commercial transactions.[55]

ish government contracted with the manufacturers of firearms to use his influence in procuring his government to purchase arms from the latter, the consul to receive 10 per cent. of the amount of the sales as commission, it was held that the contract was void and that there could be no recovery upon the contract. Oscanyan *v.* Arms Co., 103 U. S. 261, 26 L. Ed. 539. See the title ILLEGAL CONTRACTS.

49. Authentication of foreign laws and judgments.—As to authentication of foreign laws, see the title FOREIGN LAWS. As to authentication of foreign judgments, see the title FOREIGN JUDGMENTS, RECORDS AND JUDICIAL PROCEEDINGS.

51. Right to arrest of seaman.—Dallemangne *v.* Moisan, 197 U. S. 169, 174, 49 L. Ed. 709. See post, "Jurisdiction over Seamen," VIII, A, 3. And see the titles SEAMEN; TREATIES.

52. Enforcement not contrary to state constitution.—The execution of the treaty of 1853 between the United States and France providing for the arrest of seamen on requisition of the French consul, does not violate any provision of the California constitution; the imprisonment is not pursuant to a conviction of crime but is simply a temporary detention of a sailor, whose contract of service is an exceptional one (Robertson *v.* Baldwin, 165 U. S. 275, 41 L. Ed. 715), for the purpose of securing his person during the time and under the circumstances provided for in the treaty, as concerning the internal order and discipline of the vessel, and where a chief of police voluntarily performs the request of the consul as contained in a written requisition, the arrest is not illegal so far as this ground is concerned. Dallemangne *v.* Moisan, 197 U. S. 169, 174, 49 L. Ed. 709. See, generally, the title CONSTITUTIONAL LAW.

53. Mode of making arrest.—Dallemangne *v.* Moisan, 197 U. S. 169, 49 L. Ed. 709, construing the treaty with France of 1853, and holding that the act of congress of June 11, 1864, 13 Stat. 121, furnishes the only means for the execution of treaties entered into with foreign governments.

54. For what length of time seaman may be held.—Dallemangne *v.* Moisan, 197 U. S. 169, 174, 49 L. Ed. 709.

55. Consuls to Mohammedan countries.—Mahoney *v.* United States, 10 Wall. 62, 66, 19 L. Ed. 864; Dainese *v.* Hale, 91 U. S. 13, 15, 23 L. Ed. 190; Ross

2. LIABILITIES—a. *Liability on Bill of Exchange Drawn on Treasury of Home Government.*—When credit is given on the strength of a bill of exchange drawn by a foreign consul, as upon an official engagement, the consul is not liable thereon personally.[56]

b. *Accounting for Fees Derived from Office.*—See post, "Fees," VII, B.

c. *Liability for Interest on Funds on Deposit.*—Where the consul deposits the money of the United States, the government is entitled to the interest which he receives on his deposit. He is not required to put the money out at interest, but if he does, the money goes to the government.[58]

VII. Salary and Fees.

A. Salary—1. CONSTRUCTION AND OPERATION OF STATUTES IN REGARD TO SALARY.—Where a statute provides that the salary of ministers shall be a certain sum, unless otherwise prescribed by law, and a new office of minister is created by an act making no reference to salary, but the appropriation act provides for a less sum than that provided by the general statute, the amount fixed by the appropriation act will control.[59] A statute fixing the annual salary of a consul at a named sum, without limitation as to time, should not be deemed abrogated or suspended by subsequent enactments which merely appropriated a less amount for the services of that officer for particular fiscal years, and which contained no words that expressly, or by clear implication, modified or repealed the previous law.[60] But an appropriation act transferring a consulate from one class to another, the class to which it is transferred being a lower one with respect to the salary to which the consul receives, repeals the act which originally placed the consulate in the higher class.[61] And a statute fixing the salary of a consul and treating him as a consul to a Mohammedan country, becomes inoperative upon the acquisition of such country by a Christian state.[62]

v. McIntyre, 140 U. S. 453, 35 L. Ed. 581. See post, "Consular Courts," VIII.

"A great distinction has always been made between consuls to Mohammedan and consuls to Christian countries, both in the powers intrusted to them and in the duties with which they are charged. The full reciprocity which, by the general rule of international law, prevails between Christian states in the exercise of jurisdiction over the subjects or citizens of each other in their respective territories, is not admitted between a Christian state and a Mohammedan state in the same circumstances; and in our treaties with Mohammedan powers, express stipulations are made for the enjoyment by our citizens of certain exterritorial rights with respect to their persons and property." Mahoney *v.* United States, 10 Wall. 62, 66, 19 L. Ed. 864.

56. Liability on bill drawn on home government.—Jones *v.* LeTombe, 3 Dall. 384, 1 L. Ed. 647.

58. Liability for interest on fund on deposit.—United States *v.* Mosby, 133 U. S. 273, 33 L. Ed. 625. See, generally, the title INTEREST.

59. Amount of salary governed by appropriation act.—The act of March 3, 1875, ch. 153 (18 Stat. 483), amending § 1675 of the Revised Statutes, provided that the salary of an envoy extraordinary and minister plenipotentiary was to be $10,000 "unless where a different compensation is prescribed by law." On July 13, 1882, the minister and resident consul general of the United States to Turkey at a salary of $7,500 a year was appointed envoy extraordinary and minister plenipotentiary, and by the diplomatic appropriation bills of 1882, 1883, 1884, $7,500 was appropriated as salary for envoy extraordinary and minister plenipotentiary to Turkey. It was held, that as the office of envoy extraordinary and minister plenipotentiary to Turkey had not existed before the appointment of the minister and resident consul general to that position on July 13, 1882, and as the appropriation acts in regard to that office provided for a salary of $7,500, the envoy extraordinary and minister plenipotentiary was not entitled to receive more than $7,500. Wallace *v.* United States, 133 U. S. 180, 33 L. Ed. 571, distinguishing United States *v.* Langston, 118 U. S. 389, 30 L. Ed. 164.

60. Appropriation acts as repealing general statutes governing salary.—Mathews *v.* United States, 123 U. S. 182, 185, 31 L. Ed. 127; United States *v.* Langston, 118 U. S. 389, 30 L. Ed. 164.

61. Appropriation acts changing grade of consulate as repealing general law.—Mathews *v.* United States, 123 U. S. 182, 31 L. Ed. 127, distinguishing United States *v.* Langston, 118 U. S. 389, 30 L. Ed. 164.

62. Abrogation of statute by acquisition of Mohammedan country by Christian state.—The provision of the act of

2. Salary of Vice Consuls.—The president may fix the compensation of vice consuls, to be paid out of the allowance made by law for the regular consul.[63] In computing the amount of salary to which a temporary vice consul appointed by the minister resident and consul general to Siam, is entitled out of the salary of the minister resident and consul general, the salary of the minister resident and consul general should be treated as indivisible.[64] And a vice consul is entitled to compensation for a period which he served before his bond was received and approved.[65]

B. Fees—1. Right to Fees Derived from Office—a. *What Fees Belong to Consul.*—Fees for notarial and clerical work, such as recording instruments, but relating to private transactions for individuals, not requiring the use of the seal and title or seal of office;[66] fees for acknowledgments and authentications of instruments rendered to persons who requested their performance;[67] fees collected for shipping and discharging seamen on foreign built vessels sailing on the China coast under the United States flag, the seamen not being American citizens and the vessel not having cleared from a port of the United States;[68] fees received for certificates of shipment of merchandise in transit through the United States to other countries;[69] fees for examining Chinese emigrants going to the United States on foreign vessels, voluntarily paid to the consul;[70] and fees for cattle disease certificates,[71] belong to the consul in his own private right and are not the property of the United States.

b. *What Fees Belong to Government.*—On the other hand, fees for certifying invoices for free goods imported into the United States,[72] for certification of shipment or extra invoices,[73] for certificates of extra copies of quadruplicate invoices of goods shipped to the United States,[74] and fees for administering upon the estate of citizens of the United States,[76] belong to the United States and must be accounted for by the consul.

congress of May 1st, 1810, fixing a salary to the consul at Algiers and assigning to him certain duties, treating that place as belonging to a Mohammedan power, ceased to be operative when the country, of which it was the principal city, became a province of France. The construction of the secretary of state to this effect, impliedly sanctioned by the act of congress of March 1st, 1855, "to remodel the diplomatic and consular systems of the United States" (10 Stat. at Large, 621), and expressly sanctioned by the act of August 18th, 1866, to regulate those systems. Mahoney *v.* United States, 10 Wall. 62, 19 L. Ed. 864. See, generally, the title STATUTES.

63. Power of president to fix salary of vice consul.—United States *v.* Eaton, 169 U. S. 331, 42 L. Ed. 767.

64. Computation of amount of salary of vice consul.—United States *v.* Eaton, 169 U. S. 331, 42 L. Ed. 767.

65. Compensation for service before giving bond.—United States *v.* Eaton, 169 U. S. 331, 42 L. Ed. 767.

66. Notarial and clerical work.—United States *v.* Mosby, 133 U. S. 273, 33 L. Ed. 625.

67. Acknowledgment or authentication of instruments.—United States *v.* Mosby, 133 U. S. 273, 33 L. Ed. 625.

68. Shipping and discharging seamen.—United States *v.* Mosby, 133 U. S. 273, 33 L. Ed. 625.

69. Certificate of shipment of merchandise through United States to foreign countries.—United States *v.* Mosby, 133 U. S. 273, 33 L. Ed. 625.

70. Examination of emigrants.—United States *v.* Mosby, 133 U. S. 273, 33 L. Ed. 625.

71. Fees for cattle disease certificates.—United States *v.* Mosby, 133 U. S. 273, 33 L. Ed. 625.

72. Certifying invoices for free goods imported into United States.—United States *v.* Mosby, 133 U. S. 273, 33 L. Ed. 625.

The question of determining whether goods to be shipped will, when imported into the United States, be free from duty is one which is not left to the determination of the consul, often involving intricate points of fact and of law, and wholly cognizable by the proper officers and tribunals of the United States appointed for that purpose. United States *v.* Mosby, 133 U. S. 273, 33 L. Ed. 625.

73. Certificates of shipment or extra invoices.—United States *v.* Mosby, 133 U. S. 273, 33 L. Ed. 625.

74. Certificates of extra copies of quadruplicate invoices of goods shipped to United States.—United States *v.* Mosby, 133 U. S. 273, 33 L. Ed. 625.

76. Administering on estates.—United States *v.* Eaton, 169 U. S. 331, 42 L. Ed. 767. But see United States *v.* Mosby, 133 U. S. 273, 33 L. Ed. 625, where it was

2. Recovery Back of Fees Paid to Government.—Where a consul asserts his right to fees in his correspondence with the officers of the department in relation thereto, and only pays the money to avoid contest with his superior officers, he is not estopped to recover it back.[77] But in case of a voluntary payment of fees by the consul to the government as belonging to it, he is estopped to subsequently claim them in his own right.[78]

VIII. Consular Courts.

A. Jurisdiction—1. Jurisdiction as Dependent on Treaties—a. *In General.*—Originally the consul was an officer of large judicial as well as commercial power, exercising entire municipal authority over his countrymen in the country to which he was accredited. But the changed circumstances of Europe, and the prevalence of civil order in the several Christian states, have had the effect of greatly modifying the powers of the consular office; and it may now be considered as generally true, that, for any judicial powers which may be vested in the consuls accredited to any nation, we must look to the express provisions of the treaties entered into with that nation, and to the laws of the states which the consuls represent.[79] Judicial powers are usually conferred upon consuls of Christian nations in Pagan and Mahometan countries, for the decision of controversies between their fellow citizens or subjects residing there, and for the punishment of crimes committed by them.[80]

b. *Construction and Operation of Particular Treaties.*—The treaty between the United States and the Ottoman Empire, concluded June 5, 1862 (if not that made in 1830), has the effect of conceding to the United States the same privilege, in respect to consular courts and the civil and criminal jurisdiction thereof, which are enjoyed by other Christian nations; and the act of congress of June 22, 1860, established the necessary regulations for the exercise of such jurisdiction.[81] But as this jurisdiction is, in terms, only such as is allowed by the laws of Turkey, or its usages in its intercourse with other Christian nations, those laws or usages must be shown in order to know the precise extent of such jurisdiction.[82]

held, that fees for settling private estates belonged to the consul.

77. Right to retain fees asserted at time of payment.—United States *v.* Mosby, 133 U. S. 273, 33 L. Ed. 625. See, generally, the title PAYMENT.

78. Voluntary payment as estopping consul to recover back fees.—Where from the commencement of his service up to the termination of the office and the final settlement of his accounts, a consul makes no claim for a part of the fees and there is no pretense that he paid the fees to avoid controversy or that he ever made any objection or protest against them being charged to him as official fees, it is a case of voluntary payment and he cannot recover them back, in a suit instituted three years after his retirement. United States *v.* Wilson, 168 U. S. 273, 42 L. Ed. 464. See, generally, the title PAYMENT.

79. Jurisdiction as dependent on treaties.—Dainese *v.* Hale, 91 U. S. 13, 15, 23 L. Ed. 190.

The admiralty jurisdiction of a French consul was held to be dependent entirely on stipulations. Glass *v.* The Betsey, 3 Dall. 6, 1 L. Ed. 485.

Under an old treaty with France, controversies arising in the United States between citizens of France, and controversies arising in France between citizens of the United States, were to be tried by the respective consuls and vice consuls. Caignet *v.* Pettit, 2 Dall. 234, 1 L. Ed. 362; Villeneuve *v.* Barrion, 2 Dall. 235, 1 L. Ed. 362. See, generally, the title TREATIES.

80. Judicial powers usually conferred on consuls to Mahometan countries.—Dainese *v.* Hale, 91 U. S. 13, 15, 23 L. Ed. 190.

81. Treaty between United States and Turkey.—Dainese *v.* Hale, 91 U. S. 13, 23 L. Ed. 190.

82. Same—Necessity of proof of usage of Turkey with other Christian nations.—Dainese *v.* Hale, 91 U. S. 13, 14, 23 L. Ed. 190.

The defendant, as consul general of Egypt, in 1864 issued an attachment against the goods of the plaintiff, there situate. The plaintiff, and the persons at whose suit the attachment was issued, were citizens of the United States, and not residents or sojourners in the Turkish dominions. For this act the plaintiff brought suit to recover the value of the goods attached. The defendant pleaded his official character, and, as incident thereto, claimed jurisdiction to entertain the suit in which the attachment was issued. Held, that the plea was defective

2. JURISDICTION OVER OFFENSES COMMITTED IN FOREIGN PORTS.—The jurisdiction to try offenses committed on the high seas in the district where the offender may be found, or into which he may be first brought, is not exclusive of the jurisdiction of the consular tribunal to try a similar offense when committed in a port of a foreign country in which that tribunal is established, and the offender is not taken to the United States.[83]

3. JURISDICTION OVER SEAMEN.—**American Consuls in China and Japan.**—In China and Japan the judicial authority of the consuls of the United States will be considered as extending over all persons duly shipped and enrolled upon the articles of any merchant vessel of the United States, whatever be the nationality of such person. And all offenses which would be justiciable by the consular courts of the United States, where the persons so offending are native born or naturalized citizens of the United States, employed in the merchant service thereof, are equally justiciable by the same consular courts in the case of seamen of foreign nationality.[84]

Jurisdiction of Belgian Consul over Offenses by Seamen.—The Belgian consul has no jurisdiction of a homicide committed upon a Belgian ship, by one seaman thereof upon another, under art. XI of the treaty of March 9, 1880, with Belgium, giving consuls, etc., cognizance of differences between captains, officers and crews on Belgian ships, but reserving to the local authorities jurisditcion where the disorder that has arisen is of such a nature as to disturb tranquility and public order on shore or in port.[85]

B. Trial—1. IN GENERAL.—The jurisdiction of the consular tribunal is to be exercised and enforced according to the laws of the United States.[86]

2. RIGHTS OF ACCUSED—a. *In General.*—In pursuance of the laws of the United States, the accused in a prosecution before a consular tribunal, must have an opportunity of examining the complaint against him, must be presented with a copy stating the offense he has committed, is entitled to be confronted with the witnesses against him and to cross-examine them, and to have the benefit of counsel.[87]

b. *Indictment and Presentment.*—In proceedings before consular tribunals, a presentment or indictment by a grand jury is not required under the laws of the United States, and such laws are not invalid for this reason.[88]

c. *Jury Trial.*—The laws of the United States do not give the accused in a

for not setting forth the laws or usages of Turkey upon which, by the treaty and act of congress conferring the jurisdiction, the latter was made to depend, and which alone would show its precise extent, and that it embraced the case in question. Dainese *v.* Hale, 91 U. S. 13, 14, 23 L. Ed. 190.

83. Offenses in foreign ports.—Ross *v.* McIntyre, 140 U. S. 453, 471, 35 L. Ed. 581.

84. American consuls in China and Japan.—Ross *v.* McIntyre, 140 U. S. 453, 474, 35 L. Ed. 581.

85. Jurisdiction of Belgian consul.—Wildenhus' Case, 120 U. S. 1, 30 L. Ed. 565.

"The principle which governs the whole matter is this: Disorders which disturb only the peace of the ship or those on board are to be dealt with exclusively by the sovereignty of the home of the ship, but those which disturb the public peace may be suppressed, and, if need be, the offenders punished by the proper authorities of the local jurisdiction. It may not be easy at all times to determine to which of the two jurisdictions a particular act of disorder belongs. Much will undoubtedly depend on the attending circumstances of the particular case, but all must concede that felonious homicide is a subject for the local jurisdiction, and that if the proper authorities are proceeding with the case in a regular way, the consul has no right to interfere to prevent it." Wildenhus' Case, 120 U. S. 1, 18, 30 L. Ed. 565.

Arrest of seaman.—See ante, "Arrest and Imprisonment of Seamen," VI, B. 1, i.

86. Trial governed by laws of United States.—Ross *v.* McIntyre, 140 U. S. 453, 35 L. Ed. 581.

87. Rights of accused in general.—Ross *v.* McIntyre, 140 U. S. 453, 35 L. Ed. 581.

88. Right to indictment or presentment.— Ross *v.* McIntyre, 140 U. S. 453, 35 L. Ed. 581. See, generally, the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

prosecution before a consular tribunal benefit of a petit jury, and the validity of laws conferring jurisdiction on consuls is not affected by failure to provide for a jury.[89]

IX. Punishment of Crimes against Foreign Ministers.

Since punishments must be certain and definite, a person who has assaulted a foreign minister must be sentenced to a punishment prescribed by the court at the time, and cannot be sentenced to be imprisoned until the sovereign of the foreign country declares the reparation satisfactory.[90]

X. Termination of Office.

Consuls are approved and admitted by the local sovereign, and if guilty of illegal or improper conduct, the exequatur which has been given may be revoked, and they may be punished, or sent out of the country, at the option of the offended government.[91]

XI. Jurisdiction of Cases Affecting Ambassadors and Consuls.

A. In General.—It is provided by the constitution that the judicial power of the United States shall extend to "all cases affecting ambassadors, other public ministers, and consuls."[92] And although the constitution vests in the supreme court, an original jurisdiction, in cases affecting ambassadors, other public ministers and consuls, it does not preclude the legislature from exercising the power of vesting a concurrent jurisdiction, in such inferior courts, as might by law be established; and the legislature has expressly declared, that the circuit court shall have "exclusive cognizance of all crimes and offenses, cognizable under the authority of the United States."[93] A prosecution of a crime against a foreign minister is not a case "affecting ambassadors, other public ministers and consuls," and the circuit court has jurisdiction.[94]

B. Actions by or against Ambassadors and Ministers—1. Actions by Ambassadors or Ministers.—The supreme court has original, but not exclusive, jurisdiction of all suits brought by ambassadors, or other public ministers.[95]

2. Actions or Proceedings against Ambassadors or Mimisters.—The supreme court has exclusively all such jurisdiction of suits or proceedings against ambassadors, or other public ministers, or their domestics, or domestic servants, as a court of law can have consistently with the law of nations.[96] But certiorari will not lie in order to take up to the supreme court a criminal proceeding against a person claiming to be a diplomatic representative of a foreign govern-

89. Right to jury trial.—Ross *v.* McIntyre, 140 U. S. 453, 35 L. Ed. 581. See, generally, the title JURY.

90. Respublica *v.* De Longchamps, 1 Dall. 111, 1 L. Ed. 59.

91. Coppell *v.* Hall, 7 Wall. 542, 553, 19 L. Ed. 244.

92. Jurisdiction of cases affecting ambassadors, etc.—Ex parte Baiz, 135 U. S. 403, 417, 34 L. Ed. 222; Bors *v.* Preston, 111 U. S. 252, 28 L. Ed. 419; American Ins. Co. *v.* Canter, 1 Pet. 511, 7 L. Ed. 242. See, generally, the titles COURTS; JURISDICTION.

93. Jurisdiction of circuit court.—United States *v.* Ravara, 2 Dall. 297, 298, 1 L. Ed. 388; Bors *v.* Preston, 111 U. S. 252, 28 L. Ed. 419. See United States *v.* Ortega, 11 Wheat. 467, 6 L. Ed. 521.

94. Crime against foreign minister not a "case affecting ambassadors," etc.—An indictment under the crimes act of 1790, ch. 36, § 37, for infracting the law of nations, by offering violence to the person of a foreign minister, is not a case "affecting ambassadors, other public ministers and consuls," within the 2d section of the 3d article of the constitution of the United States. And the circuit courts have jurisdiction of such an offense, under the 11th section of the judiciary act of 1789, ch. 20. United States *v.* Ortega, 11 Wheat. 467, 6 L. Ed. 521.

95. Jurisdiction of action by ambassadors or ministers.—Rev. Stat., § 687; Ex parte Baiz, 135 U. S. 403, 417, 34 L. Ed. 222; Ex parte Hung Hang, 108 U. S. 552, 27 L. Ed. 811.

96. Jurisdiction of actions against ambassadors or ministers.—Rev. Stat., § 687; Ex parte Baiz, 135 U. S. 403, 417, 34 L. Ed. 222; Ex parte Hung Hang, 108 U. S. 552, 27 L. Ed. 811.

ment where it is doubtful whether the defendant is entitled to the rights and privileges of a diplomatic agent.[97] Where, in a proceeding by mandamus or prohibition to restrain the district court from taking jurisdiction of a proceeding, because one of the parties therein is a diplomatic representative of a foreign government, the petitioner introduces evidence as to his official character, the burden of proof is on the respondent to rebut such proof.[98]

C. Actions to Which a Consul or Vice Consul Is a Party—1. UNITED STATES COURTS.—While the supreme court of the United States has original jurisdiction of all suits in which a consul or vice consul is a party,[99] such jurisdiction is not exclusive, but is concurrent with that of the district courts,[1] and the circuit court of the United States has jurisdiction of a suit by a citizen against an alien, although the latter is the consul of a foreign government.[2]

2. STATE COURTS.—It was formerly the rule that a consul was exempt from suit in a state court,[3] and this privilege was not waived by a failure to take advantage of it in the lower court by plea, but might be assigned for error.[4] But in a later case it was said, that "by existing law, there is no statutory provision which, in terms, makes the jurisdiction of the courts of the United States, ex-

97. Certiorari where status of party as diplomatic agent is doubtful.—The defendant, president of a national bank, was indicted for a violation of § 5209 of the Revised Statutes. He applied for certiorari to bring the case to the United States supreme court, on the ground that at the time the offense was committed he was the political agent of a foreign government. It appeared that his government had requested his resignation before his indictment, and accepted it subsequently, and that the government of the United States had refused him free entry of goods imported for his use, a privilege usually accorded to diplomatic agents. It was held, that, as certiorari was a discretionary remedy, the petition would be dismissed, and the applicant left to his remedy elsewhere. Ex parte Hitz, 111 U. S. 766, 28 L. Ed. 592. See, generally, the title CERTIORARI.

98. Burden of proof as to representative character of party to suit.—Ex parte Baiz, 135 U. S. 403, 34 L. Ed. 222. See, generally, the title MANDAMUS.

99. Supreme court.—Rev. Stat., § 687; Ex parte Baiz, 135 U. S. 403, 417, 34 L. Ed. 222; Oscanyan *v.* Arms Co., 103 U. S. 261, 26 L. Ed. 539. See, generally, the titles COURTS; JURISDICTION.

1. District court.—Rev. Stat., § 563; Ex parte Baiz, 135 U. S. 403, 419, 34 L. Ed. 222; Bors *v.* Preston, 111 U. S. 252, 257, 28 L. Ed. 419.

2. Circuit court.—Bors *v.* Preston, 111 U. S. 252, 28 L. Ed. 419.

3. Consul formerly exempt from suit in state court.—Davis *v.* Packard, 7 Pet. 276, 8 L. Ed. 648; Davis *v.* Packard, 8 Pet. 312, 8 L. Ed. 957.

The record of the proceedings in a case, brought up with the writ of error to the court for the correction of errors of the state of New York, showed, that the suit was commenced in the supreme court of the state of New York, and that the plaintiff in error, who was consul general of the king of Saxony, did not plead or set up his exemption from such suit, in the supreme court; but on the cause being carried up to the court for the correction of errors, this matter was assigned for error in fact; notwithstanding which, the court of errors gave judgment against the plaintiff in error. The court of errors of New York having decided that the character of consul did not exempt the plaintiff in error from being sued in the state court, the judgment of the court of errors was reversed. Davis *v.* Packard, 7 Pet. 276, 8 L. Ed. 684.

The action in the supreme court of New York against the defendant, was on a recognizance of bail, and it was contended, that this was not an original proceeding, but the continuance of a suit rightfully brought against one who was answerable to the jurisdiction of the court in which it was instituted, and in which the plaintiff in error became special bail for the defendant; and therefore, the act of congress did not apply to the case. Held, that the act of congress being general in its terms, extending to all suits against consuls, it applied to this suit. Davis *v.* Packard, 7 Pet. 276, 8 L. Ed. 684.

4. Necessity of pleading privilege.—If a consul, being sued in a state court, omits to plead his privilege of exemption from the suit, and afterwards, on removing the judgment of the inferior court to a higher court by writ of error, claims the privilege, such an omission is not a waiver of the privilege. If this were to be viewed merely as a personal privilege, there might be grounds for such a conclusion, but it cannot be so considered; it is the privilege of the country or government which the consul represents; this is the light in which foreign ministers are considered by the law of nations; and our constitution and laws seem to put consuls on the same footing in this re-

clusive of the state courts in suits against consuls or vice consuls,"[5] and certainly state courts have jurisdiction of proceedings against a person who has been removed from the office of consul before the proceedings are instituted.[6]

AMBIGUITY.—See the titles BONDS; BOUNDARIES; CONTRACTS; DEEDS; INTERPRETATION AND CONSTRUCTION; MORTGAGES AND DEEDS OF TRUST; PAROL EVIDENCE; WILLS.

spect. Davis *v.* Packard, 7 Pet. 276, 8 L. Ed. 684.

If this privilege or exemption was merely personal, it can hardly be supposed, that it would have been thought sufficiently important to require a special provision in the constitution and laws of the United States; higher considerations of public policy, doubtless, led to the provision; it was deemed fit and proper, that the courts of the government, with which rested the regulation of foreign intercourse, should have cognizance of suits against the representatives of such foreign government. Davis *v.* Packard, 7 Pet. 276, 8 L. Ed. 684.

5. Bors *v.* Preston, 111 U. S. 252, 262, 28 L. Ed. 419.

6. **Consul removed before institution of proceedings.**—The consul general of Turkey was arrested by a city magistrate for the crime of embezzlement, February 14, 1898, and applied to the United States district court for habeas corpus on February 18th, upon the ground that the proceedings were unauthorized because of his consular office. At the hearing on March 12th, the writ was dismissed. On appeal, it appeared that on March 19, the state department was notified that the consul general had been removed on the 9th of that month. It was held, that the dismissal of the writ of habeas corpus by the district court was not erroneous. Iasigi *v.* Van de Carr, 166 U. S. 391, 41 L. Ed. 1045.

AMENDMENTS.

BY S. BLAIR FISHER.

I. Scope of Title, 289.

II. Amendment of Pleadings in Civil Cases, 290.

A. Power of Court to Allow, 290.

B. Time of Amendment, 290.

1. During Progress of Trial, 290.

a. In Equity, 290.

(1) In General, 290.

(2) Amendment of Bill, 290.

(3) Amendment of Answer, 292.

b. In Proceedings at Law, 292.

2. After Final Judgment or Decree, 293.

3. In Appellate Court, 293.

4. On Remand, 293.

C. In What Particulars Amendable, 293.

1. In Equity, 293.

a. In General, 293.

b. Bill, 293.

(1) Proper Scope of Amendments, 293.

(a) As to Parties, 293.

(b) To Remedy Mistake, Omission, or Uncertainty, 294.

(c) To Put in Issue New Matter to Meet Allegations in Answer, 295.

(d) To Conform to Case Made, 295.

(e) Defects in Prayer for Relief, 296.

(2) Amendments Changing Case Made by Original Bill, 296.

c. Cross Bill, 297.

d. Answer, 298.

2. Pleadings at Law, 298.

a. In General, 298.

b. Effect of Practice Conformity Act, 298.

c. Declaration, Petition or Complaint, 298.

(1) Proper Scope of Amendments, 298.

(a) As to Parties, 298.

(b) Correction of Mistake, 299.

(c) Insertion of Material Allegations, 299.

(d) To Conform to Facts Proved, 300.

(e) Amendment of Demise in Ejectment, 300.

(2) Amendments Changing Substance of Original Claim, 300.

d. Answer, 301.

D. Procedure to Obtain Amendment, 302.

1. Manner and Requisites of Application, 302.

a. Manner, 302.

b. Showing as to Grounds and Excusing Omission in Original Pleading, 302.

2. Notice, 302.

3. Leave of Court to Amend, 303.

a. Necessity, 303.

b. Discretion of Court as to Allowance or Refusal, 303.

c. Imposition of Terms as Condition of Allowance, 303.

E. Manner of Amendment, 304.

F. Effect of Amendment, 304.
1. Relation Back of Amendment—Effect Upon Running of Statute of Limitations, 304.
a. General Rule, 304.
b. Amendments Introducing New Cause of Action, 304.
c. Amendments Making New Parties, 305.
2. Effect upon Previous Submission of Cause, 305.
3. Effect as Authorizing Additional Pleadings, 305.
4. Effect as Waiving Objection to Ruling Sustaining Demurrer, 306.
5. Effect as Fixing Amount in Controversy, 306.
6. Effect upon Right to Remove Cause, 306.
G. Objections to Amended Pleadings, 306.

III. Amendment of Indictments, Informations and Presentments, 307.

IV. Amendment of Process and Return, 307.

V. Amendment of Verdict, 307.

VI. Amendment of Judgments, Orders and Decrees, 307.

VII. Amendment of Appellate Proceedings, 308.

VIII. Amendment of Records, 308.

IX. Statute of Jeofails, 308.
A. Origin and Purpose, 309.
B. Provisions Stated, Construed and Applied, 309.
1. Provisions Stated, 309.
2. Statute Construed and Applied, 310.
a. A Remedial Statute and to Be Liberally Construed, 310.
b. To What Defects Applicable, 310.
(1) In General, 310.
(2) As Dependent upon Whether Defect One of Form or Substance, 311.
(a) Defects of Form, 311.
(b) Defects in Substance, 312.

CROSS REFERENCES.

See the titles ABATEMENT, REVIVAL AND SURVIVAL, ante, p. 12; ADMIRALTY, ante, p. 119; AFFIDAVITS, ante, p. 200; APPEAL AND ERROR; ATTACHMENT AND GARNISHMENT; BILL OF PARTICULARS; DEMURRERS; DEPOSITIONS AND INTERROGATORIES; DISMISSAL, DISCONTINUANCE AND NONSUIT; EQUITY; EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL; INDICTMENTS, INFORMATIONS AND PRESENTMENTS; JUDGMENTS AND DECREES; JUSTICE OF THE PEACE; LIMITATION OF ACTIONS AND ADVERSE POSSESSION; MANDATE AND PROCEEDINGS THEREON; MOTIONS; NEW TRIALS; PARTIES; PENALTIES AND FORFEITURES; PLEADING; RECORDS; REMITTITUR; REMOVAL OF CAUSES; REPLEADER; SCIRE FACIAS; SUMMONS AND PROCESS; VARIANCE; VERDICT.

I. Scope of Title.

In this title it is intended to treat the general principles of amendments of pleadings and process in civil cases, with applications thereof, except where the amendment of some particular pleading or proceeding will be found treated in the specific title, as set out in the table of cross references to this title, as, for instance, amendments in attachment proceedings, which will be found treated in the title ATTACHMENT AND GARNISHMENT; etc. The question of amendments in admiralty proceedings has already been considered under the title ADMIRALTY, ante, p 119. No attempt will be made to cover the subjects of amendments of proceedings in criminal cases, of verdicts, judgments and decrees, records, or appellate proceedings. A treatment of these matters will be found under the appropriate titles as indicated in the table of cross refer-

ences at the beginning of this article. In the last section of this article, it is attempted to treat generally the effect of verdict and judgment as curing defects of form, under the statute of jeofails. In addition to the treatment of this subject here found, see, also, the titles JUDGMENTS AND DECREES; VERDICT.

II. Amendment of Pleadings in Civil Cases.

A. Power of Court to Allow.—Inherent Power.—It has been held that the allowance of amendments is incidental to the exercise of all judicial power, and is indispensable to the ends of justice.[1]

Statutory Authority.—Power to amend pleadings is expressly given to the federal courts by § 954 of the Revised Statutes.[2]

Jurisdiction.—But in order to allow an amendment, the court must have jurisdiction of the cause. An amendment presupposes jurisdiction of the case.[3]

B. Time of Amendment—1. DURING PROGRESS OF TRIAL—a. *In Equity*—(1) *In General.*—There are cases in chancery where amendments are permitted at any stage or progress of the cause,[4] as, where an essential party has been omitted;[5] but amendments which change the character of the bill or answer, so as to make, substantially, a new case, should rarely, if ever, be admitted, after the cause has been set for hearing, much less after it has been heard.[6]

(2) *Amendment of Bill.*—**After Demurrer Sustained.**—Formerly, upon the allowance of a demurrer to the whole bill, the bill was out of court, and no subsequent proceedings could be taken in the cause.[7] Under the rules of equity practice established by the supreme court, while the complainant is not entitled, as a matter of right, to amend his bill after a demurrer thereto has been sustained, yet the court may, in its discretion, grant him leave to do so upon such terms as it shall deem reasonable.[8]

Upon Coming in of Answer.—Under the rules of equity practice, upon the

1. **Inherent power.**—Tilton *v.* Cofield, 93 U. S. 163, 23 L. Ed. 858; Bank *v.* Sherman, 101 U. S. 403, 25 L. Ed. 866.

"The power of the court to amend where there is anything on the record to amend by, is undoubted." Randolph *v.* Barrett, 16 Pet. 138, 10 L. Ed. 914.

"That the court has the power and can, upon hearing the cause, if unable to do complete justice by reason of defective pleadings, permit amendments, both of bills and answers, is sustained by the authorities." Neale *v.* Neales, 9 Wall. 1, 19 L. Ed. 590.

2. **Statutory authority.**—The final clause of this section declares that "such courts may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules prescribe." Gagnon *v.* United States, 193 U. S. 451, 48 L. Ed. 745.

Judiciary act.—"The provision by congress in relation to amendments is to be found in the 32d section of the judiciary act of September 24th, 1789, and is similar to that in the 32 Henry VIII, but certainly not broader." Garland *v.* Davis, 4 How. 131, 11 L. Ed. 907.

For the full text of this section and citation of cases decided under and applying § 954, see post, "Provisions Stated," IX, B, 1.

Generally, as to discretion of court as to granting or refusing leave to amend, see post, "Discretion of Court as to Allowance or Refusal," II, D, 3, b.

3. **Jurisdiction.**—Hodge *v.* Williams, 22 How. 87, 88, 16 L. Ed. 237.

4. **At any state of cause.**—Walden *v.* Bodley, 14 Pet. 156, 10 L. Ed. 398; Snead *v.* McCoull, 12 How. 407, 13 L. Ed. 1043.

5. Walden *v.* Bodley, 14 Pet. 156, 10 L. Ed. 398. See post, "Proper Scope of Amendments," II, C, 1, b, (1).

6. **Amendments changing character of pleadings after cause set for hearing.**—See post, "Amendments Changing Case Made by Original Bill," II, C, 1, b, (2); "Answer," II, C, 1, d.

7. **After demurrer sustained.**—National Bank *v.* Carpenter, 101 U. S. 567, 25 L. Ed. 815.

8. **Under present rules of equity practice.**—National Bank *v.* Carpenter, 101 U. S. 567, 25 L. Ed. 815; United States *v.* Atherton, 102 U. S. 372, 26 L. Ed. 213.

Rule 29 of equity practice inapplicable.—In National Bank *v.* Carpenter, 101 U. S. 567, 25 L. Ed. 815, the complainant asked leave to amend after demurrer to his bill was sustained. Leave was refused and the bill was dismissed. On appeal to the supreme court it was insisted that the complainant was entitled of right to amend, under the 29th rule of equity practice established by the supreme court. It was held, however, that this rule had no application and did not affect the case, as such rule applies only,

coming in of defendant's answer, the plaintiff may, upon motion, without notice to the defendant, have leave to amend his bill, with or without payment of costs, as the court may direct.[9]

After Replication Filed.—After replication has been filed, the plaintiff will not be permitted to withdraw it and to amend his bill except upon compliance with the conditions imposed by the 29th rule of equity practice.[10]

Upon and after Hearing.—In a federal tribunal the matter of amendment of the bill upon the hearing rests in the sound discretion of the court. At an earlier stage of the cause, this discretion is controlled by the rules of equity practice adopted by the supreme court, but not so upon the hearing, for there is no rule on the subject of amendments applicable to the cause which has advanced to this point.[11] An amendment which changes the character of the bill ought not generally to be allowed after the case has been set for a hearing, and still less after it has been heard.[12] The reason is that the answer may become inapplicable if such an amendment be permitted.[13] Such amendments may, how-

where leave is asked before a demurrer is allowed.

Order not reviewable in absence of showing as to proposed amendment.—The order refusing such leave cannot be reviewed in the supreme court, if the record does not show what amendment the complainant desired to make. National Bank *v.* Carpenter, 101 U. S. 567, 25 L. Ed. 815.

In United States *v.* Atherton, 102 U. S. 372, 26 L. Ed. 213, after the court had sustained a demurrer to the bill, the complainant asked leave to amend; which was refused on the grounds that no amendment could be made which would justify the relief prayed. On appeal, the court said: "The right to amend after a demurrer has been sustained must rest largely, if not wholly, in the discretion of the court; and while we are not prepared to hold that in no case will its action in the matter be reviewed here, we have no hesitation in saying that the abuse of this discretion must be made plain to authorize us to do so. In the case before us, there is no suggestion of the nature of the amendment proposed to be made. No amendment was offered for the consideration of the court, nor do we know in what particulars the parties desired to amend. We have no foundation, therefore, on which to affirm that the court erred in refusing the request."

9. Upon coming in of answer.—Re Sanford, etc., Co., 160 U. S. 247, 40 L. Ed. 414, citing Equity Rules 29, 45.

10. After replication filed.—By the 29th rule of equity practice it is provided that "after replication filed, the plaintiff shall not be permitted to withdraw it, and to amend his bill except upon a special order of a judge of the court, upon motion or petition, after due notice to the other party, and upon proof by affidavit that the same is not made for the purpose of vexation or delay, or that the matter of the proposed amendment is material, and could not with reasonable diligence have been sooner introduced into the bill, and upon the plaintiff submitting to such other terms as may be imposed by the judge for speeding the cause." Washington Railroad *v.* Bradleys, 10 Wall. 299, 19 L. Ed. 894.

11. Amendment on hearing purely discretionary.—Neale *v.* Neales, 9 Wall. 1, 19 L. Ed. 590.

12. Amendment changing character of bill.—The Tremolo Patent, 23 Wall. 518, 23 L. Ed. 97; Walden *v.* Bodley, 14 Pet. 156, 10 L. Ed. 398; Snead *v.* McCoull, 12 How. 407, 13 L. Ed. 1043.

In Snead *v.* McCoull, 12 How. 407, 13 L. Ed. 1043, after the cause had been heard in argument and taken under advisement by the circuit court, the plaintiff petitioned that court to permit him to file a further bill, by way of amendment and supplement to the original bill and bill of revivor previously filed in the cause. After being heard by counsel upon his petition, the court refused to grant the prayer thereof, on the grounds that the application was made at too late a period, and that the changes proposed by the plaintiff in the character of the cause would have been in reality the presenting of an entirely new case, rather than an amendment of the original bill. The supreme court, in affirming the judgment of the circuit court, said: "This refusal of the circuit court we hold to have been sound in principle; and it is sustained by the express language and authority of this court, in the case of Walden *v.* Bodley, which declares that, although 'there are cases where amendments may be permitted at any stage of the proceedings in the cause, as where an essential party has been omitted; yet amendments which change the character of the bill or answer, so as to make substantially a new case, should rarely, if ever, be admitted after the cause is set for hearing, much less after it has been heard.' Vid. 14 Pet. 156, 10 L. Ed. 398."

13. Reason for rule.—The Tremolo Patent, 23 Wall. 518, 23 L. Ed. 97.

ever, it would seem, be allowed where the peculiar circumstances of the case justify it.[14]

(3) *Amendment of Answer.*—**In General.**—Error can scarcely be imputed to a court for refusing to allow an amendment or supplement to an answer after the case has progressed to a final hearing, nor to its judgment in disregarding the allegations of such proposed amendment.[15]

Amendment Changing Character of Answer.—The rule that amendments changing the character of the pleading, so as to make a new case, should rarely if ever, be admitted, after the cause has been set for hearing, much less, after it has been heard, applies to answers as well as to bills in equity.[16]

b. *In Proceedings at Law.*—**In General.**—By § 954 of the United States Revised Statutes, the trial court may at any time permit either of the parties to amend any defect in the pleadings upon such conditions as it may prescribe.[17] This clearly authorizes the allowance of amendments during the progress of the trial in furtherance of justice.[18]

After Judgment on Demurrer.—Although in some of the early decisions it was considered doubtful whether the court ought to permit amendments after judgment on demurrer,[19] yet under the present practice leave to amend may properly be granted after an order sustaining a demurrer.[20]

After Judgment on the Pleadings.—After the opinion of the court upon the pleadings has been delivered the parties may, it would seem, agree to amend their pleadings, and the cause be continued for further consideration.[21]

After Submission of Cause.—As to the right to make amendments after submission of the cause, and the effect upon such submission, see post, "Effect upon Previous Submission of Cause," II, F, 2.

After Jury Sworn.—It is error for the court below to permit an amendment of the declaration by the writ, after the jury has been sworn, and then to have the jury resworn and receive their verdict without consent of the defendant, without

14. As to amendments after cause heard and case for relief made out, different from that disclosed by bill, see post "To Conform to Case Made," II, C, 1, b, (1), (d).

As to amendment of cross bill at hearing, though working change in ground on which relief sought, see post, "Cross Bill," II, C, 1, c.

15. In general.—Roberts *v.* Northern Pac. R. Co., 158 U. S. 1, 39 L. Ed. 873.

Amendment refused where no facts set up unknown when original answer filed.—Where it appears by the supplemental record certified to the supreme court in obedience to a writ of certiorari, that after the circuit court had delivered its opinion and filed its findings of fact and conclusions of law, and before the entry of a final decree, the appellant moved for leave to amend the answer, the motion was properly denied by the circuit court if the proposed allegations did not set up any fact unknown to the appellant at the time of filing the original answer. Liverpool, etc., Steam Co. *v.* Phœnix Ins. Co., 129 U. S. 397, 32 L. Ed. 788.

16. Amendment changing character of answer.—Walden *v.* Bodley, 14 Pet. 156, 10 L. Ed. 398.

17. In general.—Bamberger *v.* Terry, 103 U. S. 40, 26 L. Ed. 317; Mexican Central R. Co. *v.* Duthie, 189 U. S. 76, 47 L. Ed. 715; Gagnon *v.* United States, 193 U. S. 451, 48 L. Ed. 745. For further citation of cases decided under this section, see post, "Provisions Stated," IX, B, 1.

18. Allowance during progress of trial.—Bamberger *v.* Terry, 103 U. S. 40, 26 L. Ed. 317.

19. After judgment on demurrer.—In Mandeville *v.* Wilson, 5 Cranch 15, 3 L. Ed. 23, it was quæred whether the court ought to permit amendments after judgment on demurrer, Marshall, Ch. J., observing that "after the parties have gone to trial upon a set of pleadings, and the judgment has been pronounced, it may be doubted whether the court can permit the demurrer to be withdrawn. It would not be right, in all cases, after the party had taken issue upon the law, and it has been decided against him, to suffer him also to take issue upon the fact. If it be permitted, it is a matter of great indulgence."

20. In Post *v.* Pearson, 108 U. S. 418, 27 L. Ed. 774, it was held, that the order sustaining the demurrer to the original complaint and giving the plaintiff leave to amend, did not preclude the plaintiff from reviewing nor the court from entertaining, the same question of law upon a fuller development of the facts at the trial on the amended complaint.

21. After judgment on the pleadings.—See Fletcher *v.* Peck, 6 Cranch 87, 3 L. Ed. 162.

allowing him to plead anew, and without an imparlance or awarding payment of costs by the plaintiff.[22]

On New Trial.—Amendments may, in the sound discretion of the court, be permitted upon a new trial.[23]

2. After Final Judgment or Decree.—According to the decisions it would seem that an amendment may be allowed after final judgment or decree where the peculiar circumstances of the case justify it.[24] And where such amendment is applied for before the case has passed from the jurisdiction of the lower court.[25] The grant or refusal to allow amendments at this stage rests within the discretion of the court.[26]

3. In Appellate Court.—See the title Appeal and Error.

4. On Remand.—See the title Mandate and Proceedings Thereon.

C. In What Particulars Amendable—1. In Equity—a. *In General.*—In reference to amendments of equity pleadings, the courts have found it impracticable to lay down a rule that would govern all cases. Their allowance must, at every stage of the cause, rest in the discretion of the court; and that discretion must depend largely on the special circumstances of each case. It may be said, generally, that in passing upon applications to amend, the ends of justice should never be sacrificed to mere form, or by too rigid an adherence to technical rules of practice. Undoubtedly, great caution should be exercised where the application comes after the litigation has continued for some time, or when the granting of it would cause serious inconvenience or expense to the opposite side.[28]

b. *Bill*—(1) *Proper Scope of Amendments*—(a) *As to Parties.*—If the bill be found defective as to parties, such defect may be cured by amendment adding

22. After jury sworn.—Thompson *v.* Musser, 1 Dall. 458, 1 L. Ed. 222. See post, "Effect as Authorizing Additional Pleadings," II, F, 3.

23. On new trial.—United States *v.* Hawkins, 10 Pet. 125, 9 L. Ed. 369. See the title NEW TRIALS.

24. After final judgment or decree.—In The Tremolo Patent, 23 Wall. 518, 23 L. Ed. 97, an amendment which changed the character of the bill was allowed even after final decree, the circumstances being peculiar and the cause having been, in fact, tried exactly as it would have been if the bill had originally been in the amended form.

25. "Indeed, any amendments permissible under the Statutes of Jeofails may be proper at subsequent terms (2 Tidd Pr., 917; 2 Arch. Pr. 202, 243); and at times even after a writ of error is brought. 2 How. 243; 3 Johns. (N. Y.) 95; Poph., 102; Pease *v.* Morgan, 7 Johns. (N. Y.) 468; Cheetham *v.* Tilloston, 4 Id. 499; 1 Johns. (N. Y.) Cas. 29; 2 Johns. (N. Y.) 184; 1 Bing. 486; Douglass *v.* Bean's Executors, 5 Id. 60." Bank of United States *v.* Moss, 6 How. 31, 39, 12 L. Ed. 331.

In Mexican Central R. Co. *v.* Duthie, 189 U. S. 76, 47 L. Ed. 715, which was a suit for personal injuries brought in the circuit court of the United States for the western district of Texas, the plaintiff, in his original complaint averred that he "resides in El Paso, in El Paso County, State of Texas in the western district of said state;" and that defendant was a citizen of the state of Massachusetts. The cause was tried before a jury and resulted in a verdict and judgment thereon April 10, 1902. No further proceedings were had in the cause after the entry of judgment until the 17th day of April 1902, on which day the plaintiff filed his motion asking leave to amend his petition by inserting therein the following: "And is a citizen of said state and of the United States of America," after the allegation made in the original pleading "that plaintiff resides in El Paso, in El Paso County, State of Texas." The court granted leave to so amend and defendant excepted. The supreme court held the amendment having been applied for and made before the case had passed from the jurisdiction of the circuit court, was properly allowed under § 954 of the Revised Statutes.

26 In Brown *v.* Schleier, 194 U. S. 18, 48 L. Ed. 857, the court observed that "it is exceedingly disputable whether it is an abuse of discretion to deny a motion to file an amended bill after final judgment has been rendered." And see post, "Discretion of Court as to Allowance or Refusal," II, D, 3, b.

28. In general.—Per Harlan, J., in Hardin *v.* Boyd, 113 U. S. 756, 28 L. Ed. 1141, quoted in Richmond *v.* Irons, 121 U. S. 27, 30 L. Ed. 864.

"Rules of pleading are made for the attainment of substantial justice, and are to be construed so as to harmonize with it if possible. A mistaken view of one's rights or remedies should not be per-

proper parties,[29] striking out or transposing parties,[30] or changing suit by one as individual to suit by him as representative of a class.[31]

(b) *To Remedy Mistake, Omission, or Uncertainty.*—Amendments of bills in equity are properly allowed in the case of omission or mistake of some fact or circumstance connected with the substance of the case, but not forming the substance itself,[32] or for the purpose of presenting more fully the facts at issue,[33] or where a matter has not been put in issue by the bill with sufficient clearness.[34]

mitted wholly to defeat a claim founded upon principles of equity and justice, and if the pleadings can be so amended as to admit proof of such claim, and such amendment does not introduce a new cause of action, though it may set up a new measure of damages, or work a real hardship to the party defendant, it is within the discretion even of the appellate court to permit such amendment to be made." Wiggins Ferry Co. *v.* Ohio, etc., R. Co., 142 U. S. 396, 35 L. Ed. 1055.

29. Adding proper parties.—Shields *v.* Barrow, 17 How. 130, 15 L. Ed. 158; Hardin *v.* Boyd, 113 U. S. 756, 28 L. Ed. 1141; Snead *v.* McCoull, 12 How. 407, 13 L. Ed. 1043; Walden *v.* Bodley, 14 Pet. 156, 10 L. Ed. 398; Miller *v.* McIntyre, 6 Pet. 61, 8 L. Ed. 320; Graffam *v.* Burgess, 117 U. S. 180, 29 L. Ed. 839.

"On the hearing of a cause, even upon an appeal, an order may be made for the cause to stand over, with liberty to the plaintiff to amend by adding proper parties, if it appears that the plaintiff is entitled to relief, but that it cannot be given for the want of proper parties." Lewis *v.* Darling, 16 How. 1, 14 L. Ed. 819.

"When it appears to a court of equity that a case, otherwise presenting ground for its action, cannot be dealt with because of the absence of essential parties, it is usual for the court, while sustaining the objection, to grant leave to the complainant to amend by bringing in such parties. But when it likewise appears that necessary and indispensable parties are beyond the reach of the jurisdiction of the court, or that, when made parties, the jurisdiction of the court will thereby be defeated, for the court to grant leave to amend would be useless. Section 2 of article 3 of the Constitution of the United States." Minnesota *v.* Northern Securities Co., 184 U. S. 199, 46 L. Ed. 499. See, generally, the title PARTIES.

As to the effect of amendments making new parties, upon the statute of limitations, see post, "Amendment Making New Parties," II, F, 1, c.

30. Striking name of party as plaintiff and making him defendant.—The suit was originally instituted by aliens, and a citizen of the United States, as complainants, against the defendants, citizens of the United States; in the progress of the cause, and before the final hearing, the name of the citizen of the United States, who was one of the plaintiffs, was stricken out, and he was made a defendant. Held, the substantial parties plaintiffs, those for whose benefit the decree is sought, are aliens, and the court has original jurisdiction between them and all the defendants; but they prevented the exercise of this jurisdiction, by uniting with themselves a person between whom and one of the defendants the court could not take jurisdiction; strike out his name as a complainant, and the impediment is removed to the exercise of that original jurisdiction which the court possessed between the alien parties, and all the citizen defendants; there is no objection, founded on convenience or law, to this course. Conolly *v.* Taylor, 2 Pet. 556, 565, 7 L. Ed. 518.

31. Amendment changing suit by individual to one by him as representative of a class.—"The court will generally at the hearing allow a bill which has originally been filed by one individual of a numerous class in his own right to be amended so as to make such individual sue on behalf of himself and the rest of the class." Richmond *v.* Irons, 121 U. S. 27, 30 L. Ed. 864, quoting Dan. Ch. Pr. (4th ed.) c. 5, § 1, p. 245.

32. Omission or mistake.—Shields *v.* Barrow, 17 How. 130, 15 L. Ed. 158; Hardin *v.* Boyd, 113 U. S. 756 28 L. Ed. 1141.

A formal charge of fraud may be added when it is necessary and has been omitted. Graffam *v.* Burgess, 117 U. S. 180, 29 L. Ed. 839.

Suit by alien against citizen—Omission of bill to state character of parties.—If an alien should sue a citizen, and omit to state character of the parties in the bill, though the court could not exercise jurisdiction, while the defect in the bill remained, yet it might, as is every day's practice, be corrected at any time before the hearing, and the court would not hesitate to decree in the cause. Conolly *v.* Taylor, 2 Pet. 556, 566, 7 L. Ed. 518. See the title ALIENS, ante, p. 210.

33. Amendment presenting more fully facts at issue.—In re Sanford, etc., Co., 160 U. S. 247, 40 L. Ed. 414, it was held, that, the case being left open by the opinion and mandate of the supreme court, and by the general rules of practice in equity, for further proceedings with a right in the plaintiffs to file a replication, putting the cause at issue, the circuit court might, in its discretion, allow amendments of the pleadings for the purpose of more fully or clearly presenting

ficient precision.[34]

(c) *To Put in Issue New Matter to Meet Allegations in Answer.*—Amendments of the bill are properly allowed for putting in issue new matter to meet allegations in the answer.[35]

(d) *To Conform to Case Made.*—In the absence of obligatory rules of court to the contrary, a court of equity after a cause has been heard and a case for relief made out, but not the case disclosed by the bill, has power to allow an amendment of the pleadings, on terms that the party not in fault has no reasonable ground to object to.[36]

the facts at issue between the parties. Citing Marine Ins. Co. *v.* Hodgson, 6 Cranch 206, 3 L. Ed. 200; Neale *v.* Neales, 9 Wall. 1, 19 L. Ed. 590; Hardin *v.* Boyd, 113 U. S. 756, 28 L. Ed. 1141.

34. Matters not put in issue with sufficient precision by original bill.—"Lord Redsdale says: 'If upon hearing the cause the plaintiff appears entitled to relief, * * * if the addition of parties alone is wanted, an order is usually made for the cause to stand over, with liberty to amend the bill by adding the proper parties; and in some cases where a matter has not been put in issue by bill with sufficient precision, the court has, upon hearing the cause, given the plaintiff liberty to amend the bill for the purpose of making the necessary alteration,' Redsdale Eq. Pl. 326. And see The Tremolo Patent, 23 Wall. 518, 23 L. Ed. 97." Graffam *v.* Burgess, 117 U. S. 180, 29 L. Ed. 839.

35. New matter meeting allegations in answer.—Shields *v.* Barrow, 17 How. 130, 15 L. Ed. 158.

"Under the 45th rule of equity practice, if any matter alleged in the answer shall make it necessary for the plaintiff to amend his bill, he may have leave to amend the same with or without payment of costs, as the court, or judge thereof, may in his discretion direct." Southern Pac. R. Co. *v.* United States, 168 U. S. 1, 42 L. Ed. 355.

"Undoubtedly, if a plea, upon argument, is ruled to be sufficient in law to bar the recovery of the complainant, the court of chancery would, according to its uniform practice, allow him to amend, and to put in issue by a proper replication the truth of the facts stated in the plea." Rhode Island *v.* Massachusetts, 14 Pet. 210, 10 L. Ed. 423.

Amendment setting up fraud.—In Very *v.* Levy, 13 How. 345, 14 L. Ed. 173, it was held, that though the complainant might not have anticipated, when the bill was filed, that a certain contract would be set up in the answer as a defense, yet on the coming in of the answer he might have amended his bill, averring that if any such agreement was in fact made, it was void for fraud, and charging in what the fraud consisted.

Allegation as to discovery of fraud.—In Wharton *v.* Lowrey, 2 Dall. 364, 1 L. Ed. 417, after the defendant had pleaded the statute of limitations, the complainant was allowed to amend the bill by inserting that the frauds charged therein had come to his knowledge within six years before the commencement of the suit. See the title LIMITATION OF ACTIONS AND ADVERSE POSSESSION.

Facts bringing plaintiff within savings of statute of limitations.—Where the statute of limitation is pleaded at law or in equity and the plaintiff desires to bring himself within its savings, it would be proper for him, in his replication, or by an amendment of his bill, to set forth the facts specially. Miller *v.* McIntyre, 6 Pet. 61, 8 L. Ed. 320.

In Johnson *v.* Waters, 111 U. S. 640, 28 L. Ed. 547, it was held, that an amendment was properly allowed to a creditor's bill setting out matter taking the subject of the original bill out of the prescription, where the answer admitted that the claim of the complainant was duly acknowledged by the executor as a just claim against the estate.

36. To conform to case made.—Neale *v.* Neales, 9 Wall. 1, 19 L. Ed. 590.

"'The court will sometimes at the hearing permit the prayer of the bill to be amended, so as to make it more consistent with the case made by the plaintiff than the one he has already introduced.' 1 Daniel's Ch. Pr., 1st Ed. 474; Ib. 2nd Ed. 480. And see Neale *v.* Neales, 9 Wall. 1, 19 L. Ed. 590; Hardin *v.* Boyd, 113 U. S. 756, 764, 28 L. Ed. 1141." Graffam *v.* Burgess, 117 U. S. 180, 29 L. Ed. 839.

An amendment on terms just to the party not in fault may be allowed on a bill for specific performance, where the subject matter and general purpose of both bills is the same, and the contract, consideration, promise, and acts of part performance, stated in the amended bill, are stated with sufficient precision, and are supported by proofs, taken under the original bill, which entitle the complainants to the relief which they seek. Neale *v.* Neales, 9 Wall. 1, 19 L. Ed. 590.

"It would seem clear, from the manner in which the court below of its own motion, and without assigning any reasons for this action, gave the complainants leave to amend their bill, that on the original hearing it was satisfied that the evidence made out a case for relief, but a case different from the one stated in the bill;

(e) *Defects in Prayer for Relief.*—A bill which is defective in its prayer for relief may be amended.[37]

(2) *Amendments Changing Case Made by Original Bill.*—It may be stated as a general rule that an amendment should rarely, if ever, be permitted where it would materially change the very substance of the case made by the bill, and to which the parties have directed their proofs.[38] To insert a wholly different case is not properly an amendment, and should not be considered within the rules on that subject.[39]

and, that as the pleadings must correspond with the evidence, it was necessary either to dismiss the bill without prejudice, or to give the leave to amend. The court adopted the latter alternative, doubtless, with a view to save expense to the parties, and because such a course could not, by any possibility, work any harm to the defendant. It is insisted that this proceeding was erroneous; that after a cause has been heard, the power of allowing amendments ceases, or if it exists at all, it cannot go so far as to authorize a plaintiff to change the framework of his bill, and make an entirely new case, although on the same subject matter, as, it is contended, was done in this instance under the leave to amend. This doctrine would deny to a court of equity the power to grant amendments after the cause was heard and before decree was passed, no matter how manifest it was that the purposes of substantial justice required it, and would, if sanctioned, frequently embarrass the court in its efforts to adjust the proper mode and measure of relief. To accomplish the object for which a court of equity was created, it has the power to adapt its proceedings to the exigency of each particular case, but this power would very often be ineffectual for the purpose, unless it also possessed the additional power, after a cause was heard and a case for relief made out, but not the case disclosed by the bill, to allow an alteration of the pleadings on terms, that the party not in fault would have no reasonable ground to object to. That the court has this power and can, upon hearing the cause, if unable to do complete justice by reason of defective pleadings, permit amendments, both of bills and answers, is sustained by the authorities." Neale *v.* Neales, 9 Wall. 1, 19 L. Ed. 590.

Not permitted where proposed amendment makes new case.—"In I Daniells Ch. Pr. 384, 5th ed., the author, after alluding to the rule in reference to the amendment, observes; 'The instances, however, in which this will be done are confined to those where it appears, from the case made by the bill, that the plaintiff is entitled to relief, although different from that sought by the specific prayer; when the object of the proposed amendment is to make a new case, it will not be permitted.'" Hardin *v.* Boyd, 113 U. S. 756, 28 L. Ed. 1141. See post, "Amendment Changing Case Made by Original Bill," II, C, 1, b, (2).

37. Defects in prayer for relief.—Shields *v.* Barrow, 17 How. 130, 15 L. Ed. 158; Hardin *v.* Boyd, 113 U. S. 756, 28 L. Ed. 1141; Graffam *v.* Burgess, 117 U. S. 180, 29 L. Ed. 829.

As to amendment of prayer to make it more consistent with the case made, see ante, "To Conform to Case Made," II, C, 1, b, (1), (d).

38. General rule.—Hardin *v.* Boyd, 113 U. S. 756, 28 L. Ed. 1141; Richmond *v.* Irons, 121 U. S. 27, 30 L. Ed. 864; Snead *v.* McCoull, 12 How. 407, 13 L. Ed. 1043; Walden *v.* Bodley, 14 Pet. 156, 10 L. Ed. 398; Neale *v.* Neales, 9 Wall. 1, 19 L. Ed. 590.

"The rule is thus stated in Lyon *v.* Talmadge, 1 Johns. Ch. 184, 188: 'If the bill be found defective in its prayer for relief, or in proper parties, or in the omission or statement of fact or circumstances connected with the substance of the case, but not forming the substance itself, the amendment is usually granted. But the substance of the bill must contain ground for relief. There must be equity in the case when fully stated and correctly applied to the proper parties, sufficient to warrant a decree.'" Hardin *v.* Boyd, 113 U. S. 756, 28 L. Ed. 1141.

In Snead *v.* McCoull, 12 How. 407, 13 L. Ed. 1043, it was held, that after a case had been argued and was under advisement, a motion to permit the complainant to file a further bill by way of supplement and amendment, which would have made an essential change in the character and objects of the cause, was properly overruled in the circuit court.

39. Shields *v.* Barrow, 17 How. 130, 15 L. Ed. 158.

"To strike out the entire substance and prayer of a bill, and insert a new case by way of amendment, leaves the record unnecessarily encumbered with the original proceedings, increases expenses, and complicates the suit; it is far better to require the complainant to begin anew." Shields *v.* Barrow, 17 How. 130, 15 L. Ed. 158, quoted in Hardin *v.* Boyd, 113 U. S. 756, 28 L. Ed. 1141.

Amendments held not to make a new case.—In a suit to set aside a conveyance of lands, it was alleged in the bill that the title bond was obtained through fraud and imposition practiced by the purchaser and that the greater portion of

c. *Cross Bill.*—An amendment of a cross bill at the hearing is properly allowed, although working a change in the ground upon which relief was sought,

the purchase money remained unpaid. The prayer of the bill was that the bond for title and the deeds be set aside, that an account be taken, and that a decree might be rendered quieting the title of the plaintiff as against the claims of the defendants, and for such other relief as equity might require. After the cause came for hearing, and after the evidence had been read, the complainants asked leave to amend the prayer of the bill by asserting therein the following words: "Or, if thought proper, that the court give a decree for the purchase money due on said lands for the payment thereof, and that the said lien be foreclosed." This amendment was allowed, and the defendants excepted. On appeal it was held, that such amendment was properly allowed as it did not make a new case, nor materially change the substance of the one actually presented by the bill and the proofs, but simply enabled the court, upon the case made by the original bill, to give the relief which that case justified. Hardin *v.* Boyd, 113 U. S. 756, 28 L. Ed. 1141, distinguishing Shields *v.* Barrow, 17 How. 130, 15 L. Ed. 158, and citing Neale *v.* Neales, 9 Wall. 1, 19 L. Ed. 590; The Tremole Patent, 23 Wall. 518, 23 L. Ed. 97.

In Richmond *v.* Irons, 121 U. S. 27, 30 L. Ed. 864, the bill, as originally framed, was one by a judgment creditor against a national bank and its president, alleging insolvency, and conversion of the assets, and asking a discovery of assets, appointment of receiver, etc. Leave was afterwards given the complainant to file an amended bill making additional defendants, and on the final hearing the complainant had leave to amend, and did amend the amended bill of complainant so as to allege expressly that it was filed on behalf of himself and all other creditors of the bank, and the prayer was amended so as to require an account to be taken of the amount due the complainant and other creditors of the defendant; striking out those parts which ask that the complainant's judgment be decreed to be a first lien on the property of the bank, and paid first in full out of the fund for distribution; and adding a prayer that the fund so created might be distributed among all creditors of said bank pro rata, in such a way and manner as should be directed. The supreme court held that the action of the circuit court in permitting these amendments was justified by the rules on that subject as already stated by the court in the cases of Neale *v.* Neales, 9 Wall. 1, 19 L. Ed. 590; The Tremolo Patent, 23 Wall. 518, 23 L. Ed. 97; and Hardin *v.* Boyd, 113 U. S. 756, 28 L. Ed. 1141. Such amendments were germane to the original bill and the various matters contained in it and in the amended bill, were connected with each other in such a way as fairly to bring the question of granting leave to file amended bill within the discretion of the court below.

In Jones *v.* Van Doren, 130 U. S. 684, 32 L. Ed. 1077, the original bill alleged that the defendant took the conveyance of the plaintiff's right of dower upon an express trust for her, and the amended bill alleged that he procured the conveyance from her by fraudulent misrepresentations as to the nature of the instrument, creating a trust by operation of law in her favor. The other facts alleged in the two bills were substantially identical. The supreme court, citing Hardin *v.* Boyd, 113 U. S. 756, 28 L. Ed. 1141, held, that the amendment was one which the court in the exercise of its discretion might properly allow.

In Brainard *v.* Buck, 184 U. S. 99, 46 L. Ed. 449, it was held, that under the principle laid down in Jones *v.* Van Doren, 130 U. S. 684, 32 L. Ed. 1077, the amendment to the bill was proper, and the demurrer thereto, on the ground that it stated a new and different cause of action, was properly overruled, as the purpose in both bills, was "to establish a resulting trust in favor of the complainant Buck on account of the transactions set forth in the bills, and while the reasons are stated more fully in the amended bill and in some respects differently from those in the original bill, yet the purpose is the same, arising from the same transactions and based upon the same general rule of law applicable to resulting trusts."

In the original bill, filed by the United States in the circuit court of Rhode Island, the claim of the United States to payment of a debt due to them, was asserted, on the ground of an assignment made to the United States by an insolvent debtor, who was discharged from imprisonment, on the condition, that he should make such an assignment; the debtor had been previously discharged under the insolvent law of Rhode Island, and had made, on such discharge, a general assignment for the benefit of his creditors. Afterwards, an amended bill was filed, in which the claim of the United States was placed upon the priority given to the United States, by the act of congress, against their debtors who have become insolvent; it was objected, that the United States could not change the ground of their claim, but must rest it, as presented by the original bill, on the special assignment made to them. It is true, as the defendant insists, that the original bill still remains on the record, and forms a part of the case; but the amendment presents a new state of facts,

where such amendment is simply to enable the cross complainant to avail himself of what had been alleged, and proved by the original complainants.[40]

d. *Answer.*—As to the general power of the court to amend defective answers where unable to do complete justice by reason of such defects, see ante, "Power of Court to Allow," II, A.

As to the amendment of answers changing the character of the pleading, see ante, "Amendment of Answer," II, B, 1, a, (3).

Entry of Amendment Nunc Pro Tunc.—Where the court has authority to grant an amendment to an answer, such amendment may properly be entered nunc pro tunc, as originally prayed in the answer.[41]

2. PLEADINGS AT LAW—a. *In General.*—Under the act of 1789 (now incorporated in § 954 of the Revised Statutes) either of the parties may be allowed, in the discretion of the court, to amend any defect in the pleadings.[42]

b. *Effect of Practice Conformity Act.*—The propriety of amendments of pleadings in the circuit and district courts of the United States is governed by the provisions of § 914 of the Revised Statutes, to the effect that: "The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes in the circuit and district courts, shall conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, any rule of court to the contrary notwithstanding."[43]

c. *Declaration, Petition or Complaint*—(1) *Proper Scope of Amendments*—(a) *As to Parties.*—**Adding or Striking Out Parties.**—With regard to amend-

which it was competent for the complainants to do; and on the hearing, they may rely on the whole case made in the bill, or may abandon some of the special prayers it contains. Hunter *v.* United States, 15 Pet. 173, 8 L. Ed. 86.

Amendments constituting new and substantive ground of relief.—In Warner *v.* Godfrey, 186 U. S. 365, 46 L. Ed. 1203, it was held, that the complainant, having expressly declined to put an end to the litigation, upon the theory that because of mala fides she was entitled to an unconditional recovery of the property in question, she ought not, in equity, upon the collapse of her efforts to establish fraud and bad faith on the part of the defendants, to be allowed to reform her pleadings and change her attitude towards the defendants in order to obtain that which she had expressly elected not to seek and had persistently declined to accept.

"It would be highly inequitable to permit a litigant to press with the greatest pertinacity for years unfounded demands for specific and general relief, however much confidence he may have had in such charges, necessitating large expenditures by the defendants to make a proper defense thereto, and then, after the submission of the cause, when the grounds of relief actually asserted were found to be wholly without merit, to allow averments to be by way of amendment, constituting a new and substantive ground of relief. This is especially applicable when the facts upon which such amendment rests were known at the incipiency of the litigation and the character of the relief was such as called for promptness in asserting a right thereto." Warner *v.* Godfrey, 186 U. S. 365, 46 L. Ed. 1203.

In Meriwether *v.* Garrett, 102 U. S. 472, 26 L. Ed. 197, it was held, that the bills in the case could not be amended so as to obtain relief against additional parties, without making an entirely new suit, as they were not framed with a view to any such purpose.

40. Cross bill.—Chicago, etc., R. Co. *v.* Chicago Bank, 134 U. S. 276, 33 L. Ed. 900. See the title CROSS BILLS.

41. Where, after setting up the defense of prior knowledge and use of the thing patented, and giving the names and residences of witnesses intended to be called to prove the defense, the answer to a bill for the infringement of letters patent alleges that the names and residences of certain other witnesses are unknown to the defendant, and prays leave to insert and set forth in the answer such names and residences when they shall be discovered, it is competent for the court to allow, upon such discovery, the amendment to be made nunc pro tunc. Roemer *v.* Simon, 95 U. S. 214, 24 L. Ed. 384.

42. In general.—Bamberger *v.* Terry, 103 U. S. 40, 26 L. Ed. 317; Mexican Central R. Co. *v.* Duthie, 189 U. S. 76, 47 L. Ed. 715; Gagnon *v.* United States, 193 U. S. 451, 48 L. Ed. 745. And see cases cited post, "Provisions Stated," IX, B, 1.

43. Effect of practice conformity act.—See West *v.* Smith, 101 U. S. 263, 25 L. Ed. 809; Liverpool, etc., Ins. Co. *v.* Gunther, 116 U. S. 113, 29 L. Ed. 575; Henderson *v.* Louisville, etc., R. Co., 123 U. S.

ments as to parties, it may be stated generally that, in accordance with the practice conformity act, any such amendments may be made in the United States circuit or district courts by adding or striking out the name of any party as are authorized by the Code or practice act of the state in which such federal courts are held.[44]

As to correcting mistake in name of party, see post, "Correction of Mistake," II, C, 2, c, (1), (b).

(b) *Correction of Mistake.*—Where the Code or practice act of the state in which the federal court is held authorizes it, a declaration, petition or complaint may be amended in such court by correcting any mistake therein.[45]

(c) *Insertion of Material Allegations.*—An amendment to the declaration, petition or complaint, by inserting other allegations material to the case, is proper where such amendment is authorized in the state in which the federal court is held.[46]

61, 64, 31 L. Ed. 92; Atlantic, etc., R. Co. *v.* Laird, 164 U. S. 393, 41 L. Ed. 485; Noonan *v.* Caledonia Min. Co., 121 U. S. 396, 30 L. Ed. 1061. And see post, "Proper Scope of Amendments," II, C, 2, c, (1). For a full treatment of the above act, see the title COURTS.

For a review of the Connecticut practice as to amendments—a jurisdiction in which amendments to the declaration are allowed with great liberality—see the opinion of Clifford, J., in West *v.* Smith, 101 U. S. 263, 25 L. Ed. 809.

44. Adding or striking out parties.—Thus, in Noonan *v.* Caledonia Mining Co., 121 U. S. 396, 30 L. Ed. 1061, it was held, that the amendment making a new party defendant was proper under § 142 of the Code of Civil Procedure of Dakota, providing that: "The court may, before or after judgment, * * * amend any pleadings * * * by adding or striking out the name of any party," etc.

In Royal Ins. Co. *v.* Miller, 199 U. S. 353, 50 L. Ed. 226, it was held, that there was no abuse of discretion in allowing an amendment to the declaration, after issue joined upon the replication, making an additional party plaintiff.

Generally, as to who are proper or necessary parties, the propriety, manner and time of making additional parties or striking out unnecessary or improper parties, see the title PARTIES.

Substitution of new sole plaintiff.—Rule that amendments are discretionary with the court below, and not reviewable by the supreme court, applied to amendment of declaration substituting new sole plaintiff for, and in the place of, the sole original plaintiff. Chapman *v.* Barney, 129 U. S. 677, 32 L. Ed. 800.

Amendment making additional defendant held sufficient though informal.—In Noonan *v.* Caledonia Min. Co., 121 U. S. 396, 30 L. Ed. 1061, which was an action to determine the rights of the parties to mining grounds in the territory of Dakota, it appeared during the trial that one M. was a proper if not a necessary party to a complete determination of the matters in controversy. Thereupon, by consent of parties, he was made a codefendant in the action and the following entry was made at the time, in the journal of proceedings, following the title of the cause: "By consent of all parties, Thomas F. Mahan is made a party defendant in this action. Counsel for defendant appear and answer instanter for him, any amendments to pleadings required to be prepared and served during the pendency of this action, or at its conclusion." Before the entry of judgment, the plaintiff's attorneys, in order to make the record complete as to the new defendant Mahan, instead of inserting his name in the proper place in the complaint, or rewriting it entirely, served upon the defendant's attorneys, notice that it amended its complaint by inserting the name of the said Mahan and that he claimed interest in the property in question which claim was without foundation or right, that said claim of said Mahan casts a cloud upon plaintiff's title and that plaintiff, therefore, makes said Mahan a defendant in the action and asks the same relief against him as prayed against the other defendant. On appeal to the supreme court, it was held, that, while it would have been the better course, when the order was entered that Mahan be joined as codefendant, for the attorneys of the plaintiff to have had his name at once inserted in the complaint, with such other changes as to make the allegations apply to him, yet, as the trial continued after the amendment, the defendant Mahan, participating in all its proceedings as if his name had been inserted in the complaint in the most formal manner, and he had answered it specifically, he was sufficiently made party to the case by the amendment.

45. Correction of mistake.—Noonan *v.* Caledonia Min. Co., 121 U. S. 396, 30 L. Ed. 1061, quoting from § 142 of the Dakota Code of Civil Procedure, authorizing amendment "by correcting a mistake in the name of a party, or a mistake in any other respect."

46. Material allegations.—Noonan *v.*

(d) *To Conform to Facts Proved.*—Where authorized by the Code or practice act of the state in which the federal court is held, a declaration, petition or complaint may be amended to conform it to the facts proved, where such amendment does not change substantially the claim.[47]

(e) *Amendment of Demise in Ejectment.*—In actions of ejectment, the lease being a fiction, amendments of the demise are frequently allowed.[48]

(2) *Amendments Changing Substance of Original Claim.*—Where, as is

Caledonia Min. Co., 121 U. S. 396, 30 L. Ed. 1061.

"Both in the English and American courts, amendments, have been allowed in well-considered cases, for the purpose of introducing into the suit a new and independent cause of action." Tilton *v.* Cofield, 93 U. S. 163, 23 L. Ed. 858, citing Tiernan *v.* Woodruff, 5 McLean 135.

Insertion of new counts for same cause of action.—Where an action has been removed from a state court to the circuit court, the latter may, in accordance with the state practice, grant the plaintiff leave to amend his declaration by inserting new counts for the same cause of action as that alleged in the original counts. West *v.* Smith, 101 U. S. 263, 25 L. Ed. 809.

To show surety's knowledge of changes in contract.—In United States *v.* Freel, 186 U. S. 309, 46 L. Ed. 1177, which was an action against a contractor and the sureties on his bond, it was held, that where from the contracts as set out in the declaration by attaching them as exhibits, substantial changes in the original contract appeared, such declaration put the plaintiff out of court so far as the surety was concerned, unless it averred such changes to have been made with the knowledge and consent of the surety. If the governments' pleader had evidence of facts showing such knowledge and consent, and was surprised by the action of the trial judge in sustaining a demurrer to the declaration it was open to him to ask leave to amend by adding the necessary averment.

47. To conform to proof.—Noonan *v.* Caledonia Min. Co., 121 U. S. 396, 30 L. Ed. 1061; Bamberger *v.* Terry, 103 U. S. 40, 26 L. Ed. 317; Liverpool, etc., Ins. Co. *v.* Gunther, 116 U. S. 113, 29 L. Ed. 575. See, also, Wilson *v.* Haley, etc., Co., 153 U. S. 39, 38 L. Ed. 627.

Illustrations.—In Davis *v.* Patrick, 141 U. S. 479, 35 L. Ed. 826, where it was objected that the court erred in not directing a verdict for defendant upon the ground of a departure from the allegations of the petition, the evidence showing a contract at a different time from that alleged, the court said: "As no objection was made to the admission of testimony on this ground, and as an amendment of the petition to correspond to the proof would involve but a trifling change, we cannot see that there was any error in the ruling of the court. If objection had been made in the first instance, doubtless the court would, as it ought to have done, have permitted an amendment of the petition."

In Railroad Co. *v.* Lindsay, 4 Wall. 650, 18 L. Ed. 328, where it was insisted upon for the first time in the supreme court that there was a fatal variance between the facts as found by the court, and the case made by the plaintiff's petition, the court said: "It does not appear that any of the evidence offered by the plaintiffs in the court below was objected to by the defendants, nor does it appear that any exception was taken when the court announced its findings, or subsequently when the judgment was entered. It was in the power of the court to permit the petition to be amended and the proper amendments would doubtless have been made if the objection had been stated."

48. "In an ejectment, the lease is entirely a fiction invented for the purpose of going fairly to trial on the title. Courts have exercised a full discretion in allowing it to be amended. A plaintiff has frequently been allowed to enlarge the term, when it has expired before a final decision of the cause. Between making the term extend to a more distant day, and commence at a later day, the court can perceive no difference in substance. They are modifications of the same power, intended to effect the same object; and although not precisely the same in form the one is not greater in degree than the other." Blackwell *v.* Patton, 7 Cranch 471, 3 L. Ed. 408.

In Coates *v.* Hamilton, 2 Dall. 256, 1 L. Ed. 371, by mistake the demise had been laid in the declaration, so as to commence before the death of the person, whose death gave rise to the controversy. Leave was granted to amend the declaration, by rectifying this mistake.

In ejectment, the date of the demise in the declaration may be amended, during the trial, so as to conform to the title. Blackwell *v.* Patton, 7 Cranch 471, 3 L. Ed. 408.

In Cockshot *v.* Hopkins, 2 Dall. 97, 1 L. Ed. 305, the demise in the declaration of ejectment having expired during the pendency of the action, motion was made for leave to amend by inserting the word twenty, instead of seven, so as to enlarge the term. The amendment was allowed on payment of costs. See the title EJECTMENT.

usually the case, the Code or practice act of the state in which the federal court is held prohibits amendments changing substantially the original claim, such prohibition is equally effective as to proposed amendments in the federal courts.[49]

d. *Answer.*—**Amendment to Conform to Proof.**—A defendant may be allowed to amend his pleading to cure a variance between such pleading and the proofs, where such amendment is authorized by the practice in the state in which the federal court is held.[50]

49. Amendments changing substance of original claim.—Noonan *v.* Caledonia Min. Co., 121 U. S. 396, 30 L. Ed. 1061 (decided in accordance with Dak. Code, Civ. Prac. § 142). See, also, Bamberger *v.* Terry, 103 U. S. 40, 26 L. Ed. 317; Thompson *v.* Musser, 1 Dall. 458, 1 L. Ed. 222.

In Atlantic, etc., R. Co. *v.* Laird, 164 U. S. 393, 41 L. Ed. 485, the amendments were held proper under § 471 of the California Code, which virtually forbids amendments only where the allegation of the claim or defense would be changed in its scope or meaning.

In Henderson *v.* Louisville, etc., R. Co., 123 U. S. 61, 31 L. Ed. 92, it was held, that, the action being on the common-law side of the circuit court, the pleadings and practice were governed by the law of the state, and the right to amend the petition was limited by article 419, of the Code of Practice of Louisiana, which provides that "after issue joined, the plaintiff may, with the leave of the court, amend his original petition; provided the amendment does not alter the substance of the demand by making it different from the one originally brought." Under this section an amendment wholly inconsistent with the allegations of the original petition cannot be allowed.

Amendment of complaint held not to introduce a new cause of action.—In Atlantic, etc., R. Co. *v.* Laird, 164 U. S. 393, 41 L. Ed. 485, which was an action for personal injuries, the plaintiff, on the trial, was allowed to amend her complaint by alleging that the ticket upon which she was traveling was "a second class" ticket instead of, as alleged in the original complaint, "a first class" ticket. To the cause of action stated in the complaint as thus amended, the defendants pleaded a statute of limitations of two years. Judgment was entered on the verdict, but this judgment was subsequently set aside, with leave to the plaintiff to amend her complaint. The second amended complaint was afterwards filed, dismissing one of the two joint tort feasors against whom the action was originally brought, and alleging that the injury complained of was occasioned solely by the remaining defendant. It was held, by the supreme court, that neither of the above amendments introduced a new cause of action so as to render the bar of the statute available.

Limitation of action not a change of the action.—In District of Columbia *v.* Talty, 182 U. S. 510, 45 L. Ed. 1207, it was held, that it was not error in the court below to try the case on the amended petition, as it merely rested the right of recovery on a certain contract, and its extension, which contract and extensions were relied on in the original petition. There was, therefore, only a limitation of the action, not a change of it.

Amendment of order allowing amendment to prevent contest of material facts stated in original petition.—In Henderson *v.* Louisville, etc., R. Co., 123 U. S. 61, 31 L. Ed. 92, it was held, that, under the Louisiana practice, the circuit court, after dismissing a petition as setting forth no cause of action, with leave to file an amended petition, might modify the order allowing the amendment, so as to treat the amendment as a mere addition to the original petition, and thus preclude the plaintiff from contesting a material fact, within her own knowledge, which she had once solemnly averred in the original petition.

50. Amendment to conform to proof.—In an action removed into the circuit court of the United States for the eastern district of New York, it was held, that the New York Code of Civil Procedure, §§ 539, 540, should furnish the rule of practice as to curing variance between pleadings and proof. By the first of these sections, it is provided that "a variance between an allegation in a pleading and the proof is not material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits. If a party insists that he has been misled, the fact and the particulars in which he has been misled must be proved to the satisfaction of the court. Thereupon the court may, in its discretion, order the pleading to be amended upon such terms as it deems just." Section 540 declares that, "when the variance is not material, as prescribed in the last section, the court may direct the fact to be found according to the evidence, or may order an immediate amendment without costs." Liverpool, etc., Ins. Co. *v.* Gunther, 116 U. S. 113, 29 L. Ed. 575. In this case it was held, that, although there was some obscurity in pleading a defense, yet inasmuch as all the testimony necessary to the establishment was offered and proved without objections, and, on the conclusion of the testimony, the matter was called to the attention of the court by a request of the defendant's counsel to direct a verdict on that ground alone, such matter ought

Amendments Changing Defense.—Where the Code or practice act of the state in which the federal court is held prohibits amendments changing substantially the defense, such prohibition is equally effective as to amendments in such federal courts.[51]

D. Procedure to Obtain Amendment—1. MANNER AND REQUISITES OF APPLICATION—a. *Manner.*—The usual method of application for leave to amend pleadings is by motion or petition.[52]

b. *Showing as to Grounds and Excusing Omission in Original Pleading.*—Under the rules of equity practice, the application for leave to amend the bill, after replication filed, must show that such application is not for the purpose of vexation or delay.[53]

Showing as to Materiality of Proposed Amendment and Excusing Omission from Original Pleading.—Under the 29th rule of equity practice, the appellant must show that the matter of the proposed amendment is material, and could not, with reasonable diligence, have been sooner introduced into the bill.[54]

2. NOTICE.—As to whether notice to the opposite party is essential to the allowance of amendments to pleadings, depends upon the stage of the cause at which the application is made,[55] and whether the parties are considered to be still in court.[56]

to have been either submitted to the jury, or put in shape for such submission, if the rights of the adverse party required any change in the pleadings, or opportunity for the production of other evidence.

51. Amendment changing defense.—Atlantic, etc., R. Co. *v.* Laird, 164 U. S. 393, 41 L. Ed. 485; Noonan *v.* Caledonia Min. Co., 121 U. S. 396, 30 L. Ed. 1061. See ante, "Amendments Changing Substance of Original Claim," II, C, 2, c, (2).

52. Application by motion or petition.—See National Bank *v.* Carpenter, 101 U. S. 567, 25 L. Ed. 815; In re Sanford, etc., Co., 160 U. S. 247, 40 L. Ed. 414; Snead *v.* McCoull, 12 How. 407, 13 L. Ed. 1043; Brown *v.* Schleier, 194 U. S. 18, 48 L. Ed. 857; Mexican Central R. Co. *v.* Duthie, 189 U. S. 76, 47 L. Ed. 715.

53. Affidavit that application is not for purpose of vexation or delay.—By the 29th rule of equity practice, prescribed by the United States supreme court, amendment by the plaintiff, after replication filed, will only be permitted upon special order of a judge of the court upon motion or petition, "upon proof by affidavit that the same is not made for the purpose of vexation or delay." Washington Railroad *v.* Bradleys, 10 Wall. 299, 19 L. Ed. 894.

54. Showing as to materiality and excusing omission from original pleading.—Washington Railroad *v.* Bradleys, 10 Wall. 299, 19 L. Ed. 894.

In Snead *v.* McCoull, 12 How. 407, 13 L. Ed. 1043, the supreme court, in affirming the judgment of the circuit court in refusing to allow a proposed amendment to the bill, both because the application came too late and the proposed amendment changed the character of the bill so as to make substantially a new case, said: "A fact which imparts greater force to the refusal of the circuit court to permit amendment at so late a stage of the proceedings is this, that the application to that court appears to have been accompanied with no evidence, and not even by an affidavit, to show that the amendments desired could not have been made portions of the original bill; on the contrary, it is manifest, that they might have formed a part of the case as originally presented to the circuit court, if at any time it were proper to incorporate them with the subject matter, and with the objects proposed by the original bill."

55. On coming in of answer.—Under equity rules 29, 45, upon coming in of defendant's answer, the plaintiff may, upon motion, without notice to the defendant, have leave to amend his bill. In re Sanford, etc., Co., 160 U. S. 247, 40 L. Ed. 414.

After replication filed and withdrawn.—Under the 29th rule of equity practice, amendment of the bill, after replication filed and withdrawn, must be upon due notice to the other party. Washington Railroad *v.* Bradleys, 10 Wall. 299, 19 L. Ed. 894.

56. After judgment, the parties are still in court, for all the purposes of giving effect to it; and in the action of ejectment, the court having power to extend the demise, after judgment, the defendant may be considered in court, on a motion to amend, as well as on any other motion or order which may be necessary to carry into effect the judgment. In no correct sense is this power of amendment similar to the exercise of an original jurisdiction between parties on whom process has not been served. Walden *v.* Craig, 14 Pet. 147, 10 L. Ed. 393.

3. Leave of Court to Amend—a. *Necessity.*—It would seem that, as a general rule, amendments of pleadings must be upon leave and order of court.[57]

As to objections for failure to obtain leave to amend, see post, "Objections to Amended Pleadings," II, G.

b. *Discretion of Court as to Allowance or Refusal.*—It has been repeatedly held, that the granting or refusing amendments to pleadings rests in the sound discretion of the trial court,[58] and the exercise of such discretion will not be reviewed by the supreme court, unless in case of manifest abuse.[59]

c. *Imposition of Terms as Condition of Allowance.*—The trial court may, in its discretion, as a condition of allowing amendments of pleadings, impose such terms as it may deem reasonable and proper. This power is given both by the rules of equity practice,[60] and by § 954 of the United States Revised Statutes;[61]

57. Necessity for leave and order of court.—In Ballance *v.* Forsyth, 24 How. 183, 16 L. Ed. 733, though there was a paper in the record purporting to be an amended bill, the supreme court held that it was doubtful whether it was properly filed, it not being clear that the amendments were filed with leave, and formed any part of the bill.

In Terry *v.* McClure, 103 U. S. 442, 26 L. Ed. 403, an amended bill was filed without leave, eight years after the original bill in equity had been filed, and on the day it was dismissed, on a final hearing upon the pleadings and proofs. It was held, that such amended bill must be disregarded in the consideration of the case in the supreme court.

Under the 29th rule of equity practice, amendment of the bill, after replication filed and withdrawn, must be upon a special order of a judge of the court. Washington Railroad *v.* Bradleys, 10 Wall. 299, 19 L. Ed. 894.

58. Allowance or refusal discretionary with trial court.—Mandeville *v.* Wilson, 5 Cranch 15, 3 L. Ed. 23; Marine Ins. Co. *v.* Hodgson, 6 Cranch 206, 3 L. Ed. 200; Walden *v.* Craig, 9 Wheat. 576, 6 L. Ed. 164; Chirac *v.* Reinicker, 11 Wheat. 280, 6 L. Ed. 474; Wright *v.* Hollingsworth, 1 Pet. 165, 7 L. Ed. 96; United States *v.* Buford, 3 Pet. 12, 7 L. Ed. 585; Ex parte Bradstreet, 7 Pet. 634, 8 L. Ed. 810; Smith *v.* Vaughan, 10 Pet. 366, 9 L. Ed. 457; Matheson *v.* Grant, 2 How. 263, 11 L. Ed. 261; Spencer *v.* Lapsley, 20 How. 264, 15 L. Ed. 902; Eberly *v.* Moore, 24 How. 147, 16 L. Ed. 612; Sheets *v.* Selden, 7 Wall. 416, 19 L. Ed. 166; Ewing *v.* Howard, 7 Wall. 499, 19 L. Ed. 293; Tilton *v.* Cofield, 93 U. S. 163, 23 L. Ed. 858; National Bank *v.* Carpenter, 101 U. S. 567, 25 L. Ed. 815; Hardin *v.* Boyd, 113 U. S. 756, 28 L. Ed. 1141; Richmond *v.* Irons, 121 U. S. 27, 30 L. Ed. 864; Chapman *v.* Barney, 129 U. S. 677, 32 L. Ed. 800; Bullitt County *v.* Washer, 130 U. S. 142, 32 L. Ed. 885; Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207, 34 L. Ed. 97; Gormley *v.* Bunyan, 138 U. S. 623, 34 L. Ed. 1086; Mexican, etc., R. Co. *v.* Pinkney, 149 U. S. 194, 37 L. Ed. 699; Carr *v.* Nichols, 157 U. S. 370, 39 L. Ed. 736; Kinney *v.* Columbia, etc., Ass'n, 191 U. S. 78, 48 L. Ed. 103; Royal Ins. Co. *v.* Miller, 199 U. S. 353, 50 L. Ed. 226.

In Mandeville *v.* Wilson, 5 Cranch 15, 3 L. Ed. 23; Marshall, Ch. J., held that while the permitting amendments is a matter of discretion, this did not mean that a court may in all cases permit or refuse amendments without control. A case may occur, where it would be error in a court, after having allowed one party to amend to refuse to suffer the other party to amend also, before trial.

59. Discretion not reviewed unless manifestly abused.—See cases cited in preceding note.

For a full treatment of the power of the supreme court to review the exercise of discretion by the lower courts, see the title APPEAL AND ERROR.

60. Imposition of terms under equity rules.—Under equity rules 29, 45, the plaintiff, upon coming in of the answer, may have leave to amend his bill, with or without the payment of costs, as the court may direct. In re Sanford, etc., Co., 160 U. S. 247, 40 L. Ed. 414; Southern Pac. R. Co. *v.* United States, 168 U. S. 1, 42 L. Ed. 355.

Under the 29th rule of equity practice, after replication filed, the plaintiff cannot withdraw it and amend his bill except upon "submitting to such other terms as may be imposed by the judge for speeding the cause." Washington Railroad *v.* Bradleys, 10 Wall. 299, 19 L. Ed. 894.

By the 35th rule of equity practice established by the United States supreme court, it is provided that "if, upon hearing, any demurrer or plea shall be allowed, the defendant shall be entitled to his costs. But the court may, in his discretion, upon motion of the plaintiff, allow him to amend his bill upon such terms as it shall deem reasonable." National Bank *v.* Carpenter, 101 U. S. 567, 25 L. Ed. 815.

As to the power of the court to impose terms just to the party not in fault on allowing amendment where case for relief made out other than that disclosed by bill, see Neale *v.* Neales, 9 Wall. 1, 19 L. Ed. 590.

61. Section 954 of the Revised Statutes,

and its exercise of discretion as to such terms is not open to examination on appeal.[62]

E. Manner of Amendment.—As to amendment of complaint making additional party defendant, held sufficient though informal, see ante, "As to Parties," II, C, 2, c, (1), (a). As to amendment of answer nunc pro tunc, see ante, "Answer," II, C, 1, d.

F. Effect of Amendment—1. Relation Back of Amendment—Effect upon Running of Statute of Limitations.—See, generally, the title Limitation of Actions and Adverse Possession.

a. *General Rule.*—The general rule is that an amendment of a declaration, petition or complaint, relates back to the time of the filing of the original pleading, so that the running of the statute of limitations against the amendment is arrested thereby.[63]

b. *Amendments Introducing New Cause of Action.*—The above rule, however, from its very reason, applies only to an amendment which does not create a new cause of action,[64] and, where an amended declaration or petition

expressly provides that the amendments specified therein are to be permitted upon such conditions as the court "shall, in its discretion and by its rules, prescribe." Kinney *v.* Columbia, etc., Ass'n, 191 U. S. 78, 48 L. Ed. 103; Gagnon *v.* United States, 193 U. S. 451, 48 L. Ed. 745; Mexican Central R. Co. *v.* Duthie, 189 U. S. 76, 47 L. Ed. 715; Bamberger *v.* Terry, 103 U. S. 40, 26 L. Ed. 317. For further citations of cases decreed under this section, see post, "Provisions Stated," IX, B, 1.

Effect of refusal to amend on conditions imposed on extension of time, on defendant's motion.—In Jackson *v.* Emmons, 176 U. S. 532, 44 L. Ed. 576, on Dec. 8th, 1897, after a partial hearing of the case, the plaintiff on his motion, by leave of court, withdrew a juror, and the remaining jurors were discharged from further consideration of the case, with leave to amend his declaration as advised within twenty days, and the case was continued for the term. Subsequently, on motion of the attorney for the defendants, and after notice to the plaintiff, the order limiting plaintiff's time to amend was rescinded, and he was given twenty days from the 7th of January, 1898, to amend his declaration, and was ordered to pay the costs of the term in which the juror was withdrawn. On the 27th of January, the plaintiff served on the defendant's attorney notice of election not to amend, on the ground of the order as to payment of costs. The supreme court, in holding that the trial court erred in dismissing the case, said: "If the original order granting leave to amend had been made conditional upon the payment of costs, the plaintiff might or might not have accepted it. To decline to amend afterwards upon conditions which were not exacted or even, as far as the records show, were not contemplated, cannot be charged against him as misconduct. Indeed, there is no question of his good faith, and whatever conditions or rights the defendant was entitled to in consequence of the motion should have been asserted and adjudged when the plaintiff's motion was made. If such rights had been asserted, the plaintiff would have had a choice of yielding or not yielding to them, which afterwards could not be exercised."

62. Not reviewable on appeal.—The action of an inferior court as to the terms on which it will allow a complainant to amend a bill in equity to which it has sustained a demurrer, is a matter within the discretion of such court, and not open to examination in the supreme court on appeal. Sheets *v.* Selden, 7 Wall. 416, 19 L. Ed. 166. See ante, "Discretion of Court as to Allowance or Refusal," II, D, 3, b.

63. General rule.—Union Pac. R. Co. *v.* Wyler, 158 U. S. 285, 39 L. Ed. 983; Sicard *v.* Davis, 6 Pet. 124, 8 L. Ed. 342. See, also, Atlantic, etc., R. Co. *v.* Laird, 164 U. S. 393, 41 L. Ed. 485.

Where the amendment does not set out a new cause of action, but merely that set forth in the original declaration or petition, the bar of the statute will not apply though the amended declaration or petition was not filed until after the statutory period had elapsed. Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, 36 L. Ed. 829.

When a petition for confirmation of a claim to lands in Florida was presented, and was defective, and the court allowed an amended petition to be filed, it would be too strict to say the original petition was not the commencement of the proceeding but that the amendment allowed by the superior court should be taken as the date when the claim was first preferred. United States *v.* Delespine, 15 Pet. 319, 10 L. Ed. 753.

64. Limitation of rule.—Union Pac. R. Co. *v.* Wyler, 158 U. S. 285, 39 L. Ed. 983; Sicard *v.* Davis, 6 Pet. 124, 8 L. Ed. 342.

brings forward a new and independent cause of action, the bar of the statute of limitations may apply to it.[65]

c. *Amendments Making New Parties.*—Where new parties defendant are made by amendment, the statute of limitations is available to them at the period, when the amended pleading was filed.[66]

2. Effect upon Previous Submission of Cause.—When an amendment is permitted, the court must, in its discretion, determine whether any submission which has been made ought to be vacated.[67]

3. Effect as Authorizing Additional Pleadings.—Where an amendment has been allowed to the declaration, the defendant may elect to plead de novo, or to abide by his plea.[68]

65. Amendments introducing new and independent cause of action.—Texas, etc., R. Co. *v.* Cox, 145 U. S. 593, 36 L. Ed. 829, and cases cited in preceding note.

Where the amended petition or complaint sets up a new, distinct and independent cause of action against which the statute of limitations had run at the time of the filing of such pleading, the bar of the statute will prevail. Atlantic, etc., R. Co. *v.* Laird, 164 U. S. 393, 41 L. Ed. 485.

"The principle is, that, as the running of the statute is interrupted by the suit and summons, so far as the cause of action then propounded is concerned, it interrupts as to all matters subsequently alleged, by way of amendment, which are part thereof. But where the cause of action relied upon, in an amendment, is different from that originally asserted, the reason of the rule ceases to exist, and hence the rule itself no longer applies." Union Pac. R. Co. *v.* Wyler, 158 U. S. 285, 39 L. Ed. 983.

Rule not affected by consent to amendment.—The rule just laid down as to the availability of a plea of the statute of limitations to an amended declaration, petition or complaint setting out a new cause of action, is not affected by the fact that such amended pleading was filed by consent. Such consent covers the right to file the amended pleading, but does not waive the defenses thereto when filed. Union Pac. R. Co. *v.* Wyler, 158 U. S. 285, 39 L. Ed. 983.

"If the interruption to the running of the statute created by the first summons applied only to the cause of action therein set out, it would have required an express renunciation of the benefit of the statute, which had fully operated upon the new cause of action set out in the amended petition—when that petition was filed. In Sicard's Case, supra [6 Pet. 124], although the amendment had been filed by leave of court, and was, therefore, a part of the pleadings, it was held, that the bar of the statute applied to the new cause of action alleged in the amendment and the rule there enforced is followed in the other cases cited." Union Pac. R. Co. *v.* Wyler, 158 U. S. 285, 39 L. Ed. 983.

Amendment open to plea of the statute of limitations as introducing new cause.—In Sicard *v.* Davis, 6 Pet. 124, 8 L. Ed. 342, the plaintiff brought an action of ejectment, in which he laid his demise as having been made by Steven Sicard on January 30, 1815, and at the November term of the court in 1821 he was given leave to amend by laying his demise in the name of the heirs of the original grantee of the lands, Joseph Phillips and others, to whom the land had been conveyed before the execution of the deed under which Sicard acquired his title. The supreme court, speaking through Mr. Chief Justice Marshall, held that limitations might be pleaded to the second allegation, though not to the first, because "the second count in the declaration being on a demise from a different party asserting a different title, was not distinguishable, so far as respects the bar of the act of limitations from a new action."

66. Amendment making new parties.—A bill was filed in 1808 for the purpose of obtaining the legal title to certain lands in Kentucky, and afterwards, new parties were made defendants, in an amended bill, filed in 1815. Until these parties had so become defendants, and parties to the bill, the suit cannot be considered as commenced against them; the statute of limitations will avail the new defendants, at the period when the amended bill was filed; and they are not to be affected by the proceeding during the time they were strangers to it. Miller *v.* McIntyre, 6 Pet. 61, 8 L. Ed. 320.

67. Effect upon previous submission of cause.—Bamberger *v.* Terry, 103 U. S. 40, 26 L. Ed. 317.

Where the plaintiff after submission of the cause is permitted to amend his declaration so as to avoid a variance between it and the proofs, and it appears that neither the nature nor the merits of the issue are thereby changed, the defendant is not entitled to an order setting aside the submission of the cause for trial. Bamberger *v.* Terry, 103 U. S. 40, 26 L. Ed. 317.

68. Election of defendant to plead anew or abide by plea.—The authorities prove,

4. Effect as Waiving Objection to Ruling Sustaining Demurrer.—Where a demurrer to a pleading has been sustained, the filing of an amended pleading is held to waive the objection to the ruling on the demurrer.[69]

5. Effect as Fixing Amount in Controversy.—The amount demanded by the amended complaint, when differing from that demanded in the original, determines the question of jurisdiction.[70]

6. Effect upon Right to Remove Cause.—The right to the removal of a suit under the act of March 3rd, 1875, 18 Stat. 470, ch. 137, once lost by a failure to file a petition within the prescribed time is not restored by an amendment of the pleadings afterwards so as to present different issues.[71]

G. Objections to Amended Pleadings.—**Demurrer or Motion to Strike.**—Where an amended plea is broader, as well as more specific in its averments

unquestionably, that upon an amendment being made to the declaration, by adding a count the defendant has a right to plead de novo. Wright *v.* Hollingsworth, 1 Pet. 165, 7 L. Ed. 96.

After the filing of a new count of a declaration, the defendant, who, to the former counts, has pleaded the general issue, or any particular plea may withdraw the same, and plead anew, either the general issue, or any further or other pleas, which his case may require; but he may if he please, abide by his plea already pleaded, and waive his right to pleading de novo, the failure to plead, and going to trial without objection, are held to be a waiver of his right to plead, and an election to abide by his plea; and if it, in terms, purports to go to the whole action, it is deemed sufficient to cover the whole declaration; and puts the plaintiff to the proof of his case, on the new, as well as on the old counts. Wright *v.* Hollingsworth, 1 Pet. 165, 7 L. Ed. 96.

Leave to amend before trial—Election of defendant to take costs or imparl to next term.—In Thompson *v.* Musser, 1 Dall. 458, 1 L. Ed. 222, the court in holding that an amendment after jury sworn, without consent of defendant, without giving him leave to plead anew, and without imparlance, or awarding payment of costs by the defendant, said: "Suppose, however, that the court had given the plaintiff leave to make the amendment before the trial; which they might unquestionably have done, as the nature of the action was not thereby changed; yet it was in the election of the defendant, either to take costs of the plaintiff, or to imparl to the next term; for he had a right to advise upon a plea fitting the declaration so amended; or, if the amendment did not, in his opinion, require an alteration of the plea, he might take the costs and enter the same plea immediately. At all events, I think he ought to have been allowed, if he pleased, to plead again after the amendment, and so join a new issue."

See, also, Jones *v.* Ross, 2 Dall. 143, 1 L. Ed. 324, in which, upon motion to amend the declaration in a qui tam action, it was held, that in case of such amendment the defendants would be entitled to an imparlance and costs.

69. Amendment as waiving objection to ruling sustaining demurrer.—A. filed a bill in equity to enforce a forfeiture, and obtain compensation for breach of agreement. The defendant demurred by a single demurrer. The court sustained the demurrer as respected the forfeiture, and overruled it as to the residue of the bill. The complainant amended his bill in conformity to the opinion of the court. The defendant answered. Testimony was taken, and the complainant got a decree for so much money; less, however, than he claimed. He thereupon appealed to the supreme court. The defendant did not appeal. Held, that though the court below had erred in sustaining in part, and overruling in part a demurrer which was single, yet that the complainant by amending his bill, and the defendant by answering afterwards had both waived their right to object anywhere; and the defendant specially had in the supreme court by not appealing; and that the question of forfeiture was withdrawn from the supreme court. Marshall *v.* Vicksburg, 15 Wall. 146, 21 L. Ed. 121.

Where there was a demurrer to a rejoinder, which demurrer was sustained by the court below, and the party, on leave, filed an amended rejoinder, the supreme court cannot be asked to decide upon the demurrer. The point was waived by the filing of the amended rejoinder. United States *v.* Boyd, 5 How. 29, 12 L. Ed. 36. See the title DEMURRERS.

70. Effect as fixing amount in controversy.—Washer *v.* Bullitt County, 110 U. S. 558, 28 L. Ed. 249. See the titles APPEAL AND ERROR; COURTS; JURISDICTION.

71. Effect upon right to remove cause.—Phœnix Life Ins. Co. *v.* Walrath, 117 U. S. 365, 29 L. Ed. 924.

Effect of amendment of pleadings upon jurisdiction of court after removal of cause.—Where the circuit court of the United States has jurisdiction over the parties and cause of action, by virtue of the 12th section of the judiciary act, it cannot be affected by any amendment of the pleadings changing the cause of ac-

than the original plea, an order striking such amended plea from the files is erroneous. The questions arising upon such plea could be more appropriately raised by demurrer.[72]

Objection for Omission to Obtain Leave to Amend.—An objection to an amended bill in chancery because not filed with the leave of the court below, as required by equity rule 45, cannot be first made in the supreme court.[73]

III. Amendment of Indictments, Informations and Presentments.

See the title INDICTMENTS, INFORMATIONS AND PRESENTMENTS.

IV. Amendment of Process and Return.

In this section only the statutory provisions authorizing the amendment of process, with a few illustrations of such amendments, are given. For further treatment of this question, see the title SUMMONS AND PROCESS, and the specific titles involving the necessity, form and sufficiency of summons and process and the return thereto, as, for instance, ATTACHMENT AND GARNISHMENT; EXECUTIONS; etc.

Under § 954 of the Revised Statute, the trial court may permit the amendment by either of the parties of any defect in the process upon such conditions as it shall in its discretion or by its rules prescribe.[74]

By § 948 of the Revised Statutes, "any circuit or district court may, at any time in its discretion, and upon such terms as it may deem just, allow an amendment of any process returnable to or before it, where the defect has not prejudiced, and the amendment will not injure, the party against whom such process issues."[75]

V. Amendment of Verdict.

See the title VERDICT.

VI. Amendment of Judgments, Orders and Decrees.

See the titles JUDGMENTS AND DECREES; ORDERS OF COURT, and cross references there found.

tion. Green *v.* Custard, 23 How. 484, 16 L. Ed. 471. See the title REMOVAL OF CAUSES.

72. Demurrer held proper rather than motion to strike.—Griswold *v.* Hazard, 141 U. S. 260, 35 L. Ed. 678. See the title DEMURRERS. Generally, as to striking out pleadings, see the title PLEADING.

73. Objection for omission to obtain leave to amend.—Clements *v.* Moore, 6 Wall. 299, 18 L. Ed. 786. Generally, as to raising objections for the first time in the supreme court, see the title APPEAL AND ERROR.

74. Under Rev. Stat., § 954.—Bamberger *v.* Terry, 103 U. S. 40, 26 L. Ed. 317; Gagnon *v.* United States, 193 U. S. 451, 457, 48 L. Ed. 745; Mexican Central R. Co. *v.* Duthie, 189 U. S. 76, 47 L. Ed. 715.

75. Under Rev. Stat., § 948.—Kinney *v.* Columbia, etc., Ass'n, 191 U. S. 78, 48 L. Ed. 103.

Amendment of writ by præcipe.—In Black *v.* Wister, 4 Dall. 267, 1 L. Ed. 828, it was held, that a writ in an action of debt might be amended by the præcipe, where there was a variance between the writ and the count in the sum demanded.

Amendment of execution by judgment.—An execution varying from the judgment in the sum for which issued may be amended by the judgment. Black *v.* Wistar, 4 Dall. 267, 1 L. Ed. 828.

Amendment of writ and process by striking out "administrator," etc., and inserting "executor."—The defendant, in the circuit court of Mississippi was sued and declared against as the administrator of R. He entered his appearance to the suit, and in person filed a plea in abatement averring that he was not administrator of R., and that he was the only executor of R; the plaintiff moved to amend the writ and the declaration, by striking out administrator, or, inserting executor; leave was granted, and the amendment was made. Held, that there was no error in the circuit court giving leave to amend. Randolph *v.* Barrett, 16 Pet. 138, 10 L. Ed. 914.

The power of the circuit court to authorize amendments, when there is anything in the record to amend by, is undoubted. In this case, the defendant admitted by his plea, that he was the per-

VII. Amendment of Appellate Proceedings.

See the title APPEAL AND ERROR.

VIII. Amendment of Records.

See the title RECORDS, and cross references there found.

IX. Statute of Jeofails.

A. Origin and Purpose.—Federal courts have possessed the power, from their organization to the present time, to amend formal imperfections in the pleadings, except in cases of special demurrer set down for hearing, and are directed to give judgment according to law and right of the cause.[76] This power was expressly given by the thirty-second section of the act of congress, Sept. 24th, 1789, ch. 20, 1 Stat. L. 91, to establish the judicial courts of the United States.[77] It was to prevent the mischiefs ensuing from a misapplied rigor, that statutes of jeofails have been enacted, and their salutary influence is invoked, whenever the intrinsic merits of parties litigant would, without that influence, be sacrificed to mere modes and forms of practice.[78]

B. Provisions Stated, Construed and Applied—1. PROVISIONS STATED. —By § 954 of the United States Revised Statutes it is provided that: "No summons, writ, declaration, return, process, judgment, or other proceedings in civil causes, in any court of the United States, shall be abated, arrested, quashed, or reversed for any defect or want of form; but such court shall proceed and give judgment according as the right of the cause and matter in law shall appear to it, without regarding any such defect, or want of form, except those which, in cases of demurrer, the party demurring specially sets down, together with his demurrer, as the cause thereof; and such court shall amend every such defect and want of form, other than those which the party demurring so expresses; and may at any time permit either of the parties to amend any defect in the process or pleadings, upon such conditions as it shall, in its discretion and by its rules, prescribe."[79]

son liable to the suit of the plaintiff; but averred that he was executor and not administrator; whether he acted in one character or the other, he held the assets of the testator or intestate in trust for the creditors; and when his plea was filed, it became part of the record, and furnished matter by which the pleadings might be amended. This amendment was not only authorized by the ordinary rules of amendment, but also by the statute of the United States of 1789, § 32. Randolph *v.* Barrett, 16 Pet. 138, 10 L. Ed. 914.

Amendment to return to writ of mandamus.—An amendment by allowing, nunc pro tunc, an entry, omitted at the proper time, by inadvertence, in the journal record of the clerk of the issue of a writ of peremptory mandamus; and an amendment by the marshal to his return so as to show that he had exhibited the original writ to the party served, allowed as matters of common practice. Supervisors *v.* Durand, 9 Wall. 736, 19 L. Ed. 813. See the title MANDAMUS.

76. Power possessed by federal courts since organization.—Nash *v.* Towne, 5 Wall. 689, 18 L. Ed. 527.

77. Power given by act establishing United States courts.—Roach *v.* Hulings, 16 Pet. 319, 10 L. Ed. 979.

The provisions of the above section of this act are now incorporated in § 954, U. S. Rev. Stat. See post, "Provisions Stated," IX, B, 1.

The power to allow amendments of pleadings and process, on application of the parties, under the last clause of this section, has already been treated in previous sections of this article. See ante, "Amendment of Pleadings in Civil Cases," II; "Amendment of Process and Return," IV.

78. Purpose of statute.—Roach *v.* Hulings, 16 Pet. 319, 10 L. Ed. 979.

79. Provisions of § 954.—Van Ness *v.* United States Bank, 13 Pet. 17, 10 L. Ed. 38; Bank *v.* Guttschlick, 14 Pet. 19, 10 L. Ed. 335; Randolph *v.* Barrett, 16 Pet. 138, 10 L. Ed. 914; Roach *v.* Hulings, 16 Pet. 319, 10 L. Ed. 979; Stockton *v.* Bishop, 4 How. 155, 11 L. Ed. 918; Garland *v.* Davis, 4 How. 131, 11 L. Ed. 907; Taylor *v.* Benham, 5 How. 233, 12 L. Ed. 130; Townsend *v.* Jemison, 7 How. 706, 12 L. Ed. 880; Parks *v.* Turner, 12 How. 39, 13 L. Ed. 883; Railroad Company *v.* Lindsay, 4 Wall. 650, 18 L. Ed. 328; Clements *v.* Moore, 6 Wall. 299, 18 L. Ed. 786; Laber *v.* Cooper, 7 Wall. 565, 19 L. Ed. 151; The Protector, 11 Wall. 82, 20 L. Ed. 47; Phillips, etc., Cons. Co. *v.*

2. STATUTE CONSTRUED AND APPLIED—a. *A Remedial Statute and to Be Liberally Construed.*—The act of 1789, ch. 20, § 32 is a remedial statute, and must be construed liberally to accomplish its object. It not only enables the courts of the United States, but it enjoins it upon them as a duty, to disregard the niceties of form, which often stand in the way of justice, and to give judgment according as the right of the cause and matter in law shall appear to them.[80]

b. *To What Defects Applicable*—(1) *In General.*—It has been held that the provisions of the act of 1789, now incorporated in § 954 of the Revised Statutes, are sufficiently comprehensive to embrace every conceivable step to be taken in a cause, from the emanation of the writ down to the judgment, and extend to imperfections and want of form in the findings of juries, as well as to the other proceedings in the suit.[81]

Seymour, 91 U. S. 646, 23 L. Ed. 341; Bamberger *v.* Terry, 103 U. S. 40, 26 L. Ed. 317; Lincoln *v.* Iron Co., 103 U. S. 412, 26 L. Ed. 518; Friedenstein *v.* United States, 125 U. S. 224, 31 L. Ed. 736; Mexican Central R. Co. *v.* Duthie, 189 U. S. 76, 47 L. Ed. 715; Kinney *v.* Columbia, etc., Ass'n, 191 U. S. 78, 48 L. Ed. 103; Gagnon *v.* United States, 193 U. S. 451, 48 L. Ed. 745. For further cases decided under this statute, see the general titles JUDGMENTS AND DECREES; PLEADING; SUMMONS AND PROCESS; VERDICT; and also the sections of specific titles in this work, relating to these subjects.

80. To be liberally construed.—Parks *v.* Turner, 12 How. 39, 13 L. Ed. 883.

81. Scope of § 954.—"By the 32d section of the act to establish the judicial courts of the United States, it is provided, 'that no summons, writ, return, process, judgment or other proceedings in civil causes, in any of the courts of the United States, shall be abated, arrested, quashed or reversed, for any defect or want of form, but the said courts, respectively, shall proceed and give judgment according as the right of the cause and matter in law shall appear to them, without regarding any imperfections, defects or wants of form in such writ, declaration or other pleading, return, process, judgment or course of proceeding whatsoever, except those only in cases of demurrer, which the party demurring shall specially set down and express, together with his demurrer, as the cause thereof.' It is true, that a verdict, eo nomine, is not comprised within this provision of the statute, but judgments are; and the language of the provision, 'writ, declaration, judgment or other proceedings in civil causes,' and further, 'such writ, declaration, pleading, process, judgment or other proceeding whatsoever,' is sufficiently comprehensive to embrace every conceivable step to be taken in a cause, from the emanation of the writ down to the judgment." Roach *v.* Hulings, 16 Pet. 319, 10 L. Ed. 979.

"We are satisfied that the thirty-second section of the act of congress of 1789, ch. 20, removes all difficulty in the case, and makes it the duty of this court to affirm the judgment rendered on this verdict. The section of the law referred to directs the courts of the United States to proceed and give judgment according as the right of the cause and matter in law shall appear to them, without regarding any imperfections or defects, or want of form in the writ, declaration, or other pleading, return, process, judgment, or course of proceeding whatever, except those only in cases of demurrer, which the party demurring shall specially set down and express together with his demurrer as the cause thereof. This is a remedial statute, and must be construed liberally to accomplish its object. It not only enables the courts of the United States, but it enjoins it upon them as a duty, to disregard the niceties of form, which often stand in the way of justice, and to give judgment according as the right of the cause and matter in law shall appear to them. And although verdicts are not specially mentioned in this provision, yet the words 'or course of proceeding whatever,' are evidently broad enough to include them; and, as they are within the evil, they cannot, upon a fair interpretation of the statute, be excluded from the remedy. The question, however, has been already decided in this court in the case of Roach *v.* Hulings, 16 Pet. 319, 321, 322, 10 L. Ed. 979. In that case, as in the one now before the court, the verdict was defective according to strict technical rules, and no judgment could legally be entered upon it. But this court held, that the act of congress above mentioned was intended to remove objections of that description where they impeded the administration of justice, and that it extended to imperfections and want of form in the findings of juries, as well as to the other proceedings in the suit. And although, according to the strictness required by common-law rules, the judgment must have been reversed, the court sustained it upon the ground that the substantial meaning of the verdict was manifest, and the defects objected to cured by this act of congress." Parks *v.* Turner, 12 How. 39, 13 L. Ed. 883.

(2) *As Dependent upon whether Defect One of Form or Substance*—(a) *Defects of Form.*—It may be stated, as a general rule, that, under the statute of jeofails, all merely formal defects and imperfections are cured by verdict.[82]

82. Defects of form cured by verdict.—"As a general rule, all informality in a good plea is held to be cured by a verdict, and ought to be, in order not to delay, through a mere form, what may seem to be just." Garland *v.* Davis, 4 How. 131, 11 L. Ed. 907.

A defective statement of title or cause of action is cured by verdict. Lincoln *v.* Iron Co., 103 U. S. 412, 26 L. Ed. 518; De Sobry *v.* Nicholson, 3 Wall. 420, 18 L. Ed. 263.

"A cause of action defectively or inaccurately set forth, is cured by the verdict, because, to entitle the plaintiff to recover, all circumstances necessary, in form or substance, to make out his cause of action, so imperfectly stated, must be proved at the trial; but when no cause of action is stated, none can be presumed to have been proved." Renner *v.* Bank, 9 Wheat. 581, 595, 6 L. Ed. 166.

"At common law, after verdict, if the issue joined be such as necessarily to require on the trial proof of the facts defectively or imperfectly stated or omitted, and without which it is not to be presumed that the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection, or omission is cured by the verdict." Wills *v.* Claflin, 92 U. S. 135, 23 L. Ed. 490, quoting 1 Chitty's Plead. (10th Am. Ed.) 673.

"At common law, defects in collateral pleadings, or other matters not preceding the verdict, and not to be proved in order to get a verdict, were not cured by it. Yet those were cured which related to matters necessary to be shown to get a verdict, and hence, after it, are presumed to have been shown. * * * But these defects in collateral matters, as here, when they relate to form, are as fully cured by the statutes of jeofails as those connected with the verdict are by intendment at common law." Townsend *v.* Jemison, 7 How. 706, 12 L. Ed. 880.

Uncertainty in pleadings.—The rule as to certainty in pleadings, was framed for the benefit of the parties, and may be waived by them, and in many cases, both at common law, and by the statute of jeofails, defects in this particular are cured by a verdict. Minor *v.* Mechanics' Bank, 1 Pet. 46, 7 L. Ed. 47.

Omission of conclusion to counts in declaration.—In Bank *v.* Guttschlick, 14 Pet. 19, 10 L. Ed. 335, it was held, that whatever might have been the effect of the want of a formal conclusion to the three special counts in the declaration, upon a special demurrer, the 32d section of the judiciary act of 1789 would cure the defect, if admitted to be one.

Failure of narr. in debt on penal bill to aver nonpayment—Plea of payment.—In Thompson *v.* Musser, 1 Dall. 458, 1 L. Ed. 222, which was an action of debt on a penal bill, the narr. failed to aver nonpayment by the defendant of the sum mentioned in the condition, but the defendant pleaded payment. Such defect was held to be cured by the verdict.

"We are clearly of opinion, that this defect in the declaration, with respect to the averment, cannot now be taken advantage of as an error. It might, indeed, have been fatal on demurrer; but, at this period of the cause, it is cured by the plea in bar, by the verdict, and by the statutes of jeofails. The defendant below pleaded payment, which admits the declaration to be good. 10 Vin Abr. 3, pl. 12." Thompson *v.* Musser, 1 Dall. 458, 1 L. Ed. 222.

Failure to aver value of foreign money—Verdict finding such value.—In Brown *v.* Barry, 3 Dall. 365, 1 L. Ed. 638, which was an action of debt on a bill of exchange, the declaration failed to aver the value of foreign money, but it was held, that such defect was cured by the jury's specially finding the value of such money.

Declaration on covenant—Failure to assign special breach.—Though a declaration on covenant should assign a special breach, yet, if a general breach be assigned, the defect will be cured, by a verdict for the plaintiff. Minor *v.* Mechanics' Bank, 1 Pet. 46, 7 L. Ed. 47, citing Com. Dig. Plead., p. 48. See the titles COVENANT, ACTION OF; COVENANTS.

Where the plaintiffs declared in covenant, both as heirs and devisees, without showing in particular how they were heirs, and without setting out the will, it was held not to be fatal on general demurrer. Such a defect may be amended under the 32d section of the judiciary act of 1789, c. 20. Day *v.* Chism, 10 Wheat. 449, 6 L. Ed. 363.

Omission to strike out all demises but that on which verdict given.—In a declaration in ejectment, various demises were laid, and the verdict of this jury, and the judgment of the circuit court, were entered on one of the demises only; and it was contended, that the court ought not to have entered a judgment on the issue found for the plaintiff, but should have awarded a venire de novo; and that this irregularity might be taken advantage of upon a writ of error. Held, that if this objection had been made in the circuit court, on a motion in arrest of judgment, the plaintiff would have been permitted to strike out all the demises in the declaration but that on which the

(b) *Defects in Substance.*—**General Rule.**—Under the federal statute of jeofails, as under the English Statute, 32 Henry VIII, it has frequently been adjudged that defects in substance are not cured by a verdict.[83]

What Are Defects of Substance.—A defect in substance, in a plea or verdict, is conceded, in all the books, to exist when they do not cover "whatever is essential to the gist of the action."[84]

AMERICANS.—The word "Americans" as used in a treaty conferring jurisdiction upon consular courts over "Americans committing offenses," includes not only those who are citizens of the United States, but also all who, though not strictly citizens, are by their service equally entitled to the care and protection of the government.[1]

AMICABLE ACTION.—An amicable action is one where the parties to a real controversy agree to conduct the suit in an amicable manner, that is to say, that they will not embarrass each other with unnecessary forms or technicalities, and will mutually admit facts which they know to be true, and without requiring proof, and will bring the point in dispute before the court for decision, without

verdict was given; the omission to strike out these demises was only, therefore, an omission of form; and the act of congress of 1789, ch. 20, § 32, expressly provides, that no judgment shall be reversed for any defect or want of form, but that the courts of the United States shall proceed and give judgment, according as the right of the cause and matter in law shall appear to them, without regarding any imperfections, defects or want of forms in the judgment or course of proceeding, except that specially demurred to. United States Bank *v.* Van Ness, 5 Cr. C. C. 294, affirmed in Van Ness *v.* United States Bank, 13 Pet. 17, 10 L. Ed. 38.

That special pleas have improperly concluded to the court instead of to the country, is not a matter for reversal, the matter not having been brought in any way to the attention of the court below. Laber *v.* Cooper, 7 Wall. 565, 19 L. Ed. 151.

The fact that no replication is put into two of three special pleas, raising distinct defenses, is not a matter for reversal; the case having been tried below as if the pleadings had been perfect and in form. Laber *v.* Cooper, 7 Wall. 565, 19 L. Ed. 151.

An omission to join issue upon an avowry for rent in arrear, or otherwise to notice it on the record, is a mere irregularity, cured by the verdict. Dermott *v.* Wallach, 1 Black 96, 17 L. Ed. 50.

83. Defects of substance not cured by verdict.—Garland *v.* Davis, 4 How. 131, 11 L. Ed. 907.

84. What are defects in substance.—Garland *v.* Davis, 4 How. 131, 11 L. Ed. 907.

A total omission to state any title or cause of action in the declaration is a defect which the verdict will not cure, either at common law or by statute. McDonald *v.* Hobson, 7 How. 745, 12 L. Ed. 897; Renner *v.* Bank, 9 Wheat. 581, 595, 6 L. Ed. 166; Minor *v.* Mechanics' Bank, 1 Pet. 46, 67, 7 L. Ed. 47; Pearson *v.* Bank, 1 Pet. 89, 7 L. Ed. 65; Stockton *v.* Bishop, 4 How. 155, 11 L. Ed. 918; Turner *v.* Ogden, 1 Black 450, 451, 17 L. Ed. 203; De Sobry *v.* Nicholson, 3 Wall. 420, 18 L. Ed. 263.

Mistake in nature of action not cured by verdict.—A verdict will not cure a mistake in the nature of the action. Marine Ins. Co. *v.* Young, 1 Cranch 332, 2 L. Ed. 126, in which case, the court reversed the judgment and ordered it to be arrested, because the action was a special action on the case on a policy of insurance, and the declaration showed that the policy was a specialty.

Declaration in tort—Plea of "non assumpsit."—When a declaration sounds in tort, and the plea is "non assumpsit," such a plea would be bad on demurrer. If not demurred to, and the case goes to trial (the issue and verdict following the plea), the defect is so material that it is not cured by verdict, under the statute of jeofails. Garland *v.* Davis, 4 How. 131, 11 L. Ed. 907.

Declaration on covenant—Failure to assign breach, or assignment of breach not within covenant.—In declaration upon a covenant for general performance of duty, if any breach be assigned, or a breach which is bad, as not being in point of law within the scope of the covenant, the defect is fatal, even after verdict. Minor *v.* Mechanics' Bank, 1 Pet. 46, 7 L. Ed. 47, citing Com. Dig. Plead., p. 14. See the titles COVENANT, ACTION OF; COVENANTS.

1. Americans.—In re Ross, 140 U. S. 453, 475, 35 L. Ed. 581.

A British subject enlisting as a seaman upon an **American** merchant ship is an **American** within the meaning of the treaty with Japan conferring jurisdiction upon **American** consular courts over all offenses by **Americans** against Japanese. In re Ross, 140 U. S. 453, 475, 35 L. Ed. 581. See, generally, the titles ALIENS, ante, p. 210; AMBASSADORS AND CONSULS, ante, p. 273; CITIZENSHIP; SEAMEN.

subjecting each other to unnecessary expense or delay. The amity consists in the manner in which the action is brought to issue before the court, and there must, in all cases, be an actual controversy, and adverse interests.[1]

AMICUS CURIÆ.—See the title FRIENDS OF THE COURT. As to filing briefs by, see the title APPEAL AND ERROR.

AMITY.—The word "amity" means friendship, in a general sense, between individuals, societies or nations; harmony; good understanding.[2] It is not a technical term, and when found in a statute must be given its ordinary meaning, unless there is something in the context which compels a narrower or different scope.[3]

AMNESTY.—See the title PARDON.

AMONG.—The word "among" means intermingled with. A thing which is among others is intermingled with them.[4]

AMOTION.—See the titles OFFICERS AND AGENTS OF PRIVATE CORPORATIONS; PUBLIC OFFICERS, and the cross references given under these titles.

AMOUNT IN CONTROVERSY.—See the titles APPEAL AND ERROR; COURTS; REMOVAL OF CAUSES.

AMOUNT OF TAXES.—The words "amount of taxes," in their ordinary import, express an aggregate of taxes, and, when used in a statute, the ordinary meaning may be controlled by the context.[5]

1. Amicable action.—Lord *v.* Veazie, 8 How. 251, 255, 12 L. Ed. 1067.

Where it appears from affidavits and other evidence filed by persons not parties to a suit, that there is no real dispute between the plaintiff and the defendant, but, on the contrary, that their interest is one and the same, and adverse to that of the parties who filed the affidavit, this is not an **amicable action,** and the judgment of a circuit court entered pro forma is a nullity, and a writ of error to reverse it will be dismissed. Lord *v.* Veazie, 8 How. 251, 12 L. Ed. 1067. See, generally, the title ACTIONS, ante, p. 96; APPEAL AND ERROR; FRIENDLY SUITS.

"**Amicable actions,** so far from being objects of censure, are always approved and encouraged, because they facilitate greatly the administration of justice between the parties." Lord *v.* Veazie, 8 How. 251, 255, 12 L. Ed. 1067.

2. Amity defined.—Marks *v.* United States, 161 U. S. 297, 301, 40 L. Ed. 706, citing Webster's Dictionary.

"**In amity" not synonymous with "under treaty."**—The words "in **amity**" as used in a statute relating to Indian tribes "in **amity** with the United States" are not synonymous with "under treaty." "Treaty" implies political relations, while **amity** signifies friendship, actual peace. Marks *v.* United States, 161 U. S. 297, 301, 40 L. Ed. 706.

Under the Indian depredation act of March 3, 1891, granting to the court of claims jurisdiction over claims for property "destroyed by Indians belonging to any band, tribe or nation in **amity** with the United States," all that congress intended was that when, as a matter of fact, a tribe was in the relation of actual peace with the United States, and by some individual, or individuals, without the consent or approval of the tribe, a depredation was committed upon the property of citizens of the United States, such depredation might be investigated, and the amount of the loss determined and adjudicated by the court of claims. The jurisdiction is not dependent on the nonexistence of a treaty with the tribe to which the Indian belongs, but depends on whether, as a matter of fact, the tribe was at the time, as a tribe, in a state of actual peace with the United States, or whether, on the other hand, it was engaged in actual hostilities with the United States. Marks *v.* United States, 161 U. S. 297, 301, 40 L. Ed. 706. See, generally, the title INDIANS.

3. "Amity not a technical term.—Marks *v.* United States, 161 U. S. 297, 301, 40 L. Ed. 706. See, generally, the title STATUTES.

4. Among.—Gibbons *v.* Ogden, 9 Wheat. 1, 194, 6 L. Ed. 23; Lottery Case, 188 U. S. 321, 346, 47 L. Ed. 492.

"**Commerce among the states** cannot stop at the external boundary line of each state, but may be introduced into the interior. It is not intended to say that these words comprehend that commerce, which is completely internal, which is carried on between man and man in a state, or between different parts of the same state, and which does not extend to or affect other states. Such a power would be inconvenient and is certainly unnecessary. Comprehensive as the word **among** is, it may very properly be restricted to that commerce which concerns more states than one." Gibbons *v.* Ogden, 9 Wheat. 1, 189, 194, 6 L. Ed. 23; Lottery Case, 188 U. S. 321, 346, 47 L. Ed. 492. See, generally, the title COMMERCE.

5. Amount of taxes.—Washington *v.* Pratt, 8 Wheat. 681, 688, 5 L. Ed. 714.

A statute providing for the sale of im-

AMUSEMENTS.—See, generally, the title THEATERS AND SHOWS. As to denial of equal rights to citizens at public places of amusement, see the title CIVIL RIGHTS.

ANARCHIST.—1. Properly, one who advocates anarchy or the absence of government as a political ideal; a believer in an anarchic theory of society; especially, an adherent of the social theory of Proudhon. 2. In popular use, one who seeks to overturn by violence all constituted forms and institutions of society and government, all law and order, and all rights of property, with no purpose of establishing any other system of order in the place of that destroyed; especially, such a person when actuted by mere lust of plunder. 3. Any person who promotes disorder or excites revolt against an established rule, law or custom.[1]

ANARCHY.—1. Absence or insufficiency of government; a state of society in which there is no capable supreme power, and in which the several functions of the state are performed badly or not at all; social and political confusion. Specifically—2. A social theory which regards the union of order with the absence of all direct government of man by man as the political ideal; absolute individual liberty. 3. Confusion in general.[2]

ANCESTOR.—See the title DESCENT AND DISTRIBUTION.

ANCHORED VESSELS.—See the title COLLISION.

ANCIENT DOCUMENTS.

BY ROBERT E. MAXWELL.

I. What Included within the Term Ancient Documents.
II. Ancient Documents as Evidence.

CROSS REFERENCES.

See the titles BEST and SECONDARY EVIDENCE; DEEDS; DOCUMENTARY EVIDENCE; EVIDENCE; HANDWRITING; HEARSAY EVIDENCE; LOST INSTRUMENTS AND RECORDS; MARRIAGE CONTRACTS AND SETTLEMENTS; PEDIGREE; RECORDING ACTS; RECORDS; WILLS.

I. What Included within the Term Ancient Documents.

Deeds,[3] bonds,[4] records,[5] and wills[6] are included within the term ancient documents.

II. Ancient Documents as Evidence.

For What Purpose Admitted.—An ancient document may be admitted in evidence to prove pedigree.[7]

proved lots in a city, required the advertisement of sale to state, among other things, "the **amount of taxes** due thereon." It was held, that where one person owned several lots, it was not sufficient to state in the advertisement the aggregate of the taxes due on all of his lots but that the amount due on each lot was to be separately stated. Washington *v.* Pratt, 8 Wheat. 681, 5 L. Ed. 714. See, generally, the title TAXATION.

1. Anarchist.—Turner *v.* Williams, 194 U. S. 279, 293, 48 L. Ed. 979, citing Cent. Dict. See the title ALIENS, ante, p. 210.

2. Anarchy.—Turner *v.* Williams, 194 U. S. 279, 292, 48 L. Ed. 979, citing Cent. Dict.

And Huxley is quoted as saying: **Anarchy,** is a term of political philosophy, must be taken only in its proper sense, which has nothing to do with disorder or with crime, but denotes a state of society in which the rule of each individual by himself is the only government the legitimacy of which is recognized. Turner *v.* Williams, 194 U. S. 279, 293, 48 L. Ed. 979.

3. Winn *v.* Patterson, 9 Pet. 663, 9 L. Ed. 266; Thomas *v.* Horlocker, 1 Dall. 14, 1 L. Ed. 17; Barr *v.* Gratz, 4 Wheat. 213, 4 L. Ed. 553; Williams *v.* Conger, 125 U. S. 397, 31 L. Ed. 778; Applegate *v.* Lexington, etc., Min. Co., 117 U. S. 255, 29 L. Ed. 892; Fulkerson *v.* Holmes, 117 U. S. 389, 29 L. Ed. 915. See the title DEEDS.

4. Coulson *v.* Walton, 9 Pet. 62, 9 L. Ed. 51. See the title BONDS.

5. McGuire *v.* Blount, 199 U. S. 142, 50 L. Ed. 125. See the title RECORDS.

6. Meegan *v.* Boyle, 19 How. 130, 15 L. Ed. 577. See the title WILLS.

7. Fulkerson *v.* Holmes, 117 U. S. 389, 29 L. Ed. 915. See the title PEDIGREE.

That a Document Is Ancient May Be Proven by a Copy of the Original.—A copy of an ancient document is admissible to show that the original, found and produced in court, is an ancient document.[6]

Comparison of Handwriting.—If proof is necessary to prove the identity of parties to an ancient document, comparison of handwriting may be resorted to.[7]

General Rule of Admissibility.—Ancient documents prove themselves, and are admissible in evidence without proof of execution.[8]

Prerequisites to Application of Rule.—Before proof of ancient documents can be dispensed with, they must come from the proper custody;[9] there must be nothing about them to suggest that they have been forged or tampered with, and they must present an honest as well as ancient appearance.[10]

6. Williams *v.* Conger, 125 U. S. 397, 31 L. Ed. 778.

7. "There may be cases, where, from the antiquity of the writing, it is impossible for any living witness to swear that he ever saw the party write, comparison of handwriting with documents, known to be in his handwriting, has been admitted." Strother *v.* Lucas, 6 Pet. 763, 8 L. Ed. 573. See the title HANDWRITING.

8. Crane *v.* Morris, 6 Pet. 598, 8 L. Ed. 514; Winn *v.* Patterson, 9 Pet. 663, 674, 9 L. Ed. 266; Applegate *v.* Lexington, etc., Min. Co., 117 U. S. 255, 263, 29 L. Ed. 892; Barr *v.* Gratz, 4 Wheat. 213, 4 L. Ed. 553; McGuire *v.* Blount, 199 U. S. 142, 50 L. Ed. 125.

With reference to ancient documents, it is only necessary to show that they are of age of thirty years. McGuire *v.* Blount, 199 U. S. 142, 50 L. Ed. 125.

Seventy years is a sufficient lapse of time to justify a presumption of the due execution and loss of a lease. Crane *v.* Morris, 6 Pet. 598, 8 L. Ed. 514.

Where there is prima facie evidence of the execution and delivery of an ancient document it will be admitted in evidence. Carver *v.* Astor, 4 Pet. 1, 7 L. Ed. 761.

9. Winn *v.* Patterson, 9 Pet. 663, 9 L. Ed. 266; Barr *v.* Gratz, 4 Wheat. 213, 4 L. Ed. 553; Applegate *v.* Lexington, etc., Min. Co., 117 U. S. 255, 29 L. Ed. 389; Fulkerson *v.* Holmes, 117 U. S. 389, 29 L. Ed. 915; Williams *v.* Conger, 125 U. S. 397, 31 L. Ed. 778.

With reference to ancient documents, it is only necessary to show that they come from a natural and reasonable custody; from a place where they might reasonably be expected to be found. 3 Wigmore, §§ 2138 and 2139; McGuire *v.* Blount, 199 U. S. 142, 50 L. Ed. 125.

Change of possession though in hands of a proper custodian.—Where the testimony tends to show that documents were subjected to various changes of possession during the transition of the government of Florida from Spain to the United States and upon the evacuation of Pensacola during the civil war, and there is nothing to establish that they were ever out of the hands of a proper custodian, nor to show that the originals were lost, or any evidence of a fraudulent substitution of a made-up record in the interest of parties to be benefited thereby, such documents are admissible as ancient documents when on their face they bear every evidence of age. McGuire *v.* Blount, 199 U. S. 142, 50 L. Ed. 125.

"If property passes through a dozen hands in the course of forty years, each keeping in his own possession the deed given to him, the possession of all is equally under the first deed, which may be given in evidence as an ancient deed, although never seen by any but the first grantee to whom it was given." Williams *v.* Conger, 125 U. S. 397, 417, 31 L. Ed. 778.

10. McGuire *v.* Blount, 199 U. S. 142, 50 L. Ed. 125; Applegate *v.* Lexington, etc., Min. Co., 117 U. S. 255, 29 L. Ed. 892; Williams *v.* Conger, 125 U. S. 397, 31 L. Ed. 778.

Ancient records bearing upon their face every evidence of age and authenticity, and there is nothing about them to suggest that they have been forged or tampered with and they present an honest as well as ancient appearance and come from official custody. To such public and proprietary records the courts have applied the rules of admissibility governing ancient documents. 3 Wigmore Evid., § 2145, and notes. McGuire *v.* Blount, 199 U. S. 142, 50 L. Ed. 125.

Must appear valid upon their face.—An old will, which had never been proved according to law, was properly excluded as evidence. The will does not come within the rule by which ancient instruments are admitted. It only includes such documents as are valid upon their face. Meegan *v.* Boyle, 19 How. 130, 15 L. Ed. 577.

In Missouri, where a deed was offered in evidence, purporting to convey the titles of married women to land, and their names were in the handwriting of other persons, and there was no proof that the women had either signed or acknowledged the deed, it was properly refused by the court to be allowed to go to the jury. The deed does not come within the rule by which ancient instru-

Recitals Presumed to Be True.—The recital in an ancient instrument is presumed to be true, and can only be overthrown by positive proof.[11]

Admission in One Court as Binding on Other Courts.—That an ancient document has been admitted in one court is conclusive as to its admissibility in other courts.[12]

ANCIENT LIGHTS.—See the titles ADJOINING LANDOWNERS, ante, p. 117; EASEMENTS.

ANCILLARY ADMINISTRATION.—See the title EXECUTORS AND ADMINISTRATORS.

ANCILLARY JURISDICTION.—See the title COURTS.

AND.—See OR.

AND ALSO.—See note 1.

ANGUISH.—As an element of damages, see the titles DAMAGES; TELEGRAPHS AND TELEPHONES.

ANHYDRID.—An anhydrid is an oxide capable of forming an acid by uniting with the elements of water.[2]

ments are admitted. It only includes such documents as are valid upon their face. Meegan *v.* Boyle, 19 How. 130, 15 L. Ed. 577.

Where an ancient instrument is valid, though not acknowledged, such failure of acknowledgment does not effect its admissibility as an ancient document. Williams *v.* Conger, 125 U. S. 397, 418, 31 L. Ed. 778.

When alteration will not affect admissibility.—In Coulson *v.* Walton, 9 Pet. 62, 9 L. Ed. 51, it was held, that, where, in an ancient bond, the words North Carolina, or some other words, have been erased, and the word Virginia in lieu thereof has been inserted, and the signature seems to have been scratched out and written again, such alterations will not affect the admissibility of the bond, where it appears that no one having an interest in the bond could have had a motive to alter it. See the title ALTERATION OF INSTRUMENTS, ante, p. 261.

11. Williams *v.* Conger, 125 U. S. 397, 31 L. Ed. 778.

12. A state court's decision as to admissibility of an ancient document is binding in the United States court. Williams *v.* Conger, 125 U. S. 397, 31 L. Ed. 778.

1. **And also.**—Section 8 of act of February 9, 1893, establishing the court of appeals of the District of Columbia, provides for review of cases in the supreme court of the United States where the matter in dispute exceeds five thousand dollars; "**and also** in cases without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of, an authority exercised under, the United States." In Chapman *v.* United States, 164 U. S. 436, 41 L. Ed. 504, it was contended that the latter clause of this section conferred jurisdiction upon the supreme court of the United States to review a judgment of the court of appeals of the District of Columbia in criminal cases, but the court said: "It is contended that the words **and also** as used in the section under consideration are words 'of legal art,' of 'almost immemorially precise and technical meaning,' and import, not a restriction of matter previously stated, but a transition from what had been previously declared to a new and independent subject intended to stand by itself. We do not care to go into the struggle between the courts of King's Bench and common pleas on the question of the jurisdiction of the former over civil actions, which led to the curious device of the ac etiam, more particularly to avoid the effect of 13 Car. II, 2 Stat., c. 2. It was invented in order to couple with a cause of action over which the court of King's Bench had jurisdiction, another cause of action, over which, without being joined with the first, the court would not have had jurisdiction. 2 Sellon's Pract. Appendix, 625, 630; Burges on Insolvency, 135, 149. We are unable to conclude that congress, which might easily have conferred jurisdiction in plain and explicit language, resorted to this ancient contrivance to effect it."

2. **Anhydrid.**—Lutz *v.* Magone, 153 U. S. 107, 38 L. Ed. 653. See ACID, ante, p. 75.

An anhydrous acid is an acid free from water. Lutz *v.* Magone, 153 U. S. 107, 38 L. Ed. 653. See, generally, the title REVENUE LAWS.

ANIMALS.

BY CLAUDE R. YARDLEY.

I. **Definitions**, 317.

II. **Animals as Property**, 317.
- A. Wild Animals, 317.
- B. Domestic Animals, 317.
  - 1. Ordinary Domestic Animals, 317.
  - 2. Dogs, 317.
    - a. Distinguished from Other Animals, 317.
    - b. Statutory Regulations as to the Keeping of Dogs, 318.
- C. Ownership of Increase of Animals, 319.

III. **Injuries by Animals**, 319.
- A. Keeping as a Basis of Liability, 319.
  - 1. Wild or Partially Tamed Animals, 319.
  - 2. Domestic Animals, 319.
  - 3. Negligence as a Necessary Element of Recovery, 320.
  - 4. Actions for Damages, 320.
    - a. Evidence, 320.
    - b. Instructions, 320.
- B. From Animals Grazing upon Unenclosed Lands, 320.
  - 1. At Common Law, 320.
  - 2. Under State Regulations, 321.
  - 3. Upon Lands of the United States, 321.
  - 4. Cattle Straying from Public Land onto Unenclosed Private Land, 321.
  - 5. Driving Cattle upon Another's Land, 322.
  - 6. Overstocking of Unenclosed Land, 322.
- C. Injuries to Highways from Driving Herds of Animals Thereupon, 322.

IV. **Injuries to Animals**, 322.
- A. Maintenance of Fences and Cattle Guards by Railroads, 322.
  - 1. Power to Require Maintenance, 322.
  - 2. Railroad Passing Through Federal Military Reservation, 323.
- B. Power to Compel Defendant to Pay Plaintiff Attorney Fee in Action for Injuries to Aniamls, 323.

V. **Agistment of Cattle**, 324.

VI. **Regulations as to the Grazing of Sheep**, 324.

VII. **Health and Sanitary Regulations Regarding Animals**, 324.
- A. Power to Prescribe Sanitary Regulations, 324.
  - 1. Of the Federal Government, 324.
  - 2. Of State Government, 325.
    - a. In the Absence of Federal Statute, 325.
    - b. Liability of Carrier for State Penalties, 326.
    - c. Quarantine Regulations, 326.
    - d. Effect of Animal Industry Act on State Regulations, 327.
- B. Actions for Damages for Violation of Health Regulations, 327.
  - 1. Pleadings, 327.
  - 2. Evidence, 328.
  - 3. Question for Court, 328.

CROSS REFERENCES.

See the titles BAILMENTS; CONSTITUTIONAL LAW; DAMAGES; GAME AND GAME LAWS; TROVER AND CONVERSION.

As to statutory enactments requiring transportation companies to provide food, rest and water for cattle which they are transporting, see the title CARRIERS.

I. Definitions.

Animate Being.—An animal is any animate being which is not human, endowed with the power of voluntary motion.[1]

Does Not Include Birds.—The term animals has been held to apply only to quadrupeds and not to include birds and fowls.[2]

II. Animals as Property.

A. Wild Animals.—The ownership of wild animals as long as they are in a wild state, feræ naturæ, as far as they are capable of ownership, is in the state, not as a proprietor but in its sovereign capacity as the representative and for the benefit of all people in common, the law being that all animals which can be taken upon the earth or in the air or in the sea—that is to say, wild animals—belong to those who take them.[3]

B. Domestic Animals—1. ORDINARY DOMESTIC ANIMALS.—In ordinary domestic animals, such as horses, cattle, sheep and other animals of a similar character, the owner has a perfect, absolute and complete right of property.[4]

2. DOGS—a. *Distinguished from Other Animals.*—**At Common Law.**—By the common law as well as by the law of most, if not all, the states, dogs are so far recognized as property that an action will lie for their conversion or injury. But in absence of a statute they are not regarded as a subject of larceny. The property in dogs therefore, is not of the same character as that of ordinary domestic animals, in which the right of property is absolute, but it is of an imperfect or qualified nature.[5]

1. **Being endowed with power of voluntary locomotion.**—Bouv. L. Dict., vol. 1, p. 142; Reiche *v.* Smythe, 13 Wall. 162, 20 L. Ed. 566.

2. **Applies only to quadrupeds.**—Reiche *v.* Smythe, 13 Wall. 162, 165, 20 L. Ed. 566.

Where an act of 1861 exempted from duty "animals of all kinds; birds, singing and other, and land and water fowls," and a later act levied a duty of 20 per cent. "on all horses, mules, cattle, sheep, hogs, and other live animals," held, that birds were not included in the terms "other live animals." Reiche *v.* Smythe, 13 Wall. 162, 20 L. Ed. 566. See the title REVENUE LAWS.

3. **Qualified property.**—Geer *v.* Connecticut, 161 U. S. 519, 529, 40 L. Ed. 793.

A man may have a qualified property in animals feræ naturæ propter privilegium—that is, he may have the privilege of hunting, taking and killing them in exclusion of other persons. A man's property in these animals, usually called game, is transient and continues only so long as they continue in the territory under his control, and while he may restrain a stranger from taking them in such territory, the instant they depart into the territory of another, his qualified property ceases. A man can have no absolute property in wild animals not in confinement such as he may have in earth and land, since these animals are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownership which only lasts as long as they are in active use and occupation but not longer. Greer *v.* Connecticut, 161 U. S. 519, 526, 40 L. Ed. 793, citing and quoting 2 Black. Com. 394.

4. **Absolute property in ordinary domestic animals.**—Sentell *v.* New Orleans, etc., R. Co., 166 U. S. 698, 701, 41 L. Ed. 1169.

5. **Different from ordinary domestic animals.**—Sentell *v.* New Orleans, etc., R. Co., 166 U. S. 698, 701, 41 L. Ed. 1169.

Nature of property.—"The very fact that they are without the protection of the criminal laws shows that property in dogs is of an imperfect or qualified nature, and that they stand, as it were, between animals feræ naturæ in which, until killed or subdued, there is no property, and domestic animals, in which the right of property is perfect and complete. They are not considered as being upon the same plane with horses, cattle, sheep and other domesticated animals, but rather in the category of cats, monkeys, parrots, singing birds and similar animals kept for pleasure, curiosity or caprice. They have no intrinsic value, by which we understand a value common to all dogs as such, and independent of the particular breed or individual. Unlike other domestic animals, they are useful neither as beasts of burden, for draught (except to a limited extent), nor

b. *Statutory Regulations as to the Keeping of Dogs.*—Because of the imperfect character of the property in dogs, their general nature and the fact that on account of their running at large, and their natural instincts, they are liable to become a nuisance and a menace to persons and property, the state may, under the police power, prescribe suitable regulations in regard to the keeping of dogs.[6]

Taxation.—Thus, the owner may be compelled to keep a collar on his dog and to list him for taxation, and it may be provided that if these regulations are not observed, the dogs may be killed either by private persons or by the public authorities.[7]

Killing of Unlisted Dog.—It may also be provided that where a dog is not listed for taxation, there shall be no recovery in case he is killed either by the negligent or wanton act of another, and where listed, the amount of his valuation on the taxation book shall be the amount of recovery.[8]

for food. They are peculiar in the fact that they differ among themselves more widely than any other class of animals, and can hardly be said to have a characteristic common to the entire race. While the higher breeds rank among the noblest representatives of the animal kingdom, and are justly esteemed for their intelligence, sagacity, fidelity, watchfulness, affection, and, above all, for their natural companionship with man, others are afflicted with such serious infirmities of temper as to be little better than a public nuisance. All are more or less subject to attacks of hydrophobic madness." Sentell *v.* New Orleans, etc., R. Co., 166 U. S. 698, 701, 41 L. Ed. 1169.

6. Statutory regulations.—Sentell *v.* New Orleans, etc., R. Co., 166 U. S. 698, 702, 41 L. Ed. 1169.

"As it is practically impossible by statute to distinguish between the different breeds, or between the valuable and worthless, such legislation as has been enacted upon the subject, though nominally including the whole canine race, is really directed against the latter class, and is based upon the theory that the owner of a really valuable dog will feel sufficient interest in him to comply with any reasonable regulation designed to distinguish him from the common herd. Acting upon the principle that there is but a qualified property in them, and that, while private interests require that the valuable ones shall be protected, public interests demand that the worthless shall be exterminated, they have, from time immemorial, been considered as holding their lives at the will of the legislature, and properly falling within the police powers of the several states. Laws for the protection of domestic animals are regarded as having but a limited application to dogs and cats; and, regardless of statute, a ferocious dog is looked upon as hostis humani generis, and as having no right to his life which man is bound to respect. Putnam *v.* Payne, 13 Johns. 312; Hickley *v.* Emerson, 4 Cow. 351; Brown *v.* Carpenter, 26 Vermont, 638; Woolf *v.* Chalker, 31 Connecticut, 121; Brent *v.* Kimball, 60 Illinois, 211; Maxwell *v.* Palmerton, 21 Wend. 407." Sentell *v.* New Orleans, etc., R. Co., 166 U. S. 698, 701, 41 L. Ed. 1169.

7. Requirement that dogs be listed for taxation.—Sentell *v.* New Orleans, etc., R. Co., 166 U. S. 698, 702, 41 L. Ed. 1169.

"Although dogs are ordinarily harmless, they preserve some of their hereditary wolfish instincts, which occasionally break forth in the destruction of sheep and other helpless animals. Others, too small to attack these animals, are simply vicious, noisy and pestilent. As their depredations are often committed at night, it is usually impossible to identify the dog or to fix the liability upon the owner, who, moreover, is likely to be pecuniarily irresponsible. In short, the damages are usually such as are beyond the reach of judicial process, and legislation of a drastic nature is necessary to protect persons and property from destruction and annoyance. Such legislation is clearly within the police power of the state. It ordinarily takes the form of a license tax, and the identification of the dog by a collar and tag, upon which the name of the owner is sometimes required to be engraved, but other remedies are not uncommon." Sentell *v.* New Orleans, etc., R. Co., 166 U. S. 698, 705, 41 L. Ed. 1169.

"A statute providing that no person should be liable for killing a dog found without a collar with the name of the owner engraved thereon, was held to justify the killing, although the defendant had actual notice of the ownership of the dog found without such collar. Plaintiff claimed that the act was unconstitutional, but the court held that it was not an act to take private property for public use, or to deprive parties of their property in dogs; but merely to regulate the use and keeping of such property in a manner which seemed to the legislature reasonable and expedient. 'It is a mere police regulation, such as we think the legislature might constitutionally establish.'" Sentell *v.* New Orleans, etc., R. Co., 166 U. S. 698, 702, 41 L. Ed. 1169.

8. Sentell *v.* New Orleans, etc., R. Co., 166 U. S. 698, 702, 41 L. Ed. 1169.

A statute of Louisiana, which provided

C. Ownership of Increase of Animals.—The increase or offspring of all domestic animals belong to the owner of the mother.[9]

III. Injuries by Animals.

A. Keeping as a Basis of Liability—1. WILD OR PARTIALLY TAMED ANIMALS.—Animals feræ naturæ, as a class, are known to be mischievous; and the rule is well settled, that whoever undertakes to keep such an animal in places of public resort is or may be liable for the injuries inflicted by it on a party who is not guilty of negligence, and is otherwise without fault.[10] And while certain animals feræ naturæ may doubtless be domesticated to such an extent as to be classed, in respect to the liability of the owner for injuries they commit, with the class known as tame or domestic animals, yet inasmuch as they are liable to relapse into their wild habits and to become mischievous, the rule is that if they do so, and the owner becomes notified of their vicious habit, they are included in the same rules as if they had never been domesticated.[11]

2. DOMESTIC ANIMALS.—Domestic animals, such as oxen or horses, may injure the person or property of another, but courts of justice invariably hold that

that "no dog should be entitled to the protection of the law unless the same shall have been placed upon the assessment roll, and that in civil action for the killing of or for injuries done to dogs the owner cannot recover beyond the amount of the value of such dog or dogs as fixed by himself in the last assessment preceding the killing or injuries complained of," has been held to be a valid exercise of the police power of the state. Sentell *v.* New Orleans, etc., R. Co., 166 U. S. 698, 41 L. Ed. 1169.

9. Belong to owner of mother.—Fowler *v.* Merrill, 11 How. 375, 13 L. Ed. 736; Arkansas Cattle Co. *v.* Mann, 130 U. S. 69, 78, 32 L. Ed. 854.

According to the maxim partus sequitur ventrem, the brood of all tame and domestic animals belongs to the owner of the dam or mother. 2 Bl. Com. 390. Arkansas Cattle Co. *v.* Mann, 130 U. S. 69, 78, 32 L. Ed. 854.

In Northwestern Bank *v.* Freeman, 171 U. S. 620, 630, 43 L. Ed. 307, it is said: "Under the rule that the incident follows the principle, a mortgage of domestic animals covers the increase of such animals, though it is silent as to such increase. This court said in Arkansas Cattle Co. *v.* Mann, 130 U. S. 69, 32 L. Ed. 854, by Mr. Justice Harlan, 'according to the maxim partus sequitur ventrem, the brood of all tame and domestic animals belong to the owner of the dam or mother.' 2 Bl. Com. 390. See, also, Pyeatt *v.* Powell, decided by the circuit court of Appeals for the Eighth Circuit, 10 U. S. App. 200, and cases cited."

10. Liability for keeping wild animals.—Spring Co. *v.* Edgar, 99 U. S. 645, 651, 25 L. Ed. 487.

This was an action against the proprietor of a park, to recover for injuries sustained by A. from an attack by a male deer which, with other deer, was permitted to roam in the park, and which the declaration charged that the defendant knew to be dangerous. At the trial, evidence was introduced to show that the park was open and accessible to visitors; that A. was in the habit of visiting it, and when lawfully there was attacked by the deer and severely injured; that she had often seen deer—about nine in number, three of whom were bucks, the oldest four years old—running about on the lawn, and persons playing with them, and that she had there seen the sign, "Beware of the buck;" that the park contained about eleven acres; that notices were put up in the park a year or two before, cautioning visitors not to tease or worry the deer; that she had no knowledge or belief, prior to the attack upon her, that the deer were dangerous, if not disturbed. Experts testified that in their opinion the male deer, at the season when the injury was sustained by A., was a dangerous animal. The bill of exceptions does not show that all the evidence for A. is set forth in it, or that the defendant introduced any. It was held, that a motion to dismiss the action, nonsuit the plaintiff, and to direct the jury to return a verdict for the defendant, was properly denied. Spring Co. *v.* Edgar, 99 U. S. 645, 25 L. Ed. 487.

11. Partially tamed animals.—Spring Co. *v.* Edgar, 99 U. S. 645, 653, 25 L. Ed. 487.

"Owners of wild beasts or beasts that are in their nature vicious are liable under all or most all circumstances for injuries done by them; and in actions for injuries by such beasts it is not necessary to allege that the owner knew them to be mischievous, for he is presumed to have such knowledge, from which it follows that he is guilty of negligence in permitting the same to be at large. Though the owner have no particular notice that the animal ever did any such mischief before, yet if the animal be of the class that is feræ naturæ the owner is liable to an action of damage if it get loose and do harm." Spring Co. *v.* Edgar, 99 U. S. 645, 654, 25 L. Ed. 487.

if they are rightfully in the place where the injury is inflicted, the owner of the animal is not liable for such an injury, unless he knew that the animal was accustomed to be vicious.[12]

3. Negligence as a Necessary Element of Recovery.—In an action to recover damages for injuries received from animals which were kept in a state of captivity, it is not necessary either to allege or prove that there was negligence on the part of the owner or keeper, but it will be sufficient to warrant a recovery, if it be shown either that the animals were of an untame nature or, if of a tame nature, that the owner or keeper had knowledge of their mischievous or vicious propensities.[13]

4. Actions for Damages—a. *Evidence.*—Where injuries are received from domestic animals, evidence of actions similar to those which occasioned the injury are admissible as tending to show the disposition and habits of the animals.[14]

b. *Instructions.*—The court may instruct the jury in regard to the statements of the plaintiff as to the injuries they have received from the captive animals, and may also instruct them as to the amount of damages to be awarded in case they find for plaintiff; and where the opposite party makes no objection or asks no modification of the request, it will be held correct. The court may also instruct the jury as to the testimony of experts and the determination of the weight of such testimony.[15]

B. From Animals Grazing upon Unenclosed Lands—1. At Common Law.—The rule of the common law was that every man must restrain his stock within his own grounds, and if he did not do so and they grazed upon the unenclosed grounds of his neighbor, it was a trespass for which their owner was responsible.[16]

12. Injuries from domestic animals.—Spring Co. *v.* Edgar, 99 U. S. 645, 654, 25 L. Ed. 487.

13. Necessity for negligence.—Spring Co. *v.* Edgar, 99 U. S. 645, 653, 25 L. Ed. 487.

Owners are liable for the hurt done by the animal even without notice of the propensity, if the animal is naturally mischievous, but if it is of a tame nature, there must be notice of the vicious habit. Spring Co. *v.* Edgar, 99 U. S. 645, 654, 25 L. Ed. 487.

Whoever keeps an animal accustomed to attack or injure mankind, with the knowledge of its dangerous propensities, says Addison, is prima facie liable to an action for damages at the suit of any person attacked or injured by the animal, without proof of any negligence or default in the securing or taking care of the animal, the gist of the action being the keeping of the animal after knowledge of its mischievous disposition. Spring Co. *v.* Edgar, 99 U. S. 645, 656, 25 L. Ed. 487.

14. Previous action of animals.—Kennon *v.* Gilmer, 131 U. S. 22, 33 L. Ed. 110.

The plaintiff, who was a passenger on a stage coach, was injured because of the action of the horses attached to plaintiff's coach. At the trial plaintiff sought to introduce evidence of similar conduct of the horses subsequent to the time of the injury. It was held, that evidence of subsequent misbehavior of the horse might properly be admitted, in connection with evidence of his misbehavior at and before the time of the accident, as tending to prove a vicious disposition and fixed habit, and to support the plaintiff's allegation that the horse was not safe and well broken. The length of time afterwards to which such evidence may extend is largely within the discretion of the judge presiding at the trial. Kennon *v.* Gilmer, 131 U. S. 22, 25, 33 L. Ed. 110.

15. Instructions as to evidence.—Spring Co. *v.* Edgar, 99 U. S. 645, 25 L. Ed. 487.

In an action for damages to recover injuries received by a woman from deer which were kept in a public park, the jury were instructed by the court not to believe any extravagant statement of the injuries received by the plaintiff, and that, when they had made up their minds as to the amount really sustained, they should not be nice in the award of compensation, but that it should be liberal. The defendant did not request the instruction to be qualified or explained, or a different one given. It was held, that the charge in that respect furnished no ground for reversing the judgment. Spring Co. *v.* Edgar, 99 U. S. 645, 25 L. Ed. 487.

In an action for damages to recover injuries received by a woman from deer which were kept in a public park, the court called attention to the testimony of the experts, and instructed the jury that it was for them to determine its weight. It was held, that the instruction was proper. Spring Co. *v.* Edgar, 99 U. S. 645, 25 L. Ed. 487.

16. Owner's duty at common law.—Buford *v.* Houtz, 133 U. S. 320, 328, 33

2. Under State Regulations.—The rule of the common law has never been of universal application in the United States, and the subject has been one of statutory regulation in many of the states. In these states as a rule, the landowner was required to fence his land, and unless he did so, he could not recover from an adjoining owner whose cattle grazed upon his land.[17]

3. Upon Lands of the United States.—There is an implied license growing out of the custom of nearly a hundred years, that the public lands of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who seek to use them where they are left open and unenclosed, and no act of the government forbids this. The government of the United States in all its branches, has known of this use and never forbidden it nor taken any steps to arrest it.[18]

4. Cattle Straying from Public Land onto Unenclosed Private Land. —It has also become the practice of persons owning tracts of land adjacent to the public domain, to graze their cattle partially upon their own land and partially upon the land belonging to the United States, and where this is done, one landowner cannot prevent another landowner, who has been grazing his animals partially upon his own land and partially upon the public domain, from continuing to allow his animals to graze in this manner because of the fact that they may stray upon the unenclosed land, and by so doing cause him great injury.[19]

L. Ed. 618; Lazarus *v.* Phelps, 152 U. S. 81, 84, 38 L. Ed. 363; Minneapolis, etc., R. Co. *v.* Beckwith, 129 U. S. 26, 34, 32 L. Ed. 585.

17. Effect of statutory regulations on common-law rule.—Buford *v.* Houtz, 133 U. S. 320, 328, 33 L. Ed. 618; Lazarus *v.* Phelps, 152 U. S. 81, 38 L. Ed. 363.

Nearly all the states in early days had what was called the fence law, a law by which a kind of fence, sufficient in a general way to protect the cultivated ground from cattle and other domestic animals which were permitted to run at large, was prescribed. The character of this fence in most of the statutes was laid down with great particularity, and unless it was in strict conformity to the statute, there was no liability on the part of the owner of cattle if they invaded the enclosure of a party and inflicted injury on him. If the owner of the enclosed ground had his fence constructed in accordance with the requirements of the statute, the law presumed then that an animal which invaded this encolsure was what was called a breachy animal, was not such animal as should be permitted to go at large, and the owner was liable for the damages done by him. Otherwise the right of the owner of all domestic animals, to permit them to run at large, without responsibility for their getting upon the lands of his neighbor, was conceded. The territory of Utah has now and always had a similar statute. Section 2234 of the compiled laws of Utah 1888, vol. 1, p. 789. Buford *v.* Houtz, 133 U. S. 320, 328, 33 L. Ed. 618.

Common-law rule never prevailed.—In Buford *v.* Houtz, 133 U. S. 320, 328, 33 L. Ed. 618, it is said: "It has never been understood that in those regions and in this country, in the progress of its settlement, the principle prevailed that a man was bound to keep his cattle confined within his own grounds, or else would be liable for their trespasses upon the unenclosed grounds of his neighbors. Such a principle was ill-adapted to the nature and condition of the country at that time. Owing to the scarcity of means for enclosing lands, and the great value of the use of the public domain for pasturage, it was never adopted or recognized as the law of the country, except as it might refer to animals known to be dangerous, and permitted to go where their dangerous character might produce evil results. Indeed, it is only within a few years past, as the country has been settled, and become highly cultivated, all the land nearly being so used by its owners or by their tenants, that the question of compelling the owner of cattle to keep them confined has been the subject of agitation."

18. License implied from continuous practice.—Buford *v.* Houtz, 133 U. S. 320, 326, 33 L. Ed. 618.

19. Buford *v.* Houtz, 133 U. S. 320, 326, 33 L. Ed. 618.

The plaintiffs who were owners of a large number of cattle which were being pastured on the public lands of the United States in the territory of Utah, brought an action to enjoin defendants who were owners of large number of sheep, from driving the sheep over or pasturing them upon the same land which the plaintiffs were using as a pasturage for their cattle. They alleged that the grazing of sheep upon land did it a permanent injury, that it drove cattle from such land and greatly damaged it and rendered it valueless for a long time after such sheep had been grazed thereupon. It was held, that the defendants had an equal right with the plaintiffs to pasture their animals

5. Driving Cattle upon Another's Land.—But if a cattle owner, knowing that the proprietor of certain lands had been in the habit of leasing his land for pasture, should deliberately drive his cattle upon such land in order that they might feed there, he will be bound to pay a reasonable rental.[20]

6. Overstocking of Unenclosed Land.—The owner of animals is also liable if he leases a section of land, adjoining the unenclosed section of another, and stocks his own section with a greater number of animals than it can properly support so that in order to obtain the proper amount of grass they would be forced to stray over on the adjoining section.[21]

C. Injuries to Highways from Driving Herds of Animals Thereupon.—A state has the power to provide for the recovery of damages for injuries to highways caused by the driving of herds of animals over them.[22]

IV. Injuries to Animals.

A. Maintenance of Fences and Cattle Guards by Railroads—1. Power to Require Maintenance.—A state may, in exercise of its police power, require railroads passing through the state to erect and maintain fences and cattle guards at the sides of their roads, and may provide that where there is a failure to do so, and the animals of any person are injured after straying upon the track of any railroad company, the owner may recover a sum in addition to the amount of damages actually sustained by the loss of the animals.[23]

upon the uninclosed land belonging to the United States, that the rights of neither one were subordinate to the other and, therefore, an injunction should be refused. Buford *v.* Houtz, 133 U. S. 320, 325, 33 L. Ed. 618.

20. Lazarus *v.* Phelps, 152 U. S. 81, 85, 38 L. Ed. 363.

"If * * * a cattle owner, knowing that the proprietor of certain lands, has been in the habit of leasing his lands for pasturage, should deliberately drive his cattle upon such lands in order that they might feed there, it would scarcely be claimed that he would not be bound to pay a reasonable rental. So, if he lease a section of land, adjoining an unenclosed section of another, and stock his own section with a greater number of cattle than it could properly support, so that, in order to obtain the proper amount of grass, they would be forced to stray over upon the adjoining section, the duty to make compensation would be as plain as though the cattle had been driven there in the first instance. The ordinary rule that a man is bound to contemplate the natural and probable consequences of his own act would apply in such a case." Lazarus *v.* Phelps, 152 U. S. 81, 85, 38 L. Ed. 363.

21. Lazarus *v.* Phelps, 152 U. S. 81, 38 L. Ed. 363.

22. Injuries to highways from herds of cattle.—Jones *v.* Brim, 165 U. S. 180, 41 L. Ed. 677.

A statute of Utah reads as follows: "Section 2087. Any person who drives a herd of horses, mules, asses, cattle, sheep, goats or swine over a public highway, where such highway is constructed on a hillside, shall be liable for all damage done by such animals in destroying the banks or rolling rocks into or upon such highway." It has been held, that this statute does not conflict with the fourteenth amendment of the constitution of the United States. The statute being general in its application embracing all persons under substantially like circumstances and not being an arbitrary exercise of power, does not deny to the defendant the equal protection of the law. Jones *v.* Brim, 165 U. S. 180, 41 L. Ed. 677.

23. Railroad may be compelled to maintain fences and guards.—Missouri, Pac. R. Co. *v.* Humes, 115 U. S. 512, 29 L. Ed. 463; Minneapolis, etc., R. Co. *v.* Beckwith, 129 U. S. 26, 32 L. Ed. 585; Chicago, etc., R. Co. *v.* McGlinn, 114 U. S. 542, 29 L. Ed. 270.

A state statute provided that all railroad corporations owning or operating roads in that state should erect and maintain lawful fences on the sides of the road where the same passed through, along or adjoining, enclosed or cultivated fields or uninclosed lands and further provided that the corporation should be liable in double the amount of all damages which should be done to any animals escaping from or coming upon said land, fields or enclosures occasioned by the failure to construct or maintain such fences. It was held, that this statute was not in conflict with § 1, art. 14, of the constitution of the United States, as the statute only fixed the amount of damages in proportion to injuries inflicted and it did not deprive the defendant of due process of law, as they were afforded every facility for presenting their defenses. It was further held, that the statute did not deny to any persons the equal protection of the law as the statute made no discrimination against any particular company, all railroad companies being subject to

2. Railroad Passing through Federal Military Reservation.—It has been held, that where laws requiring railroads to maintain fences and cattle guards were in force in a state, and subsequent to their enactments, a portion of land in said state was ceded to and became the property of the United States government, which was used for military purposes, that the laws remained in force as to the land ceded and that railroad companies were under the same obligations to fence that portion of their track which passed through the military reservation, as they were to fence the portion passing through the lands of private persons.[24]

B. Power to Compel Defendant to Pay Plaintiff Attorney Fee in Action for Injuries to Animals.—In an action to recover the value of animals killed or injured by a railroad company, the company cannot be compelled to pay the attorney's fee of the opposite party, where a recovery is had against the railroad company in the first instance, and such suit is appealed by the company in the event that the final judgment is against the railroad company, where no such burden is imposed upon the opposite party or any other class of litigants.[25]

the same requirements. Minneapolis, etc., R. Co. *v.* Beckwith, 125 U. S. 26, 32 L. Ed. 585; Missouri Pac. R. Co. *v.* Humes, 115 U. S. 512, 29 L. Ed. 463.

Provisions in a statute which allows the recovery by the owner of animals which are killed or injured on the tracks of a railroad company, by reason of the failure of the company to provide suitable fences or cattle guards, of an amount in excess on the actual damages received or giving to the jury a latitude in which they may assess damages, will not invalidate the statutes, the amount over and above actual compensation being given as a penalty for the failure to obey the law, and it is of no effect that the party injured, and not the state, is allowed the additional amount. Missouri, Pac. R. Co. *v.* Humes, 115 U. S. 512, 29 L. Ed. 463.

24. Chicago, etc., R. Co. *v.* McGlinn, 114 U. S. 542, 29 L. Ed. 270.

Railroad passing through military reservation.—An action was brought to recover the value of a cow belonging to plaintiff which was killed while upon the track of railroad corporation. The evidence showed that the cow had strayed upon the track at a point within the limits of a military reservation belonging to the United States, where the road was not enclosed by a fence. The statute of the state in which the military reservation was situated, required all railroad companies, whose roads were not enclosed by lawful fences, to pay to the owner of all animals killed or wounded by the engines or cars of the companies, the full value of the animals killed and damages to those wounded, regardless of negligence on the part of the railroad company. It was contended by the railroad company that the state law became inoperative within the reservation upon the cession to the United States of exclusive jurisdiction over it, but it was held, by the court, that this contention was incorrect upon the principle that where political jurisdiction and legislative power are transferred from one nation or sovereign to another, the municipal laws of the country, that is, laws intended for the protection of private rights, continue in force until abrogated or changed by the new government or sovereign, and where the United States had passed no act abrogating the state laws, it continued in force. Chicago, etc., R. Co. *v.* McGlinn, 114 U. S. 542, 29 L. Ed. 270.

25. Gulf, etc., R. Co. *v.* Ellis, 165 U. S. 150, 41 L. Ed. 666.

Liability for plaintiff's attorney's fee.—A statute of the state of Texas provided as follows: "Any person in this state having a valid bona fide claim for personal services rendered or labor done, or for damages, or for overcharges on freight, or claims for stock killed or injured by the train of any railway company, provided that such claim for stock killed or injured shall be presented to the agent of the company nearest to the point where such stock was killed or injured, against any railway corporation operating a railroad in this state, and the amount of such claim does not exceed $50, may present the same, verified by his affidavit, for payment to such corporation by filing it with any station agent of such corporation in any county where suit may be instituted for the same, and if, at the expiration of thirty days after such presentation, such claim has not been paid or satisfied, he may immediately institute suit thereon in the proper court; and if he shall finally establish his claim, and obtain judgment for the full amount thereof, as presented for payment to such corporation in such court, or any court to which the suit may have been appealed, he shall be entitled to recover the amount of such claim and all costs of suit, and in addition thereto all reasonable attorney's fees, provided he has an attorney employed in his case, not to exceed $10, to be assessed and awarded by the court or jury trying the issue." It was held, that this statute was unconsti-

V. Agistment of Cattle.

A contract which provided that an agister should provide for the feeding and caring for a number of cattle and that they should be brought up to a certain average weight, will not be enforced where it was shown that the agister received the cattle under a misunderstanding as to their true condition.[26]

VI. Regulations as to the Grazing of Sheep.

Because of the peculiar nature of sheep, and the fact that when pastured upon land, they will in the end drive all other stock off of the pasture for the reason that sheep eat the herbage closer to the ground than cattle or horses, and their hoofs being sharp, they devastate and kill growing vegetation wherever they graze for any considerable time, it has been held, that a state may pass laws classifying sheep, in regard to the places where they may graze, different from other animals and that a statute providing that no person or persons having charge of sheep shall permit them to graze upon the lands of any other person, or within two miles of the dwelling house of another person, is constitutional and valid.[27]

VII. Health and Sanitary Regulations Regarding Animals.

A. Power to Prescribe Sanitary Regulations—1. OF THE FEDERAL GOVERNMENT.—The transportation of live stock from state to state is a branch

tutional and void in that it violated the fourteenth amendment to the constitution of the United States as it compels the railroad company to pay the attorney's fee of their adversary where they are unsuccessful, while if successful it places no similar burden on the opposite party and thus works an unfair discrimination. Gulf, etc., R. Co. *v.* Ellis, 165 U. S. 150, 41 L. Ed. 666.

26. Contract for certain weight.—Teal *v.* Bilby, 123 U. S. 572, 31 L. Ed. 263.

The defendant who made a business of feeding cattle, entered into a contract with the plaintiff to feed, pasture and otherwise care for three thousand head of cattle. The agreement provided that the cattle should be fed on hay, straw and should be on stalk fields during the winter until the grass came, to be kept in inclosed pastures on grass until the middle of August, after which they were to be fed on corn until redelivered to the plaintiff. It was also agreed that the cattle should be so fed and cared for that they would increase in weight 450 pounds each, on an average. Evidence was introduced to show that because of the treatment which the cattle had previously received, they could not be wintered on hay, straw and stalk fields, and a new agreement was entered into between plaintiff and defendant by which it was agreed that the cattle should be fed upon corn during the winter. It was held, that the feeding of the cattle with a superior quality of food was sufficient evidence to show a modification of the contract, and in an action brought against the agister to recover damages for failure to comply with the terms of the contract, the plaintiff was not entitled to recover where the defendant received the cattle under a misunderstanding as to the condition they were in and to the treatment they had received previous to their reception by him. Teal *v.* Bilby, 123 U. S. 572, 31 L. Ed. 263.

27. Bacon *v.* Walker, 204 U. S. 311, 313, 51 L. Ed. 499; Bown *v.* Walling, 204 U. S. 320, 51 L. Ed. 503.

Sheep grazing.—A statute of the state of Idaho provided as follows: "Section 1210. It is not lawful for any person owning or having charge of sheep to herd the same, or permit them to be herded, on the land or possessory claims of other persons, or to herd the same or permit them to graze within two miles of the dwelling house of the owner or owners of said possessory claims." The next section provided for the recovery of damages by any person injured by the violation of the above section. This statute was attacked upon the ground that it was a violation of the fourteenth amendment of the United States, the plaintiff claiming that he had an equal right of pasturage with other citizens and that by imposing damages upon him for so doing, he was deprived of his property without due process of law, and also that a discrimination was arbitrarily and inclusively made by the statute between citizens engaged in grazing sheep on the public domain and citizens engaged in grazing other classes of stock. The court held this objection to be without weight, and the statute to be a valid and necessary police regulation, the aim of which was not to make a discrimination between the owners of sheep and that of other kinds of stock, but to secure an equality of enjoyment and use of the public domain to settlers and cattle owners with sheep owners. Bacon *v.* Walker, 204 U. S. 311, 313, 51 L. Ed. 499; Bown *v.* Walling, 204 U. S. 320, 51 L. Ed. 503.

of interstate commerce and any specified rule or regulation in respect of such transportation, which congress may lawfully prescribe or authorize and which may properly be deemed a regulation of such commerce, is paramount throughout the Union.[28] So that when the entire subject of the transportation of live stock from one state to another is taken under direct national supervision and a system devised by which diseased stock may be excluded from interstate commerce, all local or state regulations in respect of such matters and covering the same ground will cease to have any force, whether formally abrogated or not; and such rules and regulations as congress may lawfully prescribe or authorize will alone control.[29] But as congress can make no law or give authority to any officer of the United States government, to make any regulations concerning or affecting intrastate commerce, therefore an order issued by the secretary of agriculture establishing what was denominated as a quarantine line, which applied as well to the shipments of animals within the states, as to shipments between the states, was held void as an infringement on the powers of the states to regulate commerce within their borders. And the fact that a state has passed a law making a state quarantine line identical with that established by the secretary of agriculture, will not give validity to his order.[30] Such an order was also held to be in conflict with the act of February 2, 1903, known as the "Cattle Contagious Disease Act," as this act was only intended to apply to interstate shipments of animals over which congress had control.[31]

2. Of State Government—a. *In the Absence of Federal Statute.*—In the absence of congressional enactment on the subject, a state may pass laws to prevent animals suffering from contagious or infectious diseases from entering within it, and such laws will not be in conflict with the constitution of the United States.[32] But while a state may enact sanitary laws, and, for the purpose of self-protection, establish quarantine and reasonable inspection regulations, and prevent persons and animals having contagious or infectious diseases from entering the state, it cannot, beyond what is absolutely necessary for self-protection, interfere with the transportation into or through its territory.[33] A state may provide that whoever permits diseased cattle in his possession to run at large within

28. Reid *v.* Colorado, 187 U. S. 137, 146, 47 L. Ed. 108. See the title COMMERCE.

29. Reid *v.* Colorado, 187 U. S. 137, 146, 47 L. Ed. 108.

30. Illinois Central R. Co. *v.* McKendree, 203 U. S. 514, 51 L. Ed. 298.

31. Illinois Central R. Co. *v.* McKendree, 203 U. S. 514, 51 L. Ed. 298.

A state line may, in proper cases, be adopted by the federal authorities as a federal quarantine line, if limited in its effect to interstate commerce coming from points below that line. But where the federal authorities, by their order, make it apply to all shipments of animals whether interstate or intrastate commerce, and such order is in its terms apparently single and indivisible, it will not be limited by judicial construction to intrastate commerce alone, but will be declared a nullity as exceeding the federal authorities. Illinois Central R. Co. *v.* McKendree, 203 U. S. 514, 51 L. Ed. 298.

32. State enactments.—Railroad Co. *v.* Husen, 95 U. S. 465, 471, 24 L. Ed. 527; Kimmish *v.* Ball, 129 U. S. 217, 221, 32 L. Ed. 695; Grayson *v.* Lynch, 163 U. S. 468, 478, 41 L. Ed. 230; Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 614, 42 L. Ed. 878; Rasmussen *v.* Idaho, 181 U. S. 198, 45 L. Ed. 820; Reid *v.* Colorado, 187 U. S. 137, 47 L. Ed. 108; Smith *v.* St. Louis, etc., R. Co., 181 U. S. 248, 257, 45 L. Ed. 847. See, also, Austin *v.* Tennessee, 179 U. S. 343, 45 L. Ed. 224.

A state may, by its laws, exclude all animals infected with an infectious or contagious disease, until they are cured of the disease, or at least some mode of transporting them without danger of spreading it is devised. Kimmish *v.* Ball, 129 U. S. 217, 32 L. Ed. 695.

33. No application to interstate shipments.—Railroad Co. *v.* Husen, 95 U. S. 465, 24 L. Ed. 527; Rasmussen *v.* Idaho, 181 U. S. 198, 45 L. Ed. 820; Smith *v.* St. Louis, etc., R. Co., 181 U. S. 248, 254, 45 L. Ed. 847; Reid *v.* Colorado, 187 U. S. 137, 47 L. Ed. 108.

The statute of Missouri which prohibits driving or conveying any Texas, Mexican, or Indian cattle into the state, between the first day of March and the first day of November in each year, is in conflict with the clause of the constitution that ordains "Congress shall have power to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." Such a statute is more than a quarantine regulation, and not a legitimate exercise of the po-

its limits, shall be liable for any damages caused by the spread of the disease occasioned thereby.[34]

b. *Liability of Carrier for State Penalties.*—If a carrier takes diseased cattle into a state, it does so subject, for any injury thereby done to domestic cattle, to such liability as may arise under any law of the state that does not go beyond the necessities of the case and burden or prohibit interstate commerce.[35] A statute prescribing as a rule of civil conduct that a person or corporation shall not bring into the state cattle known, or which by proper diligence could be known, to be capable of communicating disease to domestic cattle, cannot be regarded as beyond the necessities of the case, nor as interfering with any right intended to be given or recognized by § 5258 of the Revised Statutes of the United States.[36]

c. *Quarantine Regulations.*—A state may also provide suitable and proper regulations for the inspection or quarantining of all animals capable of communicating, or liable to impart, disease to other animals within its borders. And such regulation will apply to animals imported into the state from other states, as well as to animals within its borders.[37] The prevention of disease being the

lice power of the state. Railroad Co. *v.* Husen, 95 U. S. 465, 24 L. Ed. 527.

That power cannot be exercised over the interstate transportation of subjects of commerce. Railroad Co. *v.* Husen, 95 U. S. 465, 24 L. Ed. 527.

34. Prohibiting diseased cattle from running at large.—Kimmish *v.* Ball, 129 U. S. 217, 32 L. Ed. 695; Smith *v.* St. Louis, etc., R. Co., 181 U. S. 248, 257, 45 L. Ed. 847.

35. Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 636, 42 L. Ed. 878; Reid *v.* Colorado, 187 U. S. 137, 47 L. Ed. 108.

Neither corporations nor individuals are entitled, by force alone of the constitution of the United States and without liability for injuries resulting therefrom to others, to bring into one state from another state cattle liable to impart or capable of communicating disease to domestic cattle. The contrary cannot be affirmed under any sound interpretation of the constitution. Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 628, 42 L. Ed. 878; Reid *v.* Colorado, 187 U. S. 137, 47 L. Ed. 108.

An act of congress that does no more than give authority to railroad companies to carry "freight and property" over their respective roads from one state to another state, will not authorize a railroad company to carry into a state cattle known, or which by due diligence may be known, to be in such a condition as to impart or communicate disease to the domestic cattle of such state. Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 638, 42 L. Ed. 878. See, also, Reid *v.* Colorado, 187 U. S. 137, 47 L. Ed. 108.

36. Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 617, 42 L. Ed. 878. See, also, Reid *v.* Colorado, 187 U. S. 137, 47 L. Ed. 108.

A statute of the state of Idaho providing that: "Whenever the governor of the state of Idaho has reason to believe that scab or any other infectious disease of sheep has become epidemic in certain localities in any other state or territory, or that conditions exist that render sheep likely to convey disease, he must thereupon, by proclamation, designate such localities and prohibit the importation from them of any sheep into the state, except under such restrictions as, after consultation with the state sheep inspector, he may deem proper," has been held constitutional and valid. Rasmussen *v.* Idaho, 181 U. S. 198, 45 L. Ed. 820.

37. Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 42 L. Ed. 878; Reid *v.* Colorado, 187 U. S. 137, 47 L. Ed. 108; Smith *v.* St. Louis, etc., R. Co., 181 U. S. 248, 45 L. Ed. 847.

Article 5043c of the Revised Statutes of Texas 1895, provides: "It shall be the duty of the commission provided for in article 5043a to protect the domestic animals of this state from all contagious or infectious diseases of a malignant character, whether said diseases exist in Texas or elsewhere; and for this purpose they are hereby authorized and empowered to establish, maintain and enforce such quarantine lines and sanitary rules and regulations as they may deem necessary. It shall also be the duty of said commission to co-operate with live stock quarantine commissioners and officers of other states and territories, and with the United States secretary of agriculture, in establishing such interstate quarantine lines, rules and regulations as shall best protect the live stock industry of this state against Texas or splenetic fever. It shall be the duty of said commission, upon receipt by them of reliable information of the existence among the domestic animals of the state of any malignant disease, to go at once to the place where any such disease is alleged to exist, and make a careful examination of the animals believed to be affected with any such disease, and ascertain, if possible, what, if any, disease exists among the live stock reported to be affected, and whether the same is contagious or infectious, and if said disease

essence of these quarantine laws, such laws apply not only to animals actually diseased, but also to those which have been exposed to the disease.[38]

d. *Effect of Animal Industry Act on State Regulations.*—State laws are not affected by the act of congress known as the "Animal Industry Act," as this act does not prohibit the states from passing laws for the exclusion, quarantining or inspection of diseased cattle, or those liable to transmit disease, but was intended for the very purpose for which the state laws are enacted. The state laws having for their object the accomplishment for their same purpose, are therefore in aid of the federal statutes.[39]

B. Actions for Damages for Violation of Health Regulations—1. PLEADINGS.—In an action to recover damages for injuries received by plaintiff's cattle, from defendant's failure to observe the necessary precautions to prevent the transmission of an infectious disease from defendant's cattle to that of plaintiff's, it is not necessary to allege in the pleadings the particular spot where the disease was transmitted, it being shown that the disease might have been transmitted at any one of several places.[40]

is found to be of a malignant, contagious or infectious character, they shall direct and enforce such quarantine lines and sanitary regulations as are necessary to prevent the spread of any such disease. And no domestic animals infected with disease or capable of communicating the same, shall be permitted to enter or leave the district, premises or grounds so quarantined, except by authority of the commissioners. The said commission shall also, from time to time, give and enfoce such directions and prescribe such rules and regulations as to separating, feeding and caring for such diseased and exposed animals as they shall deem necessary to prevent the animals so affected with such disease from coming in contact with other animals not so affected. And the said commissioners are hereby authorized and empowered to enter upon any grounds or premises to carry out the provisions of this act." It has been held, that this act was not in violation of the Federal constitution in the construction placed upon it by the highest court of Texas. Smith *v.* St. Louis, etc., R. Co., 181 U. S. 248, 249, 45 L. Ed. 847.

38. Animals exposed to disease.—Smith *v.* St. Louis, etc., R. Co., 181 U. S. 248, 255, 45 L. Ed. 847.

39. Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 42 L. Ed. 878.

"'While the states were invited to cooperate with the general government in the execution and enforcement of the act, whatever power they had to protect their domestic cattle against such diseases was left untouched and unimpaired by the act of congress.' Hence, it was decided in that case that the 'Animal Industry Act' did not stand in the way of the state of Kansas enacting a statute declaring that any person driving, shipping or transporting, or causing to be shipped, driven or transported into or through that state, any cattle liable or capable of communicating Texas or splenetic fever to domestic cattle, should be liable to the person injured thereby for all damages sustained by reason of the communication of said disease or fever, to be recovered in a civil action. We there held that the Kansas statute did nothing more than establish a rule of civil liability, in that state, affected no regulation of interstate commerce that congress had prescribed or authorized, and impaired no right secured by the national constitution." Reid *v.* Colorado, 187 U. S. 137, 148, 47 L. Ed. 108.

Section 4059 of the Iowa Code provided as follows: "If any person, now or hereafter, has in his possession in this state any such Texas cattle, he shall be liable for any damages which may accrue from allowing said cattle to run at large and thereby spreading the disease among other cattle known as the Texas fever, and shall be punished as prescribed in the preceding section." The Code prohibited the importation of Texas cattle which had not been wintered north of the southern boundary of the state of Missouri or Kansas, and prescribed a penalty consisting of fine and imprisonment for the violation of the statute. It was held, that the above statute did not violate the constitution of the United States in that it attempted to interfere or regulate interstate commerce, nor did it violate § 2, art. 4, of the constitution providing, that the citizens of each state shall be entitled to all privileges and immunities in the several states. Kimmish *v.* Ball, 129 U. S. 217, 32 L. Ed. 695. See, also, Reid *v.* Colorado, 187 U. S. 137, 47 L. Ed. 108, where a similar statute of Colorado was held constitutional.

40. Place of transmission.—Grayson *v.* Lynch, 163 U. S. 468, 478, 41 L. Ed. 230.

"There is also an allegation in the second count that the plaintiffs kept and grazed their cattle on certain lands of which they were possessed in the county of Sierra; that while so grazing upon said lands, defendants drove and pastured their cattle upon these lands, and there communicated to them the disease in question;

2. EVIDENCE.—In an action to recover damages for injuries received by plaintiff's cattle from defendant's failure to observe the proper precautions to prevent the transmission of an infectious disease, from defendant's cattle to that of plaintiff's, testimony of persons who are not experts is admissible to show that cattle with symptoms similiar to those of plaintiff's cattle were commonly reported to be afflicted with Texas fever.[41] Members of the staff of veterinary division of the department of agriculture may testify as experts concerning a disease known as Texas fever.[42]

3. QUESTION FOR COURT.—Persons having knowledge that their cattle were infected with the disease known as Texas fever are guilty of violation of a statute in delivering them to a railway company for transportation to another state or territory and the duty devolves upon them to use all necessary care to prevent their communicating a disease to healthy cattle. Whether or not this care has been exercised is a proper question for the court.[43]

ANIMUS MANENDI.—See the title DOMICILE.

ANNEXATION OF TERRITORY.—See the titles COUNTIES; MUNICIPAL CORPORATIONS.

while the finding of the court in that connection was, that it could not be determined 'whether Lynch Bros.' cattle contracted the disease on the road, or on their own range, or on Grayson's range, owing to the indiscriminate mixing of them with Grayson & Co.'s cattle on both ranges.' It certainly would not be claimed that the fact that plaintiffs could not prove whether the disease was communicated to their cattle while upon their own lands or elsewhere would prevent their recovery, if the disease were communicated either in one place or the other." Grayson *v.* Lynch, 163 U. S. 468, 478, 41 L. Ed. 230.

41. Nonexpert testimony.—Grayson *v.* Lynch, 163 U. S. 468, 478, 41 L. Ed. 230.

The court in Grayson *v.* Lynch, 163 U. S. 468, 479, 41 L. Ed. 230, spoke as follows: "Objections were taken to the testimony of three witnesses, * * * upon the ground that, not being experts, they were permitted to say that the disease with which plaintiff's cattle became affected was ordinarily called Texas fever. These witnesses, however, were not called as experts, nor did they purport to testify in that capacity. They testified fully as to the symptoms of the disease with which plaintiffs' cattle were afflicted, the resemblance of these symptoms to such as they had previously observed in other cattle, stating that the disease was generally called Texas fever. These were evidently matters of common observation. These witnesses did not claim to testify of their own knowledge as to the name of the disease, but merely as to the symptoms they observed, and that cattle so afflicted were ordinarily spoken of as having Texas fever."

42. Expert testimony.—Grayson *v.* Lynch, 163 U. S. 468, 478, 41 L. Ed. 230.

"If these gentlemen who were connected with the department of agriculture and made a specialty of investigating animal diseases, were not competent to speak upon the subject as experts, it would probably be impossible to obtain the testimony of witnesses who were. The fact that they spoke of certain districts of Texas as being infected with that disease was perfectly competent, though they may never have visited those districts in person. In the nature of their business, in the correspondence of the department and in the investigation of such diseases, they would naturally become much better acquainted with the districts where such diseases originated or were prevalent, than if they had been merely local physicians and testified as to what came within their personal observation. The knowledge thus gained cannot properly be spoken of as hearsay, since it was a part of their official duty to obtain such knowledge, and learn where such diseases originated or were prevalent, and how they became disseminated throughout the country." Grayson *v.* Lynch, 163 U. S. 468, 481, 41 L. Ed. 230.

43. Grayson *v.* Lynch, 163 U. S. 468, 484, 41 L. Ed. 230.

ANNUITY.

CROSS REFERENCES.

See the titles ADVANCEMENTS, ante, p. 198; CONTRACTS; DOWER; EXECUTORS AND ADMINISTRATORS; GROUND RENTS; TAXATION; TRUSTS AND TRUSTEES; WILLS.

Definition.—A yearly sum stipulated to be paid to another in fee, or for life or years, and chargeable only on the person of the grantor.[1]

Nature.—A contract for annuity is in the nature of an ordinary contract,[2] and may be sold or assigned like other property.[3]

Usury.—The purchase of an annuity, if a bona fide sale, has never been considered as usurious. Yet, if it is apparent the transaction is a mere device to avoid the statute of usury, it will be treated as a usurious contract.[4]

Property Chargeable.—The question as to what property is chargeable with an annuity is one of intention of the parties, to be derived from the instrument creating it.[5]

Priority of Lien.—The lien of an annuity created on a particular fund takes

1. 2 Bla. Com. 40; Co. Litt. 144b; Bouvier L. Dict; Black's L. Dict.

2. A contract to pay an annuity is like any other contract in that, upon breach of the contract, annuitant can elect to treat it as finally broken by the defendant, and can maintain an action, and recover all that he would have received in the future, as well as in the past. Pierce *v.* Tenn. R. Co., 173 U. S. 1, 16, 43 L. Ed. 591.

3. Loyd *v.* Scott, 4 Pet. 205, 224, 7 L. Ed. 833; Scott *v.* Loyd, 9 Pet. 418, 446, 9 L. Ed. 178.

4. Scott *v.* Loyd, 9 Pet. 418, 446, 9 L. Ed. 178.

The inequality of price will not, of itself, make the contract usurious. Loyd *v.* Scott, 4 Pet. 205, 224, 7 L. Ed. 833.

"The purchase of an annuity, or any other device used to cover an usurious transaction, will be unavailing. If the contract be infected with usury, it cannot be enforced. Where an annuity is raised, with the design of covering a loan, the lender will not be exempted by it from the penalties of usury. 3 Bos. & Pul. 159. On this point, there is no contradiction in the authorities." Lloyd *v.* Scott, 4 Pet. 205, 224, 7 L. Ed. 833.

A mere application for a loan does not convert a subsequent annuity, which yields a profit beyond legal interest, into a usurious contract; but an actual contract for the loan, if converted into an annuity, in order to avoid the law, is within the statute. Scott *v.* Lloyd, 9 Pet. 418, 449, 9 L. Ed. 178. See the title USURY.

5. In a will devising certain land, the testator provided for a life annuity of money, and other money legacies and "that all the legacies which I have given in money and not charged upon any particular fund is not demandable * * * for the term of two years after my decease." The devise of land was with a condition of forfeiture in case of nonpayment of the money legacies and life annuity. It was held, that as there was no other legacies given that answered the description of legacies in money charged on a particular fund, the life annuity was a charge on the land devised. Bank *v.* Hudson, 111 U. S. 66, 75, 28 L. Ed. 354.

D. devised all his estate to his executor, in trust to convert the same into money, and after payment of debts, to invest the surplus in the funds, or put out on interest. He then bequeathed £1500 to E., to be paid at the age of 21, subject to the subsequent provisos; and directed £1000 to be set apart, and the interest to be paid to S., during her life, and after bequeathing other pecuniary legacies, said, provided, "that in case the personal estate, and the produce arising from the real estate, which I shall die seized and possessed of, shall not be sufficient to answer the said annuities and legacies herein before by me bequeathed, then and in such case, I direct, that the said annuities and legacies so by me bequeathed, shall not abate in proportion; but the whole of such deficiency (if any there shall be) shall be deducted out of the £1500 bequeathed to E.," whom he also made his residuary legatee. The estate was more than sufficient at the time of the testator's death, to pay all debts, annuities and legacies, but afterwards, by the bankruptcy of the executor, became insufficient. Held, that E.'s legacy of £1500 should be liable to S.'s annuity. Silsby *v.* Young, 3 Cranch 249, 2 L. Ed. 429. See the title WILLS.

priority over subsequent liens created on the same fund.[6]

Duration of Lien.—A decree of a court of chancery establishing the arrears due on an annuity as a specific lien on land, by virtue of a will, does not create a lien, but merely gives effect to the lien which the will created; and therefore is not affected by a statute limiting the lien of a judgment or decree on the property of the defendant to a certain period.[7]

ANNULMENT OF MARRIAGE.—See the title MARRIAGE.

ANOTHER SUIT PENDING.—See the title ABATEMENT, REVIVAL AND SURVIVAL, ante, p. 15.

ANSWERS.—See the titles ADMIRALTY, ante, p. 119; EQUITY; PLEADING.

ANTENUPTIAL CONTRACTS AND SETTLEMENTS.—See the title MARRIAGE CONTRACTS AND SETTLEMENTS.

ANTICHRESIS.—Antichresis, under the Louisiana law, is a pledge where the security given consists in immovables.[1]

ANTICIPATE.—In patent law, that which would infringe if later, would anticipate if earlier.[2]

ANTI-TRUST LAWS.—See the title MONOPOLIES AND CORPORATE TRUSTS.

ANY.—While the word "any" is generally used in the sense of all or every,[3]

6. A lien of an annuity on land created by will takes priority over a mortgage to secure creditors, given subsequent to the will, and will be enforced against the purchaser at foreclosure sale. Bank *v.* Hudson, 111 U. S. 66, 77, 28 L. Ed. 354. See the title MORTGAGES AND DEEDS OF TRUST.

7. Bank *v.* Hudson, 111 U. S. 66, 76, 28 L. Ed. 354. See, also, the title JUDGMENTS AND DECREES.

1. Antichresis.—Livingston *v.* Story, 11 Pet. 351, 9 L. Ed. 746. See the titles MORTGAGES AND DEEDS OF TRUSTS; PLEDGE AND COLLATERAL SECURITY.

The creditor acquires by the contract of **antichresis** the right of reaping the fruits or other rewards of the immovables given to him in pledge; on condition of deducting, annually, their proceeds from the interest, if any be due to him, and afterwards from the principal of his debt; the creditor is bound, unless the contrary is agreed on, to pay the taxes, as well as the annual charges of the property given to him in pledge; he is likewise bound, under the penalty of damages, to provide for the keeping and necessary repairs of the pledged estate; and may lay out, from the revenues of the estate, sufficient for such expenses. The creditor does not become proprietor of the pledged immovables, by the failure of payment at the stated time; any clause to the contrary is null; and in that case, it is only lawful for him to sue his debtor before the court, in order to obtain a sentence against him, and to cause the objects which have been put into his hands to be seized and sold. The debtor cannot, before the full payment of his debt, claim the enjoyment of the immovables which he has given in pledge; but the creditor, who wishes to free himself from the obligations under the **antichresis,** may always, unless he has renounced this right, compel the debtor to retake the enjoyment of his immovables. Livingston *v.* Story, 11 Pet. 351, 352, 9 L. Ed. 746.

2. Anticipate.—Knapp *v.* Morss, 150 U. S. 221, 228, 37 L. Ed. 1059, citing Peters *v.* Active Mfg. Co., 129 U. S. 530, 32 L. Ed. 738; Thatcher Heating Co. *v.* Burtis, 121 U. S. 286, 30 L. Ed. 942; Grant *v.* Walter, 148 U. S. 547, 37 L. Ed. 552; Gordon *v.* Warder, 150 U. S. 47, 37 L. Ed. 992. See, generally, the title PATENTS.

3. Any in sense of all or every.—United States *v.* Palmer, 3 Wheat. 610, 631, 4 L. Ed. 471; Holy Trinity Church *v.* United States, 143 U. S. 447, 463, 36 L. Ed. 226; dissenting opinion of Swayne, J., in Slaughter House Cases, 16 Wall. 36, 128, 21 L. Ed. 394. See, also, Montclair *v.* Ramsdell, 107 U. S. 147, 152, 27 L. Ed. 431.

Any in its comprehensive sense.—The words "**any** car" as used in act of March 21, 1893, making it unlawful for a railroad engaged in interstate commerce to use or haul **any** car not equipped with automatic couplers means all kinds of cars running on the rails, and includes locomotives. Johnson *v.* Southern Pac. R. Co., 196 U. S. 1, 49 L. Ed. 363. See, generally, the titles COMMERCE; RAILROADS.

"Not to impose **any** further tax or burden," when used in reference to some tax already imposed, means no other tax besides that to which reference is made. Those words, so used, cannot be limited by a refinement upon the etymology of the word **any,** out of or beyond its meaning in common discourse, to **any** like; and the words "**any** further tax," used with relation to some other tax, will, by common consent, as it always has been, be intended to mean **any** additional tax besides that referred to, and not **any** further like

this meaning may be restrained by the context or subject matter of the writing in which it is employed.[4]

tax. Gordon *v.* The Appeal Tax Court, 3 How. 133, 147, 11 L. Ed. 529.

"The words 'any captain or mariner of any ship or other vessel,' comprehend all captains and mariners, as entirely as the words 'any person or persons,' comprehend the whole human race." United States *v.* Palmer, 3 Wheat. 610, 631, 4 L. Ed. 471.

"The words 'any person or persons,' are broad enough to comprehend every human being." United States *v.* Palmer, 3 Wheat. 610, 631, 4 L. Ed. 471; Holy Trinity Church *v.* United States, 143 U. S. 447, 462, 36 L. Ed. 226.

Any railroad.—A state statute authorized counties to subscribe to the stock of "any railroad," provided the subscription did not exceed a certain amount. It was held, that the words "any railroad" were used distributively, and that the proviso had reference to the subscription to "any railroad;" that is, any one railroad taken separately, and that a county might subscribe to more than one railroad, provided the subscription did not exceed the amount designated in the statute. County of Chicot *v.* Lewis, 103 U. S. 164, 167, 26 L. Ed. 495.

Any court.—The act of congress of July 13, 1866, provided that "no suit shall be maintained in any court for the recovery of any tax alleged to have been erroneously or illegally assessed or collected, until an appeal shall have been duly made to the commissioner of internal revenue." In Collector *v.* Hubbard, 12 Wall. 1, 15, 20 L. Ed. 272, the court, in construing this section, said: "Unless the meaning of the section can be restrained by construction, it is quite clear that it includes the state courts as well as the federal courts, as the language is that no suit shall be maintained in any court to recover any tax alleged to have been erroneously or illegally assessed or collected, and there is not a word in the section tending to show that the words 'any court' are not used in their ordinary sense. Unquestionably if the provision is a good bar in the federal courts, it is a good bar in all courts acting under the same act of congress, and furnishes the rule of decision for all.

"Any criminal case," as used in the 5th amendment, providing that no person shall be compelled in any criminal case to be a witness against himself, means any criminal case against any person whatever, and is not limited to a criminal proceeding against the witness himself. Counselman *v.* Hitchcock, 142 U. S. 547, 35 L. Ed. 1110. See, generally, the title WITNESSES.

Any person.—The clause which forbids a state to deny to any person the equal protection of the laws was clearly intended to prevent the hostile discrimination against the negro race so familiar in the states where he had been a slave, and for this purpose the clause confers ample power in congress to secure his rights and his equality before the law. Slaughter-House Cases, 16 Wall. 36, 38, 21 L. Ed. 394.

Any creditor.—The phrase in the 6th section of the bankrupt act, "any creditor or creditors who shall claim any debt or demand under the bankruptcy," does not mean such creditors who come in and prove their debts, but all creditors who have a present subsisting claim upon the bankrupt's estate, whether they have a security or mortgage therefor or not. Ex parte Christy, 3 How. 292, 293, 11 L. Ed. 603.

Any contract.—A state statute provided that persons who perform labor upon, or furnish materials, etc., for, the construction or repairing of a building, by virtue of any contract with the owner of the same, or his agent, have a right to the benefit of a lien. In McMurray *v.* Brown, 91 U. S. 257, 265, 23 L. Ed. 321, the court said: "Certainly the words any contract are sufficiently comprehensive to include special contracts as well as contracts which arise by implication, unless the materialman is secured by a deed of trust or mortgage, or in some other form of security repugnant to the theory that he ever intended to hold a lien under the mechanics' lien law."

4. "Any restrained by context or subject matter.—United States *v.* Palmer, 3 Wheat. 610, 631, 4 L. Ed. 471; Holy Trinity Church *v.* United States, 143 U. S. 447, 463, 36 L. Ed. 226.

Any kind of property.—The North Carolina act of March 28, 1870, providing for laborers and mechanics' lien on any building, lot, farm or "any kind of property not herein enumerated," is too limited in its scope to justify the conclusion that the legislature had any intention, by that act, to give a lien upon railroad property. Buncombe County Comr's *v.* Tommey, 115 U. S. 122, 29 L. Ed. 305.

"Any court" as used in § 4284 of the Revised Statutes, providing for proceedings to limit the liability of ship owners, "in any court" means "any court of competent jurisdiction," which is any court having jurisdiction of the cause of action for which the limitation of liability is sought. Ex parte Phenix Ins. Co., 118 U. S. 610, 624, 30 L. Ed. 274, citing Ex parte Slayton, 105 U. S. 451, 26 L. Ed. 1066. See, generally, the titles ADMIRALTY, ante, p. 119; SHIPS AND SHIPPING.

The act of March 2, 1807, ch. 77, prohibiting the importation of slaves into any port or place within the jurisdiction

ANY ONE YEAR.—See note 1.

APACHES.—See the title INDIANS.

APEX.—The apex of a vein is not necessarily a point, but often a line of great length.[2]

APOTHECARIES.—See the title DRUGGISTS.

APPAREL.—See WEARING APPAREL.

of the United States, provided that the captain, etc., of **any** ship or vessel, of the burden of forty tons or more and sailing coastwise, etc., having on board **any** negroes, etc., shall, previous to the departure of such ship or vessel, make out and deliver duplicate manifests, etc., and if **any** ship or vessel, being laden and destined as aforesaid, shall depart from the port where she may then be, without the captain, master, or commander having first made out and subscribed duplicate manifests of a negro, mulatto and person of color on board such ship or vessel, as aforesaid, and without having previously delivered the same to the said collector or surveyor, and obtained a permit, in manner as herein required, every such ship or vessel, etc., shall be forfeited to the use of the United States. It was held, that the words "**any** ship or vessel" meant those ships or vessels only which had been directed to make out such manifests, "in manner as herein prescribed," and only applied to vessels of forty tons or over, as only such vessels could obtain the permit directed. The Mary Ann, 8 Wheat. 380, 388, 5 L. Ed. 641.

1. Any one year.—The words **any one year** in a statute providing that a receiver should not receive more than a named sum as salary and commissions, in **any one year,** means **any year** calculated from the date of the appointment of the receiver, and does not mean **any** fiscal **year.** United States *v.* Dickson, 15 Pet. 141, 10 L. Ed. 689. See YEAR.

2. Apex.—Larkin *v.* Upton, 144 U. S. 23, 36 L. Ed. 330. See, generally, the title MINES AND MINERALS.

APPEAL AND ERROR.

BY FRANK MOORE.

I. **Right to Appellate Review,** 333.
II. **The Various Remedies Considered,** 333.
III. **Appellate Jurisdiction,** 334.
IV. **Decisions Reviewable,** 349.
V. **Certificate of Division of Opinion,** 355.
VI. **Parties and Persons Entitled to Appeal,** 356.
VII. **Waiver of Right,** 357.
VIII. **Exceptions and Objections,** 358.
IX. **Transfer of Cause,** 359.
X. **Assignment of Errors,** 365.
XI. **Briefs,** 366.
XII. **Effect of Appeal,** 366.
XIII. **Appearance,** 367.
XIV. **Dismissal and Reinstatement,** 367.
XV. **Presumptions on Appeal,** 369.
XVI. **Reversible Error,** 369.
XVII. **Hearing and Determination,** 370.
XVIII. **Costs,** 374.

I. **Right to Appellate Review,** 375.
II. **The Various Remedies Considered,** 376.
A. In General, 376.
B. Appeal and Writ of Error, 377.
1. Appeal, 377.
a. Origin and Nature, 377.
b. Definitions and Distinctions, 377.
c. Proceedings Reviewable by Appeal, 378.
(1) Proceedings in Equity, 378.
aa. In General, 378.
bb. Particular Instances Considered, 379.
(2) Cases of Admiralty and Maritime Jurisdiction, 300.
(3) Decisions of Court of Claims, 381.
(4) Habeas Corpus Proceedings, 381.
d. What Law Governs Appeals, 381.
2. Writ of Error, 382.
a. Definition, Nature and Distinctions, 382.
(1) Definition, 382.
(2) Nature, 382.
(3) Distinguished from Motion for New Trial, 383.
b. Proceeedings Reviewable by Writ of Error, 383.
(1) Common-Law Proceedings, 383.
aa. In General, 383.
bb. Illustrative Cases, 384.
cc. Actions Tried by Court, 385.
(2) Proceedings in Equity, 386.
c. Review of Proceedings under Circuit Court of Appeals Act, 386.

3. Review of Proceedings in District of Columbia, 387.
4. Review of Order Remanding Cause to State Court, 387.
5. Review of Proceedings in State Courts, 388.
6. Review of Proceedings in Territorial Courts, 388.
a. In General, 388.
b. Cases at Law and in Equity, 388.
c. Form of Proceeding as Dependent on Whether or Not There Has Been a Trial by Jury, 389.
7. Agreement of Parties or Counsel, 390.
8. Rules of Practice in State Courts, 390.
a. In General, 390.
b. Review of Causes from Louisiana, 391.
9. Distinction between Appeals and Writs of Error as Regards the Scope of the Remedies, 391.
10. Election of Remedies, 394.
C. Writ of Prohibition, 394.
D. Mandamus, 395.
1. In General, 395.
2. Adequacy of Other Remedies, 398.
E. Habeas Corpus, 399.
1. In General, 399.
2. Limitations of General Rule, 401.
3. Adequacy of Other Remedies, 402.
F. Certiorari, 403.
1. In General, 403.
2. Adequacy of Other Remedies, 403.
3. Proceedings of Military Tribunals, 404.
4. Under Circuit Court of Appeals Act, 404.
G. Bill in Equity, 404.
H. Motions, 405.
I. Cross Appeals, 405.
J. Successive or Double Appeals, 405.
K. Joinder of Separate Suits in One Appeal, 406.

III. Appellate Jurisdiction, 406.
A. Acquisition and Extent, 406.
1. Definition and General Consideration, 406.
2. Burden of Showing Jurisdiction, 407.
3. Source of Appellate Power, 407.
4. Jurisdiction of Inferior Court, 409.
5. Consent as Conferring Jurisdiction, 409.
6. Construction of Statute Conferring Right of Appeal, 411.
a. In General, 411.
b. Affirmative and Negative Description, 411.
c. Repealing Acts, 412.
7. What Law Governs, 413.
8. Where Jurisdiction Is Assumed Sub Silentio, 414.
9. Determination of This Court's Jurisdiction, 414.
B. Loss or Divestiture of Jurisdiction, 414.
C. Jurisdiction in Particular Proceedings, 415.
1. In Criminal Cases, 415.
a. In General, 415.
b. Treason, 417.
c. Contempt Proceedings, 417.
(1) In General, 417.
(2) Error to State Court, 419.
(3) Effect of Circuit Court of Appeals Act, 419.
d. Exceptions to General Rule, 419.

(1) Appeals from State Courts, 419.
(2) Appeals by the State, 419.
(3) Proceedings on Writ of Prohibition, 419.
(4) Habeas Corpus Proceedings, 420.
(5) Certificate of Division of Opinion, 420.
(6) Territorial Courts of Florida, 420.
e. Statutory Provisions, 421.
2. In Prize Causes, 422.
3. In Habeas Corpus Proceedings, 422.
a. Power of This Court to Issue the Writ, 422.
b. Review of Judgments of the Circuit Courts, 424.
c. Review of Judgments of District Courts, 427.
4. In Mandamus Proceedings, 427.
5. Proceedings to Condemn Property of Insurrectionists, 428.
6. Injunctions against Judgments of State Courts, 429.
7. Review of Judgments on a Caveat, 429.
D. Appellate Jurisdiction over Particular Courts and Tribunals, 429.
1. Over District Courts, 429.
a. Under Early Statutes, 429.
b. Under Circuit Court of Appeals Act, 430.
(1) In Cases in Which the Jurisdiction of the Court Is in Issue, 430.
(2) In Prize Causes, 431.
(3) In Cases of Conviction of Infamous Crimes, 431.
(4) In Cases Involving the Construction or Application of the Federal Constitution, 431.
(5) In Cases Involving the Constitutionality of Any Law of the United States, or the Validity or Construction of Treaties, 451.
(6) In Cases Involving the Constitutionality of State Laws and Constitutions, 431.
(7) Appeals by United States from District Court for Florida, 431.
c. Review of Judgments of the District Court for Porto Rico, 432.
d. Judgments and Decrees of District Courts in Cases Transferred from Territorial Courts, 432.
e. Judgments and Decrees of District Court of Alaska, 432.
2. Over Circuit Courts, 433.
a. Under Early Statutes, 433.
(1) In General, 433.
(2) Cases Removed from District to Circuit Courts, 433.
b. By Direct Appeal, 433.
(1) Under Circuit Court of Appeals Act, 433.
aa. In General, 433.
bb. In What Cases Allowable, 434.
aaa. In Cases in Which the Jurisdiction of the Court Is in Issue, 434.
aaaa. In General, 434.
bbbb. Jurisdiction of Court As a Federal Court Must Be Involved, 434.
cccc. Jurisdiction over Separate and Distinct Cases, 437.
dddd. Jurisdiction Challenged Must Be That of Court Rendering Decree, 438.
eeee. What Are Questions of Jurisdiction, 438.

aaaaa. In General, 438.
bbbbb. Specific Applications of General Rule, 439.
ffff. Necessity for Finality of Judgment, 442.
gggg. What Judge May Certify, 443.
hhhh. The Certificate, 443.
aaaaa. In General, 443.
bbbbb. Necessity for, 443.
ccccc. Time of Granting Certificate, 444.
ddddd. Form and Requisites, 445.
iiii. Simultaneous Appeal and Certification, or the Rule in Jahn's Case, 448.
jjjj. Double Appeals, 430.
kkkk. Hearing and Determination, 430.
llll. Scope of Review, 452.
mmmm. Waiver, 453.
bbb. In Prize Causes, 454.
ccc. In Cases of Conviction of Capital or Infamous Crimes, 454.
aaaa. By Act of March 3rd, 1891, 454.
aaaaa. In General, 454.
bbbbb. Infamous Crimes Defined, 455.
ccccc. Remedies for Transfer of Cause, 556.
ddddd. Scope of Review, 456.
eeeee. Reversal, 456.
bbbb. By Act of January 20, 1898.
ddd. In Cases Involving the Construction or Application of the Federal Constitution, 457.
aaaa. In General, 457.
bbbb. Determination of Question, 459.
cccc. Proceedings Reviewable, 463.
dddd. Time of Raising Constitutional Question, 463.
eeee. Double Appeals, 464.
eee. In Cases Involving the Constitutionality of Any Law of the United States or the Validity or Construction of Treaties, 464.
aaaa. In General, 464.
bbbb. Determination of Question, 465.
cccc. Scope of Review, 468.
fff. In Cases Involving the Constitutionality of State Laws and Constitutions, 469.
aaaa. In General, 469.
bbbb. What Is a "Law of a State," 470.
cccc. Who May Raise the Question? 470.
dddd. Showing As to Jurisdiction, 471.
eeee. Hearing and Determination, 473.
cc. When Jurisdiction is Exclusive and When Concurrent, 474.
dd. Transfer of Cause, 475.
ee. Cross Appeals, 475.
ff. Limitations, 475.
gg. Showing As to Jurisdiction, 475.
hh. Scope of Review, 476.

ii. Necessity for Finality of Decision, 477.
(2) Proceedings by the Interstate Commerce Commission, 478.
3. Over Circuit Court of Appeals, 478.
a. In General, 478.
b. By Appeal or Writ of Error, 478.
(1) In General, 478.
(2) Jurisdiction as Dependent on Amount in Controversy, 479.
(3) Jurisdiction as Dependent on Finality of Decision, 480.
(4) Decisions Reviewable, 481.
aa. In General, 481.
bb. Cases in Which United States Is a Party, 482.
cc. Bankruptcy Decisions, 482.
dd. Cases Arising under the Revenue Laws, 482.
ee. Cases Dependent upon Citizenship of Parties, 482.
ff. Copyright Cases, 488.
(5) Hearing and Determination, 488.
(6) Supersedeas, 488.
(7) Reversal or Affirmance, 489.
(8) Mandate, 489.
c. By Mandamus, 489.
d. By Certiorari, 489.
(1) In General, 489.
(2) Allowance of Writ, 491.
(3) In What Cases the Writ May Issue, 491.
aa. In General, 491.
bb. Particular Cases as Involving Questions of Sufficient Importance Considered, 492.
cc. Habeas Corpus Proceedings, 494.
dd. Admiralty Cases, 494.
ee. Bankruptcy Proceedings, 494.
ff. Where There Is No Judgment in Court of Appeals, 494.
(4) Limitations upon Time of Application, 494.
(5) Review of Interlocutory Orders, 495.
(6) Review of Questions of Fact, 497.
(7) Assignment of Errors, 497.
(8) The Record, 497.
(9) Scope of Review, 497.
(10) Rendering and Ordering Final Judgment, 497.
e. Simultaneous Appeal and Certiorari, 497.
f. Construction of Words "Or Otherwise," 498.
4. Over Courts of the District of Columbia, 498.
a. Right to Appellate Review, 498.
b. What Law Governs, 499.
(1) In General, 499.
(2) Effect of State Laws, 499.
(3) Review of Decisions of Court of Appeals, 500.
c. Proceedings Reviewable, 500.
(1) Probate Proceedings, 500.
(2) Criminal Proceedings, 500.
(3) Habeas Corpus Proceedings, 502.
(4) Patent Proceedings, 503.

d. Decisions Reviewable, 503.
(1) Cases Involving the Validity of Federal Statutes, 503.
(2) Necessity for Finality of Judgments and Decrees, 503.
(3) Summary and Special Proceedings, 504.
(4) Discretionary Matters Not Involving the Merits, 504.
e. Effect of Appeal or Scope of Review, 505.
f. Judgment on Reversal, 505.
5. Over Court of Claims, 505.
a. In General, 505.
b. Right of Appeal, 506.
c. What Law Governs, 508.
d. Special Acts Conferring Jurisdiction, 508.
e. Appeal as a Matter of Right, 509.
f. Decisions Reviewable, 510.
(1) Jurisdiction as Dependent upon Question Whether Decision Will Affect a Class of Cases, 510.
(2) Jurisdiction as Dependent upon Amount in Controversy, 510.
(3) Jurisdiction as Dependent upon Nature and Form of Judgment, 511.
aa. In General, 511.
bb. Decision Must Be Judicial in Its Nature, 511.
cc. Judgments Pro Forma, 512.
dd. Judgments for Money, 512.
(4) Judgment Rejecting Setoffs and Counterclaims, 512.
g. Finding of Facts, 512.
(1) In General, 512.
(2) In Cases of Equity Jurisdiction, 513.
(3) Form, Sufficiency and Contents, 513.
(4) Right to Bring Up Evidence on Which Findings Are Based, 514.
aa. In General, 514.
bb. Where Rights of Parties Depend upon Circumstantial Facts, 514.
(5) Requests for Findings, 515.
(6) Time of Filing Findings, 515.
(7) Remedy in Case of Mistakes as to Findings, 515.
(8) Conclusiveness of Findings, 516.
(9) Construction of Findings, 516.
h. Review of Findings on Questions of Fact, 516.
(1) In General, 516.
(2) Limitations of General Rule, 517.
i. Assignment of Errors, 518.
j. Transfer of Cause, 518.
(1) Allowance of Appeal, 518.
(2) Remedies, 518.
(3) Limitations, 519.
(4) The Record, 519.
k. Certiorari, 520.
l. Grant of New Trial Pending Appeal, 521.
m. Conclusiveness of Judgment, 521.
n. Continuance, Dismissal and Reinstatement, 522.
o. Mandamus, 522.
p. Mandate, 522.

6. Over Territorial Courts, 522.
a. In General, 522.
b. Under Circuit Court of Appeals Act, 523.
c. Over the Indian Territory, 525.
d. Over Territory of Hawaii, 527.
e. Effect of Admission of Territory as State, 528.
(1) In Absence of Statute, 528.
(2) Statutory Provisions, 528.
f. Over Particular Proceedings, 529.
(1) In Criminal Cases, 529.
(2) In Habeas Corpus Proceedings, 530.
(3) Findings of Court, 531.
(4) Miscellaneous Proceedings, 533.
g. Transfer of Cause, 533.
(1) In General, 533.
(2) What Law Governs, 533.
(3) Allowance of Appeal, 533.
(4) Remedies for Reviewing, 533.
(5) Time for Taking Appeal, 533.
(6) Writ of Error, Citation and Bond, 534.
h. Assignment of Errors, 534.
i. Scope and Extent of Review, 534.
(1) In General, 534.
(2) Necessity for Finality of Decision, 535.
(3) Review of Questions of Fact, 535.
aa. In General, 535.
bb. Review of Findings of Fact by Territorial Court, 536.
(4) Review of Discretionary Matters, 541.
(5) Questions of Practice, 541.
j. The Statement of the Facts, 541.
k. Exceptions and Objections, 544.
l. Mandate, 545.
7. Over State Courts, 546.
a. In General, 546.
b. Construction of Statute, 548.
(1) In General, 548.
(2) Words "Statute of a State" Defined, 548.
(3) Meaning of Term "Suit" in Statute, 548.
(4) The Words "Authority Exercised under Any State" Defined, 550.
(5) Validity of Statute or "Authority Exercised under the United States," 550.
c. Constitutionality of Statute, 554.
d. Effect of Ordinance of Secession, 554.
e. Consent as Conferring Jurisdiction, 555.
f. Laws Drawn in Question Must Be Those of "State," 555.
(1) In General, 555.
(2) Decisions of Political Bodies, 555.
(3) Decisions of Territorial Courts, 555.
g. Decision Must Be That of "Highest Court" in State, 556.
h. What Is the Assertion of "A Right or Immunity," 558.
i. Decisions Reviewable, 559.
(1) In General, 559.
(2) Necessity for Finality of Judgment or Decree, 559.
(3) Orders at Chambers, 560.

j. Plaintiff in Error Must Have Personal Interest in the Litigation, 560.
k. Necessity for Adverse Decision, 564.
(1) Under First Clause of the Statute, 564.
(2) Under Second Clause of the Statute, 567.
(3) Under Third Clause of the Statute, 568.
l. Parties, 569.
(1) In General, 569.
(2) Effect of Eleventh Amendment to the Constitution, 570.
m. Who May Make the Objection, 570.
n. Where Both Parties Claim under Same Act of Congress, 570.
o. Power of State Courts to Decide Federal Questions, 570.
p. Showing as to Jurisdiction, 571.
(1) In General, 571.
(2) That Federal Question Was Actually or Necessarily Raised and Decided, 571.
aa. In General, 574.
bb. Where Federal Question Only Collaterally Involved, 580.
cc. Dismissal for Want of Jurisdiction, 580.
dd. Dismissal by State Court for Want of Proper Appeal, 580.
ee. Reasons of Rule, 581.
ff. Limitations of and Exceptions to General Rule, 581.
(3) Where Decision Is Based on Independent Grounds, 585.
(4) Question Must Be Real and Not Fictitious or Frivolous, 593.
(5) Necessity of Showing Error in Judgment of State Court, 597.
(6) Effect of Failure to Comply with State Practice, 597.
(7) Where Decree Is Silent as to Grounds of Decision, 597.
(8) Error to Supreme Court of Louisiana, 597.
(9) Judicial Notice, 597.
(10) Time and Manner of Showing Existence of Federal Question, 599.
aa. In General, 599.
bb. Must Be "Specially Set Up or Claimed," 601.
aaa. In General, 601.
bbb. Qualifications of General Rule, 609.
cc. Assignment of Reasons for Rehearing or New Trial, 613.
dd. In Briefs of Counsel and Oral Argument, 613.
ee. Certificate of Presiding Judge of State Court, 614.
aaa. Office of Certificate, 614.
bbb. Necessity of Certificate, 615.
ccc. Form and Sufficiency of Certificate, 615.
ddd. Weight and Sufficiency, 615.
ff. Time of Claiming Federal Question, 618.
aaa. In General, 618.
bbb. Prior to Judgment in State Court, 620.

ccc. Where Question Was Not Existent at Time of Judgment, 621.
ddd. Motion to Set Aside Judgment and Transfer Cause, 621.
eee. In Assignment of Errors in Highest State Court, 621.
fff. Motion for New Trial, 621.
ggg. After Remand by State Court, 621.
hhh. On Second Hearing in State Court, 623.
iii. On Second Appeal, 623.
jjj. In Petition for Writ of Error to State Court, 623.
kkk. In Petition for Writ of Error to This Court, 623.
lll. In Briefs of Counsel, 624.
mmm. In Petition for Rehearing, 624.
aaaa. In General, 624.
bbbb. Qualifications of General Rule, 627.
nnn. Upon Motion to Quash Execution, 628.
ooo. Raising Federal Question for First Time in This Court, 628.
ppp. Binding Effect of State Practice, 629.
(11) Determination of Jurisdiction, 632.
(12) Federal Questions Raised Must Be Identical in Both Courts, 632.
q. Decisions Reviewable, 633.
(1) In General, 633.
(2) Criminal Cases, 634.
aa. In General, 634.
bb. Habeas Corpus to State Courts, 636.
(3) Defenses Arising under Act of Congress, 640.
(4) Denial of Rights under National Bank Act, 640.
aa. In General.
bb. Showing as to Jurisdiction, 641.
(5) Denial of Rights under Bankrupt Act, 643.
(6) Denial of Right to Remove Causes to Federal Courts, 647.
aa. In General, 647.
bb. Effect of Act of March 3rd, 1887, 649.
(7) Denial of Full Faith and Credit to Judgments, Records and Judicial Proceedings of Sister States, 650.
(8) Denial of Faith and Credit to Judgments and Decrees of Federal Courts, 654.
aa. In General, 654.
bb. Rights of Purchasers at Marshals' Sales, 658.
cc. Liability on Injunction Bond Executed under Order of Federal Courts, 660.
dd. Construction of Judgments and Decrees, 661.
ee. Showing as to Jurisdiction, 661.
(9) Denial of Rights under Clause Guaranteeing a Republican Form of Government, 663.
(10) Denial of Religious Liberty, 663.
(11) Abridging the Freedom of Speech or of the Press, 663.
(12) Denial of Rights to Ambassadors and Consuls, 663.

(13) Denial of Rights Claimed under the Duty or Bounty Acts, 664.
(14) Denial of Equal Privileges to Citizens of the Several States, 664.
(15) Denial of Right Claimed under the President's Proclamation, 664.
(16) Denial of Right under Naturalization Laws, 664.
(17) Denial of Due Process of Law or Equal Protection of the Laws, 664.
aa. In General, 664.
bb. Condemnation Proceedings, 668.
cc. Regulation of Railroad Rates, 668.
dd. Election of State Officers, 669.
ee. Persons Not Parties to a Proceeding, 670.
ff. Denial of Right to Offer Defenses, 670.
gg. Jury and Jury Trial, 670.
hh. Denial of Rights to Foreign Corporations, 672.
ii. Erroneous Decisions of State Courts, 672.
jj. Showing as to Jurisdiction, 672.
(18) Denial of Rights Claimed under Treaties, 674.
(19) Denial of Rights under the Commerce Clause of the Constitution, 677.
(20) Denial of Rights under the Fifteenth Amendment, 679.
(21) Jurisdiction over Navigable Waters, 679.
(22) Acts of Congress Regulating Common Carriers, 680.
(23) Decisions Relating to Boundaries between Land Granted by United States, 680.
(24) Claim of Title to Land under United States, 681.
aa. In General, 681.
bb. Construction of Patents, 685.
cc. Titles Claimed under Patents Based upon Spanish or Mexican Grants, 686.
(25) Claim of Right under Automatic Coupler Act, 688.
(26) Denial of Title of United States to Land, 688.
(27) Denial of Rights under Swamp Land Act. 688.
(28) Illegal or Unenforceable Contracts, 688.
(29) Validity of Confederate Transactions, 689.
(30) Decisions of State Court under Ordinance of Secession, 690.
(31) Denial of Rights under the Fifth Amendment, 690.
(32) Denial of Right to Trial by Jury under the Seventh Amendment, 690.
(33) Questions Arising under the Stamp Acts, 690.
(34) Questions Arising under the Quarantine Laws, 691.
(35) Power of the States to Emit Bills of Credit, 695.
(36) Power of States to Coin Money, 692.
(37) Compacts between States, 692.
(38) Sovereignty of the States, 692.
(39) Questions Arising under Federal Mining Statutes, 693.
(40) Questions Relating to Public Officers and Members of the Cabinet, 696.
(41) Validity of State Election Laws, 697.
(42) Questions Relating to Federal Securities, 697.
(43) Claim of Right under Legal Tender Act, 697.
(44) Claim of Right under Internal Revenue Act, 698.

(45) State Legislation Regulating Sale of Intoxicating Liquors, 698.
(46) Questions Arising under the Public Land Acts, 698.
(47) Constitutional Provisions Defining the Judicial Power, 699.
(48) Claim of Title or Right under the Patent Laws, 699.
(49) Questions Relating to the Indian Tribes, 701.
(50) Federal Statutes Relating to Rivers and Harbors, 701.
(51) Ordinance for Government of Northwest Territory, 702.
(52) Federal Statutes Relating to Administration of Estates, 702.
(53) Domestic and Social Status of Persons, Such as Slaves, 702.
(54) Slave Contracts and Transactions, 703.
(55) Impairment of Obligation of Contract, 703.
aa. In General, 703.
bb. Prior or Subsequent Legislation, 704.
cc. Distinction between Violation and Impairment, 707.
dd. Whether a Subsequent Statute Has Repealed a Contract, 708.
ee. By-Laws and Ordinances, 708.
ff. Impairment by Judicial Department, 708.
gg. Acts of State Officers, 712.
hh. Misconstruction of State Statutes by State Court, 712.
ii. Where Court Applies General Law, 713.
jj. Exemptions from Taxation, 713.
kk. Determination as to Validity, Interpretation and Existence of Contract, 715.
ll. Showing as to Jurisdiction, 720.
(56) Questions Arising under the Shipping Laws, 724.
(57) Review of Mandamus Proceedings, 724.
(58) Denial of Immunities to Receivers Appointed by Federal Courts, 725.
(59) Assignment of Claims against Government, 726.
(60) Cruel and Unusual Punishment, 726.
(61) Questions of General Law, 726.
aa. In General, 726.
bb. Various Specific Applications of the General Rules, 727.
cc. Administration of the Common Law, 732.
dd. General Principles of Equity, 733.
ee. Principles of Comity, 733.
ff. Res Adjudicata, Laches and Estoppel, 733.
gg. Qualifications of General Rules, 735.
(62) Where Decision of State Court Depends upon the Construction of State Statutes and Constitutions, 736.
aa. In General, 736.
bb. Various Specific Applications of the General Rules, 740.
cc. Enactment of State Statutes, 746.
dd. Construction of Objection That State Statute Is "Unconstitutional and Void," 746.

ee. Qualifications of General Rules, 748.
(63) Where Decision of State Court Depends upon Questions of State Practice and Procedure, 748.
(64) Decision That Right under Constitution Has Been Waived, 750.
(65) Sufficiency of Showing in State Court, 751.
r. Amount in Controversy, 751.
s. Transfer of Cause, 751.
(1) In General, 751.
(2) What Law Governs, 751.
(3) Remedy for Transferring Cause, 752.
(4) Allowance of Writ of Error, 753.
aa. In General, 753.
bb. Necessity for Allowance, 753.
cc. By Whom Allowed, 754.
dd. Proof of Allowance, 755.
(5) Form and Requisites of Writ of Error, 755.
aa. In General, 755.
bb. Specifications in Writ, 755.
cc. Teste of Writ, 755.
dd. Signature, 755.
(6) Issuance and Service of Writ of Error, 755.
aa. In General, 755.
bb. From Whence Issued, 755.
cc. To What Court the Writ Should Be Directed, 755.
(7) Return of Writ, 758.
(8) Amendment of Writ, 759.
(9) The Citation, 759.
aa. Signature, 759.
bb. Service, 760.
(10) Appeal Bond, 760.
(11) Limitations, 760.
(12) Parties to Proceedings, 761.
aa. In General, 761.
bb. Appealable Interest, 761.
(13) Assignment of Errors, 762.
t. The Record, 763.
(1) In General, 763.
(2) Form and Contents of Record, 764.
aa. In General, 764.
bb. Necessity for Setting out Treaty, Act of Congress or Constitutional Provision, 764.
cc. Orders in State Court Subsequent to Removal, 765.
dd. Petition for Rehearing, 765.
ee. Petition for Writ of Error, 765.
ff. Arguments of Counsel, 766.
gg. Opinion of the State Court, 766.
aaa. Under the 25th Section of the Judiciary Act, 766.
bbb. Under Later Statutes, 766.
ccc. Review of Cases from Louisiana, 769.
hh. Assignment of Errors, 770.
ii. Instructions, 770.
jj. Certificate of Chief Judge of State Court, 770.
kk. Certificate or Statement of Clerk or Judge, 770.

ll. Supplemental Transcript, 770.
(3) Examination of Record, 771.
(4) Impeachment or Contradiction of Record, 771.
(5) Authentication of Record, 771.
(6) Certiorari, 771.
(7) Amendment, 771.
u. Scope of Review, 771.
(1) In General, 771.
(2) Irregularities and Mere Errors, 773.
(3) Discretionary Matters, 773.
(4) Questions of Fact, 774.
aa. In General, 774.
bb. Rulings on Questions of Evidence, 778.
cc. Findings of Fact by Referee, 780.
dd. Findings of Court, 780.
ee. Rule in Equity Proceedings, 781.
ff. Rule Where Court Directs a Verdict, 781.
(5) Denial of Right by Municipal Ordinance, 782.
(6) Denial of Right to Remove Causes, 782.
v. Affirmance, Reversal or Dismissal, 782.
(1) In General, 782.
(2) Affirmance, 782.
aa. In General, 782.
bb. Want of Substantiality in Claim, 783.
cc. Moot Cases, 783.
dd. Division of Opinion in State Court, 783.
ee. Uniting Motion to Affirm with Motion to Dismiss, 784.
ff. Damages Awarded for Frivolous Appeal, 786.
(3) Reversal, 786.
aa. In General, 786.
bb. Harmless Error, 787.
(4) Dismissal, 787.
aa. Grounds for Dismissal, 787.
aaa. Want of Jurisdiction, 787.
bbb. When State Court Proceeds on Non-Federal Ground, 787.
ccc. Frivolous Appeals, 788.
ddd. Want of Substantiality in Claim, 788.
eee. Moot Cases, 789.
bb. Operation and Effect of Decree, 790.
cc. Hearing and Determination of Motion, 790.
(5) Hearing and Determination, 791.
w. Effect of Transfer of Cause, 791.
(1) In General, 791.
(2) Supersedeas, 791.
(3) Execution on Judgment of State Court, 792.
(4) Effect on Injunction Proceedings, 792.
x. Presumptions on Appeal, 793.
y. Mandate, 793.
(1) Remand for Further Proceedings, 793.
(2) Rendering and Ordering Judgment, 794.
(3) Direction of Mandate, 795.
(4) Compliance with Mandate, 796.
(5) Recalling Mandate, 796.
8. Over Military Courts and Tribunals, 795.
9. Over Supreme Court of Philippine Islands, 797.

a. In General, 797.
b. Amount in Controversy, 797.
c. Remedies for Transferring Cause, 798.
d. Re-Examination of Facts, 798.
e. Appeals by the Government in Criminal Cases, 799.
f. Assignment of Errors, 799.
g. Reversal, 799.
10. Over Court of Private Land Claims, 799
a. Right of Appeal, 799.
b. The Remedy for Reviewing, 800.
c. Questions Reviewable, 800.
(1) In General, 800.
(2) Necessity for Finality of Decision, 801.
(3) Discretionary Matters, 801.
(4) Questions of Fact, 801.
d. Transfer of Cause, 801.
(1) In General, 801.
(2) What Law Governs, 801.
(3) Allowance of Appeal, 802.
(4) Parties to the Appeal, 802.
(5) Notice of Intention to Appeal, 802.
(6) Limitations of Appeal, 803.
e. Exceptions and Objections, 803.
f. Effect of Appeal, 804.
g. Who May Allege Error, 804.
h. Dismissal of Appeal, 804.
11. Over Supreme Court of Porto Rico and the United States District Court, 805.
a. In General, 805.
b. Jurisdiction as Dependent on Amount in Controversy, 806.
c. Jurisdiction as Dependent on Claim of Federal Right, 806.
d. Scope of Review, 808.
12. Review of Decisions of Interstate Commerce Commission, 808
E. Under Circuit Court of Appeals Act, 810.
1. Causes That Brought About the Legislation, 810.
2. Effect on Prior, Inconsistent Legislation, 810.
3. Purpose or Object of Statute, 811.
4. Construction of Statute, 811.
a. In General, 811.
b. Retroactive Operation of Statute, 811.
5. Time of Taking Effect, 812.
6. Effect on Pending Cases, 812.
7. Remedies, 813.
8. Review by Certificate, 813.
9. Appellate Jurisdiction of Circuit Court of Appeals, 813.
a. In General, 813.
b. Construction of Words "Unless Otherwise Provided by Law," 814.
c. Admiralty Cases, 814.
d. Revenue Cases, 814.
e. Criminal Cases, 815.
(1) In General, 815.
(2) Contempt Cases, 816.
(3) Writ of Scire Facias upon Recognizance, 817.
f. Cases Arising under Patent Laws, 817.
g. Jurisdiction Dependent on Citizenship, 817.
(1) In General, 817.

(2) Construction of Term "Aliens," 819.
(3) Rule Where Jurisdiction Is Not Dependent Solely on Diversity of Citizenship, 819.
(4) Review of Ancillary, Auxiliary or Supplemental Proceedings, 812.
h. Effect of Bankruptcy Act, 823.
i. Finality of Judgments and Decrees, 823.
(1) In General, 823.
(2) Interlocutory Orders Granting or Refusing Injunctions, 824.
j. Limitations upon Appeal, 827.
k. Double Appeals, 827.
l. Rule in Jahn's Case, 830.
m. Mandate, 831.
F. Appellate Jurisdiction as Dependent upon Amount or Value in Controversy, 831.
1. History of Legislation, 831.
a. Under the Early Statutes, 831.
b. Under Circuit Court of Appeals Act, 832.
2. What Law Governs, 833.
a. In General, 833.
b. Rule Governing Appeals, 833.
3. Review of Proceedings in Particular Courts, 834.
a. Appeals from Territorial Courts, 834.
b. Appeals in Admiralty, 835.
c. Appeals from Circuit Courts, 835.
d. Appeals from District of Columbia, 835.
e. Original Jurisdiction of Circuit Courts, 836.
4. The Phrase "Matter in Dispute" Defined, 837.
5. Must Exceed Jurisdictional Amount, 838.
6. Effect of Repeal Pending Appeal, 838.
7. General Construction of Statute, 838.
8. Consent or Agreement of Parties, 839.
9. To What Parties Applicable, 839.
10. Cross Appeals, 840.
11. Amount Actually in Dispute Controls, 840.
a. In General, 840.
b. Value of Property, 841.
c. Usurious Claims, 841.
d. Settlement of Decedents' Estates, 842.
e. Collateral Effect of Judgment, 842.
f. Where There Is a Valid Defense to the Action, 847.
g. Where Part of Demand Is Not Due, 847.
12. Matter in Dispute Not Susceptible of Pecuniary Estimation, 848.
a. In General, 848.
b. Appeals from the District of Columbia and the Territories, 849.
c. Criminal Prosecutions, 851.
d. Habeas Corpus, 852.
e. Title and Right to Office, 853.
f. Right to Have Goods Transported by a Carrier, 854.
g. Custody of Children, 854.
h. Guardian and Ward, 855.
i. Registration of Trademarks, 855.
j. Denial of Application for a Patent, 855.
k. Divorce and Alimony, 855.

13. Aggregate Amount of Demand, 856.
a. In General, 856.
b. Several Liabilities of Different Defendants, 858.
c. Bill by Single Plaintiff to Enforce Distinct Liabilities, 862.
d. Decree against Appellant for Several Distinct Claims, 862.
e. Distinct Judgments and Decrees against Distinct Parties on Distinct Causes, 863.
f. Appeals in Admiralty, 864.
g. Suit to Recover Possession of Land, 865.
h. Hearing Causes Together, 866.
i. Qualifications of General Rule, 867.
(1) Persons Having Common and Undivided Interest, 867.
(2) Claimants under a Common Title, 871.
(3) Aggregation to Avoid Multiplicity of Suits, 872.
j. Practice, 872.
14. Set-Off and Counterclaim, 872.
15. Interest and Costs, 873.
a. In General, 873.
b. Interest, 874.
c. Costs, 875.
d. Limitations of General Rule, 875.
16. Showing and Determination of Amount, 877.
a. In General, 877.
b. Burden of Proof and Weight of Evidence, 878.
c. Right to Introduce Evidence to Prove Amount, 879.
d. Affidavits, 879.
e. Order of Court, 883.
f. Determination from Pleadings, 883.
(1) In General, 883.
(2) In Tort Actions, 885.
(3) Where Damages Are Liquidated, 885.
(4) From Prayer of Bill, 886.
(5) Amended Pleadings, 886.
(6) Cross Bills, 887.
(7) Qualifications of General Rule, 887.
(8) Sufficiency of Pleadings, 890.
g. From Exceptions to Master's Report, 890.
h. Jurisdiction Dependent upon Sum in Dispute as Case Stands in This Court, 890.
i. Distinction between Appeals by Plaintiff and by Defendant, 891.
j. Amount or Kind of Money, 893
k. Value of Property or Right, 893.
(1) In General, 893.
(2) Removal of Trustees, 895.
(3) Nuisances, 895.
(4) In Suits for Partition, 896.
(5) In Suits to Restrain Levy and Collection of Tax, 896.
(6) Funds and Deposits in Court, 896.
(7) In Detinue and Replevin, 896.
(8) Right of Possession of Property, 897.
(9) Interference with Exclusive Privileges, 898.
(10) Proof of Value, 898.

l. Amount of Debt, 898.
m. Determination as of What Time, 899.
n. Subsequent Change in Value of Subject of Controversy, 899.
o. Determination of Amount in Particular Proceedings, 900.
(1) In Injunction Proceedings, 900.
(2) In Actions on Official Bonds, 900.
(3) In Probate Proceedings, 900.
(4) In Suits for Specific Performance, 900.
(5) In Suits to Foreclose Mortgages, 900.
p. Appeals after Issuance of Mandate, 900.
q. Reduction of Amount, 900.
(1) Reduction by Remission, 900.
(2) Reduction Authorized by Act of Congress, 902.
(3) Reduction by Payment and Settlement, 902.
(4) Reduction by Amendment or Set-Off, 903.
r. Effect of Admissions by Parties, 903.
s. Stipulations of Parties, 904.
17. Jurisdiction without Regard to Sum or Value in Dispute, 904.
a. Review of Judgments or Decrees of Supreme Court or Court of Appeals of District of Columbia or of Any of the Territories, 904.
b. Revenue Cases, 905.
c. Cases Touching Patent Rights and Cases Involving Validity of Patents and Copyrights, 907.
d. Suits for Infringement of Trademarks, 908.
e. Cases in Which the Validity of a Treaty or a Statute of, or an Authority Exercised under the United States Is Drawn in Question, 908.
f. Deprivation of Constitutional Rights and Immunities, 915.
g. Action for Dower, 915.
h. Cases of Violation of or Departure from Mandate, 916.
i. Cases Certified from Circuit Courts, 916.
j. Suits against United States, 916.
k. Cases from Territory of Florida, 916.
l. Review of Orders Remanding Causes Removed from State Courts, 916.
m. Cases Involving Jurisdiction of Circuit Courts, 917.
n. Error to State Court, 919.
o. Effect of Circuit Court of Appeals Act, 919.
18. Dismissal and Reinstatement, 919.
G. Appeals from District to Circuit Courts, 920.
H. General Power to Issue Writs, 921.

IV. Decisions Reviewable, 921.
A. What Law Governs, 921.
B. Nature, Form and Validity of Judgment as Governing Right of Review, 922.
1. In General, 922.
2. Decision Must Be Exercise of Judicial Power, 923.
3. Decisions of Special Tribunals, 926.
4. Judgments by Default and Decrees Pro Confesso, 926.
5. Orders Disbarring Attorneys, 927.
6. Consent Decrees, 927.
7. Judgment or Decree Pro Forma, 927.
8. Judgments Awarding Peremptory Mandamus, 927.

9. Judgments or Decrees in Ancillary Proceedings, 927.
10. Judgments in Summary Proceedings, 928.
a. In General, 928.
b. Judgments on Motions, 928.
c. Judgments Awarding Peremptory Mandamus, 928.
11. Judgments in Habeas Corpus Proceedings, 928.
12. Proceeding Must Be a Case at Law or in Equity, 929.
C. Finality of Decision as Governing Right of Review, 929.
1. Introductory, 929.
2. Necessity for Finality, 929.
a. In General, 929.
b. Under Circuit Court of Appeals Act, 931.
c. What Law Governs, 931.
3. Statement of General Rules or Tests, 932.
a. In General, 932.
b. Effect of Motion to Vacate Judgment or Decree, 935.
c. Effect of Motion for New Trial, 936.
d. Decrees Subject to Future Modifications and Directions, 936.
e. Decrees with Superadded Reservations, 936.
f. Contingent or Conditional Decrees, 936.
g. Where Decree Is Final Only as to Some of the Parties, 937.
(1) In General, 937.
(2) Dismissal as to Some of the Defendants Only, 937.
h. Failure to Dispose of Severable Matters, 939.
i. Orders Disposing of Matters Arising Subsequent to Principal Decree, 939.
j. Decrees Disposing of Collateral Matters, 939.
k. Supplemental Decree in Execution of the Original Decree, 940.
l. Entry and Signing of Judgment or Decree, 941.
4. Particular Judgments, Orders and Decrees Considered, 941.
a. Judgments or Orders of Quashal, 941.
b. Decisions in Injunction Proceedings, 942.
(1) In General, 942.
(2) Writ of Error to State Court, 943.
(3) Under Circuit Court of Appeals Act, 943.
c. Judgments Awarding or Refusing to Award Writs, 943.
d. Judgments by Divided Court, 944.
e. Orders and Decrees at Chambers, 944.
(1) In General, 944.
(2) Error to State Court, 944.
(3) Habeas Corpus Proceedings, 944.
f. Judgments, Orders and Decrees of Dismissal and Nonsuit, 945.
(1) Judgments of Dismissal, 945.
aa. In General, 945.
bb. Dismissal of Cross Bill, 945.
cc. Dismissal of Libel or Cross Libel, 946.
(2) Judgments of Nonsuit, 946.
g. Refusal to Enter Exoneretur on Bail Bond, 946.
h. Decrees in Foreclosure Proceedings, 947.
(1) In General, 947.
(2) Decree in Suit to Restrain Foreclosure of Mortgage, 948.
(3) Executory Process in Louisiana, 948.

(4) Limitations of General Rule, 949.
i. Order Certifying Finding upon Issue to Jury, 950.
j. Judgments, Orders and Decrees of Affirmance, 951.
k. Decisions with Respect to Reference, 952.
(1) Decree Ordering a Reference, 952.
(2) Decision on Report of Referee, 957.
l. Order Refusing Rehearing, 957.
m. Judgment Affirming Order of Probate, 957.
n. Decisions Affecting Pleadings, 958.
(1) Judgments on Demurrers, 958.
(2) Striking out Pleadings, 958.
(3) Judgments on Pleas in Abatement, 958.
o. Orders Remanding Causes Removed from State Courts, 959.
(1) Prior to the Act of March 3rd, 1875, 959.
(2) Under Act of March 3rd, 1875, 960.
(3) Under the Act of March 3rd, 1887, 960.
(4) Under the Act of February 25th, 1889, 963.
(5) Under Circuit Court of Appeals Act, 963
p. Vacating and Setting Aside Judgment, 964.
q. Orders for Distribution of Property, 964.
r. Judgments on Rules or Motions, 964.
s. Judgments Reversing and Remanding Causes, 966.
(1) In General, 966.
(2) Error to State Courts, 968.
(3) Judgments Awarding New Trials, 972.
t. Orders Made in Progress of Cause, 972.
(1) In General, 972.
(2) Orders Directing That Property Be Delivered to a Receiver, 973.
(3) Orders Directing Payment of Money into and out Court, 973.
(4) Decrees upon Matters Arising after Transfer of Cause, 974.
(5) Rulings on Applications for Receivers, 974.
(6) Order Directing Witness to Testify and Produce Documents, 974.
u. Judgments in Summary Proceedings, 974.
(1) In General, 974.
(2) Mandamus Proceedings, 975.
v. Orders Reviving Suits and Actions, 975.
w. Judgments, Orders and Decrees in Particular Cases Considered, 975.
(1) Decisions Affecting Judicial Sales, 975.
(2) Decisions Affecting Receivers, 976.
(3) Decisions Affecting Trustees, 976.
(4) Orders in Proceedings in Aid of Execution, 976.
(5) Orders in Contempt Proceedings, 977.
(6) Orders in Habeas Corpus Proceedings, 979.
(7) Decrees in Suits to Dissolve Corporations, 979.
(8) Decrees in Admiralty, 979.
(9) Judgments and Decrees in Condemnation Proceedings, 980.
x. Decrees Respecting Costs, 981.
5. Practice, 981.
a. Raising and Waiving Objections, 981.
b. Dismissal, 982.

c. Reinstatement, 982.
d. Examination of the Merits, 983.
D. Discretionary Matters, 983.
1. In General, 983.
2. Amendments, 984.
3. Bail, 986.
4. Bills of Review, 986.
5. Certiorari, 986.
6. Change of Venue, 986.
7. Consolidation of Actions, 987.
8. Continuances, 987.
9. Costs, 988.
10. Allowance of Counsel Fees and Damages, 989.
11. Dismissal and Nonsuit, 989.
12. Election between Counts in Indictment, 989.
13. Evidence, 990.
a. Order of Proof, 990.
b. Admission or Rejection of Evidence, 990.
c. Manner of Taking Down Testimony, 991.
d. Witnesses, 991.
e. Interpreters, 992.
f. Demurrer to the Evidence, 992.
14. Fines, 992.
15. Indictments, 992.
16. Injunctions, 993.
17. Interest, 993.
18. Intervention, 993.
19. Judgments and Decrees, 994.
a. Arrest of Judgment, 994.
b. Opening, Amending and Vacating, 994.
(1) Opening, 994.
(2) Amending, 994.
(3) Vacating, 994.
c. Motion and Order for Judgment, 995.
20. Judicial Sales, 995.
21. Jury, 995.
22. Lost Instruments and Records, 996.
23. Mandamus, 996.
24. Decisions on Motions, 996.
a. In General, 996.
b. Motion to Quash Execution or Indictment, 996.
c. Motion for Stay of Execution, 997.
d. Motion for Leave to Discontinue, 997.
e. Motion to Enter Exoneretur of Bail, 997.
25. New Trials, 997.
a. In General, 997.
b. Binding Effect of State Practice, 1000.
c. Effect of Uniformity Act, 1000.
d. Rule in Territorial Courts, 1000.
26. Open and Close, 1000.
27. Pleadings, 1001.
a. Supplemental Pleadings, 1001.
b. Allowance of New and Additional Pleas, 1001.
c. Filing Pleadings, 1001.
d. Order to Make More Definite and Certain, 1001.
e. Withdrawal and Striking Out Pleadings, 1001.
28. Prohibition, 1002.

29. Receivers, 1002.
30. Rehearing, 1003.
31. Rules of Court, 1003.
32. Salvage, 1003.
33. Separate Trials, 1004.
34. Special Interrogatories to the Jury, 1004.
35. Surprise, 1004.
36. Venditioni Exponas, 1004.
37. Appeal and Supersedeas Bond, 1004.
38. Review of Action of Court in Expressing Opinion upon Facts, 1004.
39. Acts of Officers of the Various Departments, 1004.

E. Review of Questions of Fact, 1005.
1. In General, 1005.
2. Constitutional and Statutory Provisions, 1010.
3. Concurrent Decisions of Two Inferior Courts, 1012.
a. In General, 1012.
b. Limitations of General Rule, 1015.
4. What Law Governs, 1015.
a. In General, 1015.
b. Louisiana Practice, 1015.
5. Agreement of Parties, 1016.
6. Construction of Statutes, 1017.
7. Weight and Sufficiency of Evidence, 1018.
8. Excessiveness of Damages, 1020.
9. Limitations of and Exceptions to General Rule, 1020.
a. In General, 1020.
b. Appeals in Admiralty, 1020.
c. Appeals in Equity, 1021.
10. Decisions of Land Department, 1022.
11. Effect of Bankruptcy Act, 1023.
12. How Findings of Fact by the Court May Be Reviewed, 1023.
a. In General, 1023.
b. Review of Findings of Court, 1023.
(1) Rule Prior to Statute, 1023.
aa. In General, 1023.
bb. Bill of Exceptions, 1025.
aaa. Necessity for Bill of Exceptions, 1025.
bbb. Review of Admission and Exclusion of Evidence, 1026.
ccc. Separation of Questions of Law from Questions of Fact, 1026.
cc. Louisiana Practice, 1027.
dd. Waiver of Jury, 1028.
(2) Statutory Rule, 1028.
aa. In General, 1028.
bb. To What Courts Applicable, 1030.
cc. Nature of Finding, 1031.
dd. Kinds of Findings, 1031.
ee. Necessity for Presence of Counsel, 1031.
ff. Form and Sufficiency of Findings, 1031.
aaa. In General, 1031.
bbb. Facts Must Be Found by Circuit Court, 1032.
ccc. Ultimate Facts, 1032.
ddd. Completeness of Findings, 1032.

gg. Waiver of the Jury, 1033.
aaa. Constitutional Right to Waive Jury Trial, 1033.
bbb. Necessity for Waiver, 1033.
ccc. What Constitutes a Waiver, 1033.
aaaa. In General, 1034.
bbbb. Statement of Facts by Judge as Evidence of Waiver, 1034.
cccc. Presumption as to Waiver, 1034.
ddd. The Written Stipulation, 1035.
aaaa. Necessity for Filing, 1035.
bbbb. Form and Sufficiency of Stipulation, 1036.
cccc. How Existence of Stipulation Shown, 1036.
hh. Review of General Findings, 1037.
aaa. In General, 1037.
bbb. Assignment of Error on General Finding, 1040.
ii. Review of Special Findings, 1040.
aaa. Nature of Special Finding, 1040.
bbb. Duty to Make Special Finding, 1040.
ccc. Form and Sufficiency, 1041.
ddd. Scope of Review, 1043.
jj. Rulings of Court in Progress of Trial, 1044.
aaa. In General, 1044.
bbb. Meaning of Phrase "Rulings of the Court in the Progress of the Trial," 1045.
ccc. Remedies, 1045.
kk. Review of Findings upon Questions of Fact, 1045.
ll. The Record, 1050.
aaa. In General, 1050.
bbb. Necessity of Bill of Exceptions, 1051.
ccc. Stipulation of Parties, 1053.
mm. Vacating Submission of Cause, 1053.
nn. Presumptions on Appeal, 1053.
oo. Hearing and Determination, 1054.
aaa. Affirmance, 1054.
bbb. Dismissal or Reversal, 1054.
ccc. Rendering or Ordering Final Judgment, 1055.
(3) In Actions against the Government, 1055.
(4) Construction of Findings, 1056.
c. Review of Judgments Founded upon Agreed Statement of Facts, 1056.
(1) In General, 1056.
(2) Nature of Agreed Case, 1057.
(3) Form, Sufficiency and Contents of Agreed Statement, 1057.
(4) The Record—Necessity for Bill of Exceptions, 1057.
d. Review of Judgments Founded upon Special Verdict, 1058.
(1) In General, 1058.
(2) Definition and Nature, 1059.
(3) Form and Requisites, 1059.
aa. In General, 1059.
bb. Reference of Cause to Court, 1060.
cc. Presence and Assent of Court, 1060.
(4) Review, 1060.

aa. In General, 1060.
bb. Exceptions and Objections, 1061.
aaa. In General, 1061.
bbb. Necessity of Bill of Exceptions, 1061.
cc. Scope of Review, 1061.
dd. Reversal or Affirmance, 1062.
e. Review of Findings by Referees, Arbitrators, etc., 1062.
f. Other Methods Considered, 1065.

VOL. 2, U. S. E.

[Divisions V to XVIII, inclusive, of the title "Appeal and Error," will be found in Vol. 2.]

V. Certificate of Division of Opinion.
A. Under the Acts of 1802 and 1872.
1. In General.
2. To What Courts Applicable.
3. General Requisites.
a. In General.
b. Must Be a Suit or Cause.
c. Questions Must Arise at Trial of Cause.
d. "Upon the Request of Either Party or Their Counsel."
e. Invalidity of Proceedings Below.
f. Necessity for Finality of Judgment.
g. Competency of Judges of Circuit Court.
4. Where Disagreement Is as to Part of Case Only.
5. Certifying Whole Case for Decision.
6. Questions That May Be Brought Up and Considered.
a. In General.
b. Abstract or Hypothetical Questions.
c. Questions of Law or Fact.
d. Questions Relating to Matters of Discretion.
(1) In General.
(2) Division on a Motion.
aa. In General
bb. Motion for New Trial.
cc. Motion to Quash Indictment or Information.
dd. Motions to Revive.
(3) Separate Trials.
(4) Opening and Vacating Judgments and Decrees.
(5) Matters of Practice.
e. Jurisdiction of Circuit Court.
7. Review of Particular Proceedings.
a. Cases in Bankruptcy.
b. Criminal Cases.
c. Where Disagreement Arises on Special Verdict or Motion in Arrest of Judgment.
8. Division Pro Forma.
9. Form, Sufficiency and Contents of Certificate.
a. In General.
b. Certificate Must Contain Distinct Proposition of Law Clearly Stated.
c. Rule in Criminal Cases.
10. Transfer of Cause.
a. Proceedings for Transfer.
b. Effect of Transfer

[Divisions V to XVIII, inclusive, of the title "Appeal and Error," will be found in Vol. 2.]

(1) On Proceedings in Circuit Court.
(2) How Much of Cause Transferred.
(3) Certificate as Precluding Right to Writ of Error.
(4) Abiding the Event.
c. Hearing Confined to Questions Certified.
d. Right to Withdraw Record or Discontinue Cause.
e. Rule of Decision in Supreme Court.
11. Affirmance or Reversal.
a. In General.
b. Division of Opinion.
12. Jurisdictional Amount.
B. Under Circuit Court of Appeals Act.
1. In General.
2. Effect on Pre-Existing Statutes.
3. Rule of Decision.
4. Constitution of Circuit Court of Appeals.
5. Questions to Be Brought Up and Considered.
a. In General.
b. Criminal Cases.
c. Conflict between Supreme Court Decisions.
d. Conflict between Courts of Appeals.
e. Discretionary Matters.
6. Form, Contents and Sufficiency of Certificate.
a. In General.
b. Statement of Facts.
c. Questions Must Be Clearly and Distinctly Certified.
d. Certificate Must Present a Distinct Point or Proposition of Law.
7. Review of Questions of Fact.
8. Right to Certify the Whole Case to This Court.
9. Presumptions on Appeal.
10. Rules of Court as to Bringing Up the Record.

VI. Parties and Persons Entitled to Appeal.
A. Who Entitled to Appeal.
1. In General.
2. Mutuality of Right.
3. Party Aggrieved.
4. Appealable Interest.
a. In General.
b. Devolution of Interest.
5. Particular Parties and Persons Considered.
a. Claimants to Funds and Deposits in Court.
b. Parties by Representation.
c. Municipal Corporations.
d. Natural and Artificial Persons.
e. Parties to Bankruptcy Proceedings.
f. Parties to Consolidated Actions.
g. Persons Holding Railroad Securities.
h. Public Officers.
i. Purchasers at Judicial Sales.
j. Receivers.
k. States.
(1) In General.
(2) The State or United States in Criminal Cases.
(3) The United States in Civil Cases.

[Divisions V to XVIII, inclusive, of the title "Appeal and Error," will be found in Vol. 2.]

l. Defendants in Default Judgment.
m. Mortgagor and Mortgagee.

B. Proper and Necessary Parties.
1. Plaintiffs in Error.
a. In General.
b. Real Parties in Interest.
c. Parties to Joint Judgments and Decrees.
(1) In General.
(2) Principal and Surety.
(3) Summons and Severance or Equivalent Proceedings.
(4) Limitations of General Rule.
(5) Reversal.
(6) Dismissal.
2. Defendants in Error.
a. In General.
b. Husband and Wife.
c. Municipal Corporations.

C. Intervention.
1. Who May Intervene.
2. California Land Cases.
3. From Final Judgments and Decrees.
4. Petition.
5. Rights of Interveners.

D. Designation and Description of Parties.
1. Necessity for.
2. Sufficiency.
a. In General.
b. Christian Names of Parties.
c. Must Be Described by Individual Names.
d. Partnerships.
3. Presumptions on Appeal.
4. Variance.
5. Exceptions and Objections.

E. Death of Party.
1. In General.
2. Of Plaintiff in Error.
3. Of Defendant in Error.
4. Of One of Several Plaintiffs or Defendants.
5. Place of Revival.
6. Persons to Be Substituted.

VII. Waiver of Right.

A. By Release of Errors.
1. In General.
2. Consent Decrees.
3. Who May Release Errors.
4. Hearing and Determination.

B. Implied Waiver or Release of Errors.
1. In General.
2. Acceptance of Benefits.
a. In General.
b. Payments on Judgment.
(1) In General.
(2) Partial Satisfaction.
3. Enforcement of Judgment by Execution.
4. Performance of Judgment or Decree.

[Divisions V to XVIII, inclusive, of the title "Appeal and Error," will be found in Vol. 2.]

5. Motion for New Trial.
6. Obtaining Leave to Amend.
7. Seeking Other Modes of Relief.

VIII. Exceptions and Objections.

A. General Principles.
1. Object of Objections.
2. Necessity for Objections.
a. In General.
b. Limitations of and Exceptions to General Rule.
(1) In General.
(2) Errors Apparent on the Record.
(3) Illegal Contracts and Transactions.
3. Necessity for Exceptions.
4. Time for Perfecting Exceptions.
5. Form and Sufficiency.

B. Applications of Rules to Particular Instances.
1. Form of Action, Modes or Procedure and Irregularities at the Trial.
2. Arbitration and Award.
3. Arguments of Counsel.
4. Assignments for Benefit of Creditors.
5. Questions Relating to Corporations.
6. Matters of Defense.
7. Depositions.
8. Dismissal and Nonsuit.
9. Duties, Imports and Internal Revenue.
10. Evidence.
a. Necessity for Objections and Exceptions.
b. Objections Must Be Taken Below.
(1) In General.
(2) Illustrative Cases.
c. Form and Sufficiency of Exceptions and Objections.
d. Time to Take and Perfect Exceptions.
11. Findings of Court.
12. Public Lands and Spanish and Mexican Grants.
13. Instructions.
a. Right to Except.
b. Objections Must Be Made below.
c. Necessity for Excepting.
d. Form and Sufficiency of Exceptions and Objections.
e. Time for Excepting.
14. Interest.
15. Issues to the Jury.
16. Judgments and Decrees.
17. Jurisdiction and Venue.
a. In General.
b. Equity Jurisdiction.
(1) In General.
(2) Adequate Remedy at Law.
c. Defects in Appeal or Writ of Error.
d. Power of Court to Render a Judgment.
e. Sufficiency of Amount in Controversy.
f. Venue.
18. Parties.
a. For Want of Proper Parties.
b. For Misjoinder of Parties.

[Divisions V to XVIII, inclusive, of the title "Appeal and Error," will be found in Vol. 2.]

c. Multifariousness.
d. For Misnomer.
e. Capacity to Sue.
f. Substitution or Intervention.
19. Pleadings.
a. Declaration.
b. Plea or Replication.
c. Filing Pleadings.
d. Variance.
20. The Record.
21. Reference.
a. Exceptions to Master's Report.
(1) Necessity for Excepting below.
(2) Form and Sufficiency of Exceptions.
22. Removal of Causes.
23. Sheriffs' Sales.
24. Equity, Admiralty and Maritime Causes.
25. Statute of Limitations.
26. Stipulations.
27. Verdict.
28. Questions Relating to Wills.
29. Witnesses.
a. Competency.
b. Examination.
30. Criminal Proceedings.
31. Theory of the Case.
32. Peremptory Exceptions in Louisiana.
33. Waiver of Exceptions and Objections.

IX. Transfer of Cause.

A. In General.
B. Entitling the Cause.
C. Prayer for and Allowance of Appeal.
1. Necessity for Allowance.
2. The Petition or Application.
a. Necessity for.
b. Right to File.
c. Form.
d. Amendment of Petition.
e. Petition as Part of Record.
3. Special Allowance.
4. Form and Sufficiency of Allowance.
5. Allowance by Whom.
6. Time of Allowance.
a. At Term or in Vacation.
b. Allowance Nunc Pro Tunc.
c. Presumptions on Appeal.
7. Order of Allowance.
a. Form and Requisites.
b. Entry of Order.
c. Opening and Vacating Order.
(1) Power of Court.
(2) Grounds for Vacating.
(3) At What Stage of Proceedings.
(4) Remedies.
d. Relation.
e. Conclusiveness of Order.

[Divisions V to XVIII, inclusive, of the title "Appeal and Error," will be found in Vol. 2.]

8. Effect of Allowance.
9. Proof of Allowance.
10. Mandamus to Compel Allowance
11. Vacation or Revocation of Allocatur.

D. Limitations upon Time for Taking.
1. In General.
2. In Particular Proceedings and Courts.
a. In General.
b. Bills of Review.
c. Causes of Admiralty and Maritime Jurisdiction.
d. Appeals from Territorial Courts.
e. From Court of Claims
f. From District to Circuit Courts.
g. Settlement of Private Land Claims in California.
h. In Criminal Cases.
i. Cross Appeals.
3. When Statute Begins to Run.
4. Postponement, Suspension or Interruption.
a. When Is an Appeal Taken.
b. Motion for New Trial or Petition for Rehearing.
c. War and Stay Law Period.
d. Disabilities.
5. Computation of Time.
6. Pleading the Statute.
7. Effect of Circuit Court of Appeals Act.

E. The Writ of Error.
1. Purpose or Object of Writ.
2. Necessity of Writ.
3. Form and Requisites.
a. Form.
b. Requisites and Sufficiency.
(1) In General.
(2) Description of Judgment.
(3) Naming Return Day.
(4) Teste.
(5) Sealing.
(6) Date.
(7) Indorsement.
c. Exceptions and Objections.
4. Issuance and Service of Writ.
a. In General.
b. Issuance.
c. Service.
(1) Necessity for Service.
(2) Time of Service.
(3) Manner of Serving.
(4) Effect of Failure to Serve.
5. Return.
a. In General.
b. Sufficiency of Return
(1) In General.
(2) Original or Copy.
c. Time and Place of Return.
d. Specification of Return Day in Writ.
e. Compelling Return.
f. Waiver.
6. Amendment of Writ.

[Divisions V to XVIII, inclusive, of the title "Appeal and Error," will be found in Vol. 2.]

a. Right to Amend.
b. Discretion of Court.
c. Amendable Defects.
(1) In General.
(2) Error as to Return Day.
(3) Absence of or Mistake in Teste.
(4) Absence of or Mistake in Seal.
(5) Mistake in Title of Writ.
(6) Defects with Respect to the Parties.
(7) Omission to Allege Jurisdiction.
d. Amendments by Record.
e. Motion for Leave.
7. Dismissal.
8. Variance.
F. The Citation.
1. Definition, Distinctions and Office.
2. What Law Governs.
3. Necessity for.
a. In General.
b. Appeals Allowed in Open Court.
(1) In General.
(2) Appeals Perfected after the Term.
c. In Admiralty and Prize Causes.
d. Legal Equivalents of Citation.
e. Effect of Want of Notice on Judgment or Decree.
f. Dismissal.
4. Form and Requisites.
a. In General.
b. Date.
c. Statement of Names of Parties.
d. Signing of Citation.
5. Issuance.
a. Whence Issued.
b. To Whom Addressed.
c. By Whom Issued.
6. Service.
a. Necessity.
b. Constructive Service.
c. Time of Service.
(1) In General.
(2) Before Return Day.
d. Manner and Place of Service.
e. Upon Whom Served.
f. Proof of Service.
7. Return.
8. Waiver.
a. In General.
b. By Appearance.
(1) Defects and Irregularities.
(2) Want of Citation.
aa. General Appearance.
bb. Special Appearance.
cc. Altering General to Special Appearance.
(3) Withdrawing or Striking Out Appearance.
c. By Acceptance of Defective Service.
d. By Acknowledgment of Notice.

[Divisions V to XVIII, inclusive, of the title "Appeal and Error," will be found in Vol. 2.]

9. Amendment.
10. Presumptions on Appeal.

G. Appeal Bond.
1. Definition and Nature.
2. Necessity for.
a. In General.
b. Appeals by United States.
c. Appeals in Forma Pauperis.
d. Under Circuit Court of Appeals Act.
e. Waiver.
3. Discretion of Court.
4. Form and Sufficiency.
a. In General.
b. Signing.
c. Condition of Bond.
d. Parties.
(1) Obligors.
(2) Obligees.
(3) Sureties.
e. Description of Judgment.
f. Must Contain Security for Costs.
g. Dismissal.
5. Approval of Bond.
a. Necessity for.
b. Approval by Whom.
c. Form and Evidence of Approval.
d. Vacating Approval.
6. Time of Filing Security.
7. Additional Security.
8. Obviating Defects in Bonds and New Bonds.
9. Amount of Bond.
10. Appeals in Admiralty.
11. Appeals in Bankruptcy.
12. Actions on Bond.
a. Liability of Sureties on Appeal Bonds.
(1) Discharge of Sureties.
(2) Extent of Liability of Sureties.
(3) Pleas and Defenses.
(4) Liability Fixed by Affirmance of Judgment.
b. Pleas.
c. Damages.
d. Interest.
e. Joint Judgment against Principal and Sureties.
f. Summary Judgment.
g. Necessity for Execution.

H. The Record or Transcript.
1. Definition.
2. Original Record or Transcript.
3. What Constitutes the Record Proper.
a. In General.
b. Assignment of Errors.
c. Certificates and Statements of Clerk.
d. Citation.
e. Depositions, Affidavits and Exhibits.
f. Findings of Court.
g. Minutes.

[Divisions V to XVIII, inclusive, of the title "Appeal and Error," will be found in Vol. 2.]

h. Opinions of Court.
i. Matters Resting in Parol.
j. Pleadings.
k. Petition for Rehearing.
l. Petition for Appeal or Removal of Causes.
m. Proceeding before Commissioners.
n. Process.
o. Report of Judge.
p. Verdict and Judgment.
(1) In General.
(2) Issues to the Jury.
q. Papers Filed after Issuance of Writ.
r. Record in Another Suit.

4. Errors Not Apparent on Face of Record and Matters to Be Shown by Record.
a. In General.
b. Record in Criminal Cases.
c. Review of Order of Remand.
d. Amendments.
e. Laws and Statutes.
f. Jurisdiction of Court below.
(1) In General.
(2) In Summary Proceedings.
(3) Citizenship of Parties.
(4) Service of Process.
(5) Validity of Judgment Where Jurisdiction Not Shown.
g. Jurisdiction of Appellate Court.
(1) Steps Necessary to Give Jurisdiction to Appellate Court.
aa. Prayer for and Allowance of Appeal.
bb. Issuance and Service of Citation.
cc. Taking of Security or Appeal Bond.
(2) Amount in Controversy.
h. Evidence.
(1) In General.
(2) In Chancery Cases.
(3) Modes of Putting Evidence on the Record.
(4) Witnesses.
i. Reasons for Decision.
j. Papers and Documentary Evidence.
(1) In General.
(2) Admission or Rejection of Documentary Evidence.
k. Rules of Court.
l. Stipulations.
m. Exceptions and Objections.
(1) To the Evidence.
(2) To the Instructions.
(3) To Master's Report.
n. Allowance of Counsel Fees as Damages.
o. Instructions.
p. Judicial Notice.

5. Necessity for Bill of Exceptions, Agreed Statement of Facts or Special Verdict.
a. Bill of Exceptions.
b. Other Modes than Bill of Exceptions.

[Divisions V to XVIII, inclusive, of the title "Appeal and Error," will be found in Vol. 2.]

c. Stipulation or Agreement of Parties.
6. Requisites, Sufficiency and Contents.
a. Contents of Record.
(1) In General.
(2) Pleadings.
(3) Names of Jurors.
(4) The Citation.
(5) Remedying Incomplete Transcripts.
(6) Stipulation of Parties.
b. Form and Sufficiency.
(1) Statement of Pleadings.
(2) Incorporating Rules of Court.
(3) Dismissal and Reinstatement.
7. Filing.
a. Necessity for Filing.
b. Duty of Appellant.
c. Time for Filing.
(1) In General.
(2) Waiver.
(3) Effect of Filing Record before Motion to Dismiss.
(4) Dismissal and Reinstatement.
(5) Excuses for Delay in Filing.
(6) Limitations of General Rule.
(7) Docketing and Dismissing Causes.
aa. The Rules of Court Stated.
bb. Filing of Record by Defendant in Error.
cc. Time of Rendition of Judgment.
dd. Where Cause Is Docketed before Motion to Dismiss.
ee. Sufficiency of Record.
ff. Certificate of Clerk.
aaa. Necessity for.
bbb. Form and Requisites.
gg. Operation and Effect of Rule.
hh. Reinstatement.
ii. Supersedeas.
(8) Extension of Time.
(9) How Objection Made.
d. Remedies in Case of Failure or Refusal to File.
(1) Motion for Rule to File.
(2) Mandamus.
e. Withdrawal of Transcript.
8. Authentication and Certification.
a. Necessity for.
b. Who May Certify.
c. The Certificate of Authentication.
(1) Necessity for Certificate.
(2) Form and Sufficiency.
d. Transfer of Causes from Territorial Courts.
9. Printing.
a. Necessity for Printing Record.
b. Duty of Plaintiff in Error.
c. Right to Take Original Records to Printer.
d. How Much to Be Printed.
e. Clerk's Fees and Costs of Printing.
(1) In General.

[Divisions V to XVIII, inclusive, of the title "Appeal and Error," will be found in Vol. 2.]

(2) Payment by Whom.
aa. Appellant or Plaintiff in Error.
bb. Against Losing Party.
cc. Party Appealing in Cross Suit.
dd. Party Causing Unnecessary Matter to Be Printed.
(3) In Cases of Dismissal or Affirmance.
(4) Time of Payment.
(5) Remission of Fees and Costs.
f. Duty of Clerk with Respect to Indexing and Delivery of Copies.
g. Stipulation of Parties.
10. Construction of Record.
11. Amendment and Correction of Record.
a. Power of Court.
b. What Law Governs.
c. Consent of Parties.
d. Amendable Defects.
(1) Clerical Errors.
(2) Defects in Findings of Court.
e. Amendments in Appellate Court.
(1) Power of Court to Allow.
(2) In Admiralty.
(3) Consent of Parties.
(4) Amendable Defects.
aa. Clerical Errors.
bb. Failure of Record to Show Jurisdiction.
(5) Venire De Novo.
f. The Motion or Application.
g. At What Stage of Proceedings.
h. Waiver of Errors and Imperfections in Record.
12. Impeachment or Contradiction of Record.
13. Return of Record to Court below.
I. Docketing and Entry of Appeals.
1. In General.
2. Time of Docketing.
a. In General.
b. Excuses for Failure to Docket in Time.
3. Where Cause Is Brought Up by Appeal and Writ of Error.
4. How Objection Taken.
5. Dismissal.
6. Waiver.
J. Clerks' Fees.
1. In General.
2. Who Entitled.
3. Liability for.
4. Service with Respect to Record.
5. Docketing and Dismissing Causes for Failure to File Fee Bond.
6. Right to Withhold Mandate until Payment.
K. Waiver of Irregularities in Transfer of Cause.

X. Assignment of Errors.
A. The Rules of Court Stated.
B. Office of Assignment.
C. Necessity for.
1. In General.

[Divisions V to XVIII, inclusive, of the title "Appeal and Error," will be found in Vol. 2.]

2. Rule Requiring Its Annexation to and Return with Writ of Error.
3. Effect of Its Omission.
D. Reason and Object of Rule.
E. Form and Sufficiency.
1. In General.
2. As to the Instructions.
3. As to the Evidence.
4. As to the Judgment.
5. As to Rulings upon Report of Master.
6. As to Demurrer.
F. Construction of Assignment.
G. Scope of Assignment.
H. Striking Out.

XI. Briefs.
A. Necessity for Briefs.
B. Form and Contents of Brief.
1. The Rules of Court Stated.
2. Abstract or Statement of Case.
a. In Brief of Plaintiff in Error.
b. In Brief of Defendant in Error.
3. Specification of Errors.
a. In Brief for Plaintiff in Error.
(1) In General.
(2) As to Instructions.
(3) As to the Evidence.
(4) As to Master's Report.
(5) Effect of Omission of Specification.
b. In Brief for Defendant in Error.
4. The Argument.
5. Incorporation of State Statutes in Brief.
6. Scandal and Impertinence.
C. Filing.
1. Who May File.
2. Time of Filing.
a. Brief of Counsel for Plaintiff in Error.
b. Brief of Counsel for Defendant in Error.
3. Notice of Filing.
4. Effect of Failure to File.
a. Brief of Plaintiff in Error.
b. Brief of Defendant in Error.
D. Printing Briefs.
E. Admissibility in Evidence.

XII. Effect of Appeal.
A. In General.
B. On Jurisdiction of Trial Court.
1. In General.
2. Appeals in Chancery.
3. Appeals from District of Columbia.
4. Effect on Injunctions below.
5. Amendments and Directions.
6. Enforcement of Judgment or Decree.
7. In Criminal Cases.
a. In Capital Cases.
b. In Habeas Corpus Proceedings.
c. Right of Trial Court to Bail Accused.

[Divisions V to XVIII, inclusive, of the title "Appeal and Error," will be found in Vol. 2.]

C. On Decision of Court below.
1. Vacation of Judgment.
2. Appeals in Eminent Domain Proceedings.
3. Availability as Estoppel Pending Appeal.
D. Trials De Novo.
1. Proceedings for Settlement of Private Land Claims.
2. Appeals from Nevada.
3. Appeals in Admiralty.
4. Appeals to Supreme Court of Philippine Islands.
E. Effect on Liens.
F. Effect on Subject Matter or Property in Litigation.
1. In General.
2. Appeals in Admiralty.
G. Patent Cases.
H. Power to Issue Writs.

XIII. Appearance.
A. Necessity for Entering Appearance.
1. Of Appellant.
2. Of Appellee.
B. Time for Entering Appearance.
C. Authority to Enter Appearance.
1. In General.
2. Of Attorney General.
3. Of Partners.
4. Proof of Authority.
D. Effect of Failure to Appear.
1. Failure of Plaintiff in Error.
2. Failure of Defendant in Error.
3. Failure of Both Parties.
E. Effect of Appearance as Waiver.
F. Withdrawal and Striking Out of Appearance.

XIV. Dismissal and Reinstatement.
A. Dismissal.
1. Grounds for Dismissal.
a. No Actual Controversy Existing.
(1) In General.
(2) Fictitious or Frivolous Issues.
(3) Specific Applications of General Rules.
aa. Controversy between Parties on Same Side.
bb. Compromise or Settlement of Controversy.
aaa. Controversies between Private Individuals.
bbb. Criminal Prosecutions.
cc. Criminal Prosecutions.
aaa. In General.
bbb. Habeas Corpus Proceedings.
dd. Surrender of Letters Patent.
ee. Reversal of Decree Pending Appeal.
ff. Suit to Try Title to Office.
gg. Dissolution of Corporations.
hh. Compliance with Judgment Pending Appeal.
ii. Failure to Mature Cause or Perfect Appeal.
jj. Proceedings to Test Constitutionality of Statutes.
kk. Repeal of Statute Pending Appeal.
(4) Stipulations.
(5) Contempt of Court.

[Divisions V to XVIII, inclusive, of the title "Appeal and Error," will be found in Vol. 2.]

(6) Practice and Procedure.
aa. Rule to Show Cause.
bb. Parties to Motion.
(7) Hearing and Determination.
aa. Evidence in Support of Motion.
aaa. In General.
bbb. Extrinsic Evidence.
aaaa. In General.
bbbb. Affidavits.
ccc. Time of Introducing Evidence.
ddd. Weight and Sufficiency of Evidence.
bb. Evidence in Rebuttal.
(8) Rehearing.
b. Want of Jurisdiction.
c. Premature Appeals.
d. Want of Prosecution.
e. Failure to Take Appeal.
f. Failure to Specify Errors on Record.
g. Failure to Annex Bill of Exceptions or Statement of Facts.
h. Double Appeals.
i. Hearing and Determination of Post Bellum Transactions.
2. Dismissal of Cross Appeals.
3. Dismissal by Agreement or Stipulation.
4. Right of Court to Annex Conditions.
5. Simultaneous Dismissal and Affirmance.
6. The Motion.
a. Uniting Motion to Affirm with Motion to Dismiss.
(1) In General.
(2) When Proper.
(3) Printing the Record.
b. Time of Making Motion.
(1) Before or after Return Day of Writ.
(2) After Entering Appearance.
(3) Before Regular Call of Docket.
(4) Want of Citation or Irregularities therein.
(5) At Hearing on the Merits.
(6) Laches.
c. Notice of Motion.
(1) Necessity for.
(2) Requisites and Sufficiency.
(3) Briefs of Counsel.
d. Parties to Motion.
(1) Who May Make Motion.
(2) Persons Opposing Motion.
e. Hearing of Motion.
(1) Time for Hearing.
(2) Scope of Review.
aa. Matters of Fact Alleged in Motion.
bb. Regularity of Writ and Fact of Jurisdiction.
cc. Consideration of Merits of Controversy.
(3) Sufficiency of the Motion Papers.
(4) The Record.
aa. Necessity for.
bb. Printing the Record.
7. Waiver of Right to Dismiss.
8. The Order of Dismissal.
9. Process.

[Divisions V to XVIII, inclusive, of the title "Appeal and Error," will be found in Vol. 2.]

B. Reinstatement.
1. Distinction between New Appeal and Reinstatement.
2. Discretion of Court.
3. When Allowed.
4. Stipulation of Parties.
5. At What Stage of Proceedings.
6. The Motion.
7. Review of Refusal to Reinstate.
8. Mandamus.

XV. Presumptions on Appeal.

A. In Support of Proceedings below.
1. In General.
2. Duty of Plaintiff in Error to Show Error.
3. As to Instructions.
4. As to Evidence
a. Admission or Rejection.
b. Loss or Destruction of Documentary Evidence.
c. Execution and Proof of Documents.
d. Witnesses.
e. Sufficiency of Evidence.
5. As to Jurisdiction.
a. Of Trial Court.
(1) Distinction between Courts of General and Limited Jurisdiction.
(2) Courts of General Jurisdiction.
(3) Courts of Limited or Special Jurisdiction.
(4) Service of Process.
b. Of Appellate Court.
6. As to the Pleadings.
a. In General.
b. Plea.
c. Demurrers.
d. Replication.
7. As to the Verdict.
8. Reference.

B. Presumptions as to the Record.

XVI. Reversible Error.

A. Right to Complain of Error.
1. Parties Not Appealing.
a. In General.
b. The Appellee.
2. Errors Affecting Co-Party.
3. The Party Who Recovered Judgment.

B. Statement of General Principles.
1. Error Must Be Prejudicial.
a. In General.
b. Illustrative Cases.
(1) Miscellaneous Cases.
(2) Defects and Irregularities in the Pleadings.
aa. In General.
bb. Striking Out Pleadings.
(3) Errors with Respect to the Evidence.
aa. In General.
bb. Admission of Evidence.
aaa. In General.

[Divisions V to XVIII, inclusive, of the title "Appeal and Error," will be found in Vol. 2.]

bbb. Trials by Court without Jury.
cc. Exclusion of Evidence.
aaa. Harmless Error.
bbb. Reversible Error.
dd. Witnesses.
aaa. In General.
bbb. Competency.
ccc. Examination.
ee. Curing Errors.
(4) Errors with Respect to the Instructions.
aa. In General.
bb. Inaccuracies in Expression.
cc. Giving Instructions More Favorable than Requested.
dd. Invasion of Province of Jury.
aaa. In General.
bbb. Direction of Verdict.
ee. Misleading Instructions.
ff. Instructions Not Based on the Evidence.
(5) Rule in Criminal Cases.
c. Change in Law Pending Appeal.
2. Presumption as to Prejudice.
a. In General.
b. Illustrative Cases.
3. Other Kinds of Harmless Errors Considered.
a. Invited Errors.
(1) In General.
(2) Admission or Exclusion of Evidence.
(3) Instructions.
(4) Jurisdiction of Court.
b. Errors Favorable to the Complainant.
(1) In General.
(2) Errors with Respect to the Evidence.
(3) Errors with Respect to the Instructions.
(4) Exceptions to General Rule.
C. Waiver of Error.
1. Express Waiver.
2. Implied Waiver.

XVII. Hearing and Determination.

A. Stipulations.
1. In General.
2. Withdrawal from Stipulations.
B. Order in Which Causes Should Be Heard.
C. Advancement of Causes.
1. Statutes and Rules of Court Stated.
2. What Causes Advanced.
a. Questions of Public Importance.
(1) In General.
(2) Where Execution of Revenue Laws Is Enjoined or Stayed.
b. Causes Involving Private Interests.
c. Causes Involving Great Hardships.
d. Jurisdiction of Court below.
(1) Rules of Court Stated.
(2) Appeals from Decree on Merits.
(3) Writs of Error to State Courts.
(4) The Motion.

[Divisions V to XVIII, inclusive, of the title "Appeal and Error," will be found in Vol. 2.]

(5) Hearing and Determination.
e. Criminal Cases.
f. Where a State Is a Party.
g. Causes without Merits.
h. Direct Appeals under Act of March 3rd 1891.
i. Appeals from Interlocutory Orders under § 7 of Court of Appeals Act.
3. Hearing and Determination of Motion.
a. In General.
b. Consolidation of Causes.
c. Briefs and Arguments.
d. The Record.
e. Sufficiency of Motion Papers.
f. The Order.

D. Arguments of Counsel.
1. Latitude.
2. Time for Hearing Arguments.
a. Rules of Court.
b. Assigning Days for Argument.
c. Neither Party Ready at Second Term.
3. Oral Arguments.
4. Effect of Failure to Submit Argument.
5. Submission of Causes on Printed Arguments.
6. Opening and Closing Argument.

E. Submission of Cause.

F. Consolidation of Causes.

G. Continuance or Postponement of Hearing.
1. In General.
2. Absence of Counsel.
3. Death of Counsel.
4. Abiding the Event.

H. Withdrawal or Discontinuance.
1. In General.
2. Grounds for Allowance.
3. Time of Allowance.

I. Double Appeals.

J. Mandamus to Compel Hearing.

K. Right to Introduce New Evidence in Appellate Court.
1. In General.
2. Affidavits to Support Motion for New Trial.
3. Appeals in Equity.
a. In General.
b. Limitations of General Rule.
4. Admiralty and Prize Causes.

L. Right of Parties to a Decision.

M. Effect of Change in Law Pending Appeal.
1. In General.
2. Repeal of Statutes.
3. Writ of Error to State Court.

N. Effect of Destruction or Abolition of Court Pending Appeal.

O. Scope of Review.
1. In General.
2. Cases Dismissed for Want of Jurisdiction.
3. Cases Pending in Law and Equity.
4. Where Part Only of Decision Is Appealed from.
5. Matters Unnecessary to Decide in This Court.
6. Constitutional Questions.

[Divisions V to XVIII, inclusive, of the title "Appeal and Error," will be found in Vol. 2.]

7. Matters Not Decided below.
8. In Particular Cases.
   a. Damages for Breach of Contract.
   b. Appeals from Orders Confirming Foreclosure Sales.
   c. Appeal from Order of Revival.
   d. Appeals in Habeas Corpus Proceedings.
   e. Under Circuit Court of Appeals Act.
   f. Appeals from Indian Territory.
9. Reasons for Decision.
10. Orders Previously Made in Cause.
11. Orders Subsequent to Decision Appealed from.
12. Where Jurisdictional Amount Is Insufficient.

P. Opinions of Court.
1. Duty to Deliver.
2. Majority of Court.
   a. Constitutional Questions.
   b. Questions of Reversal.
3. Certified Copies of Opinions.
4. Recordation.
5. Disposition of Original Opinion.

Q. Reversal.
1. In General.
2. Grounds for Reversal.
   a. In General.
   b. Want of Jurisdiction.
   c. Admission or Exclusion of Evidence.
   d. No Actual Controversy.
   e. Errors Cured by the Verdict or Statute of Jeofails.
   f. Changing Theory of Case on Appeal.
   g. Reasons for Decision.
   h. Instructions.
   i. De Minimis Lex Non Curat.
   j. Upon Question of Costs.
   k. Remittitur.
3. Reversal of Void Judgments.
4. Reversal by Agreement or Stipulation.
5. Partial Reversal.
   a. In General.
   b. Rule in Criminal Cases.
6. Judgments by Default.
7. Effect of Reversal.
   a. In General.
   b. On Judicial Sales.
8. Rendition and Entry of Judgment.
   a. Rendering and Ordering Final Judgment.
      (1) In General.
      (2) In Criminal Cases.
      (3) Appeals in Equity.
      (4) Special Findings.
   b. Necessity for Presence of Parties.
   c. Entry Nunc Pro Tunc.
9. Restitution.
   a. Right to Restitution.
      (1) In General.
      (2) In Case of Reversals for Want of Jurisdiction.
      (3) In Prize Causes.
   b. Who Liable to Make Restitution.

[Divisions V to XVIII, inclusive, of the title "Appeal and Error," will be found in Vol. 2.]

(1) In General.
(2) Agents.
(3) Assignees of Judgments.
(4) The United States.
(5) Third Parties or Strangers.
(6) Purchasers at Judicial Sales.
c. Extent of Restitution.
d. Proceedings to Obtain Restitution.
(1) Scire Facias.
(2) Summary Proceedings by Motion.
(3) Assumpsit.
(4) Attachment for Contempt.
e. The Motion.
R. Affirmance.
1. In General.
2. Grounds for Affirmance.
a. In General.
b. Where Proceedings below Were Correct.
(1) In General.
(2) Error to State Court.
c. Where Record Is Defective.
d. Causes Tried by the Court.
e. Where Errors below Were Committed by Jury.
f. Where Writ of Error Is Frivolous or Taken for Delay.
g. Division of Opinion.
(1) In General.
(2) Applications of Rule in Particular Cases.
aa. Division on Questions of Jurisdiction.
bb. Division on Motion in Arrest of Judgment.
cc. Division on Motion for Rehearing.
dd. Division in Case of Special Verdict.
ee. Division in Case of Demurrer.
(3) Powers of Appellate Court.
aa. In General.
bb. Right to Grant New Trial.
(4) Force and Effect of Judgment.
aa. As an Estoppel.
bb. The Rule of Precedents or Stare Decisis.
(5) Necessity for Entry of Judgment.
(6) Opinion of Court.
(7) Costs.
(8) Reargument or Rehearing.
h. No Actual Controversy Existing.
i. Want of Jurisdiction.
3. Rule in Territorial Courts.
4. Affirmance by Agreement or Stipulation.
5. Conditional Affirmance.
6. Simultaneous Affirmance and Reversal.
7. Affirmance Nunc Pro Tunc.
8. Hearing and Determination of Motion.
9. Interest and Damages on Affirmance.
a. Statutes and Rules of Court Stated.
b. Construction of Rules.
c. Where Writ Is Sued Out Merely for Delay.
(1) Writs of Error.
(2) Appeals.
(3) Instances of Proceedings Taken for Delay.

[Divisions V to XVIII, inclusive, of the title "Appeal and Error," will be found in Vol. 2.]

d. Decrees in Equity.
e. Determination of Right.
f. Agreement or Stipulation of Parties.
g. Measure and Elements of Damages.
(1) Measure.
(2) Elements.
h. Computation of Damages.
i. Interest.
(1) Statutory Provisions.
(2) Right to Recover.
aa. In General.
bb. Rule in Pennsylvania.
cc. Cases Removed by Appeal.
dd. Rule in Chancery and Admiralty.
ee. On Judgment of This Court.
ff. Determination of Right.
(3) Computation of the Interest.
aa. Time from and to Which Computed.
bb. Rate of Interest.
aaa. Statutes and Rules of Court Stated.
bbb. Object of Rule.
ccc. Rules as to Decrees in Chancery.
ddd. Rule as to Cases in Admiralty.
(4) Amendments.
(5) Mandate.
10. Power to Change Judgments of Dismissal to Judgments of Affirmance.
S. Modification.
T. Opening, Amending and Vacating.
1. Control of Court over Its Judgments.
a. In General.
b. At Subsequent Term.
2. Grounds for Amending and Vacating.
U. Force and Effect of Decision.
1. On Second Appeal.
a. In General.
b. Application of Rule to Decrees in Chancery.
c. Application of Rule to Judgments by Divided Courts.
d. Persons Concluded.
e. Matters Concluded.
(1) Jurisdictional Matters.
(2) Matters Unnecessary to the Decision.
(3) Priority of First Judgment.
(4) Allowance of Interest and Damages.
(5) How Determined.
f. When Second Appeals Allowed.
2. Operation of Appealed Judgment as an Estoppel.
3. Rule of Precedents or Stare Decisis.

XVIII. Costs.

A. Nature and Extent of Right to Costs.
1. Discretion of Court.
2. On Affirmance.
a. In General.
b. Affirmance upon Agreement of Parties.
3. On Reversal.
a. In General.
b. For Want of Jurisdiction.

[Divisions V to XVIII, inclusive, of the title "Appeal and Error," will be found in Vol. 2.]

c. Where Judgment Is Affirmed in Part and Reversed or Modified in Part.
d. Where Remittitur Is Entered.
e. Apportionment.
f. Enforcement.
g. Entry of Judgment below.
4. On Dismissal.
a. In General.
b. For Want of Prosecution.
(1) In General.
(2) Failure to Appear.
c. For Want of Jurisdiction.
(1) In General.
(2) Exceptions to General Rule.
d. No Actual Controversy Existing.
e. Dismissal upon the Merits.
5. On Modification.
B. Right to and Liability for Costs.
1. Who Entitled to Costs.
2. Who Liable for Costs.
a. In General.
b. Appeals in Forma Pauperis.
3. The United States.
4. As Affected by Negligence or Omission of Party.
5. Where Judgment Silent as to Costs.
6. Assignees.
C. Particular Items.
1. Printing.
a. In General.
b. Printing the Record.
c. Printing Briefs.
d. Printing Objections.
2. Docket Fees.
3. Counsel Fees.
4. Transcript or Copy of the Record.
D. Taxation.
1. In General.
2. Time of Taxing Costs.
3. Re-Taxation.
E. Proceedings for Enforcement.
F. Reversal.

CROSS REFERENCES.

See the titles BILL OF REVIEW; CERTIORARI; EXCEPTIONS, BILL OF, AND STATEMENT OF FACTS ON APPEAL; SUPERSEDEAS AND STAY OF PROCEEDINGS.

As to review of proceedings in justice's court, see the title JUSTICES OF THE PEACE. As to review of bankruptcy proceedings, see the title BANKRUPTCY. As to review of admiralty proceedings, see the title ADMIRALTY, ante, p. 119. As to the mandate of the appellate court, and when proceedings will be remanded for further proceedings in the court below, see the title MANDATE AND PROCEEDINGS THEREON. As to review of revenue causes, see the title REVENUE LAWS. As to review of condemnation proceedings, see the title EMINENT DOMAIN.

I. Right to Appellate Review.

A party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop just where the rescinding

act finds them, unless special provision is made to the contrary.[1] And if at the time of final judgment there is no right of appeal whatever, a party cannot evoke a new one by filing a petition for rehearing, even if, by accident, it is kept along until an act giving an appeal is passed.[2]

II. The Various Remedies Considered.

A. In General.—There are two principal methods known to English jurisprudence, and to the jurisprudence of the federal courts, by which cases may be removed from an inferior to an appellate court for review. These are the writ of error and the appeal. There may be, and there are, other exceptional modes, such as the writ of certiorari at common law, and a certificate of division of opinion under the acts of congress. The appeal, which is the only mode by which a decree in chancery or in admiralty can be brought from an inferior federal court to this court, does bring up the whole case for re-examination on all the merits, whether of law or fact, and for consideration on these, as though no decree had ever been rendered. The writ of error is used to bring up for review all other cases, and when thus brought here, the cases are not open for re-examination on their whole merits, but every controverted question of fact is excluded from consideration, and only such errors as this court can see that the inferior court committed, and not all of these, can be the subject of this court's corrective power.[3] The regulation of the appellate power of this court being conferred upon congress, and congress having given an appeal or writ of error in only certain specified cases, the implication is irresistible, that those errors and irregularities, which can only be reviewed by appeal or writ of error, cannot be reviewed in this court in any other cases than those in which those processes are given.[4]

1. Baltimore, etc., R. Co. *v.* Grant, 98 U. S. 398, 401, 25 L. Ed. 231; Freeborn *v.* Smith, 2 Wall. 160, 173, 17 L. Ed. 922; United States *v.* Klein, 13 Wall. 128, 20 L. Ed. 519.

A party to a suit has no vested right to an appeal or a writ of error from one court to another. Such a privilege once granted may be taken away, and if taken away, pending proceedings in the appellate court stop just where the rescinding act finds them, unless special provision is made to the contrary. The Revised Statutes gave parties the right to remove their causes to this court by writ of error and appeal, and gave us the authority to re-examine, reverse, or affirm judgments or decrees thus brought up. The repeal of that law does not vacate or annul an appeal or a writ already taken or sued out, but it takes away our right to hear and determine the cause, if the matter in dispute is less than the present jurisdictional amount. Railroad Co. *v.* Grant, 98 U. S. 398, 401, 25 L. Ed. 231; Sherman *v.* Grinnell, 123 U. S. 679, 31 L. Ed. 278.

An appeal which had been allowed from a district court having circuit court powers dismissed; it having been allowed just after an act had passed, which created a circuit court for the same district, and which repealed so much of any act as gave to the district court circuit court powers. The Lucy, 8 Wall. 307, 19 L. Ed. 394.

2. Harrison *v.* Magoon, 205 U. S. 501, 503, 51 L. Ed. 900.

3. Murdock *v.* Memphis, 20 Wall. 590, 621, 22 L. Ed. 429.

"The appellate power of this court is broader than its original, and generally—that is, in most cases—it may be said that the issue of a writ of habeas corpus by us, when it is directed to one of our inferior courts, is an exercise of our appellate jurisdiction. Without going at large into a discussion of its extent, it is sufficient for the present to notice the fact that the exercise of the appellate power is not limited by the constitution to any particular form or mode. It is not alone by appeal or by writ of error that it may be invoked. In Re Metzger, 5 How. 176, 12 L. Ed. 104, it was indeed ruled that an order of commitment made by a district judge, at chambers, cannot be revised here by habeas corpus. But such an order was reviewable in no form; and besides, the authority of that case has been much shaken. In re Kaine, 14 How. 103, 14 L. Ed. 345; Ex parte Yerger, 8 Wall. 85, 19 L. Ed. 332." Ex parte Virginia, 100 U. S. 339, 341, 25 L. Ed. 676.

4. Ex parte Parks, 93 U. S. 18, 21, 23 L. Ed. 787.

By the constitution of the United States, the supreme court possesses no appellate power in any case, unless conferred upon it by act of congress; nor can it, when conferred, be exercised in any other form, or by any other mode of proceeding, than that which the law prescribes. Barry *v.* Mercein, 5 How. 103, 119, 12 L. Ed. 70.

And in the case of The United States *v.* Curry, 6 How. 106, 12 L. Ed. 363, the court held, that where the power of the

B. Appeal and Writ of Error.—1. APPEAL—a. *Origin and Nature.*—An appeal was a civil-law proceeding in its origin.[5] It was unknown to the common law. In the civil law and equity jurisprudence, its object was to take the whole case to the higher tribunal, there to be tried and determined de novo, upon the issues between the parties, as though the cause had originated in the appellate court.[6]

b. *Definitions and Distinctions.*—**Definition.**—An appeal is the removal of a cause from an inferior to a superior court.[7] It has been decided, by the supreme court, that the term appeal in the judiciary act of 1789 must be understood in its technical sense as expressive of the civil-law mode of removing a cause to a higher tribunal, and not in its popular sense as descriptive of appellate jurisdic-

court to hear and determine a case is conferred by acts of congress, and the same authority which gives the jurisdiction points out the manner in which it shall be brought before us, we have no power to dispense with the provisions of the law, nor to change or modify them. Cited in Carroll *v.* Dorsey, 20 How. 204, 15 L. Ed. 803.

Right of court to create other processes.—A writ of error does not lie from the supreme court of the United States to the general court for the territory northwest of the Ohio. "The very existence of the court whose judgment is complained of is derived from the United States. The laws adopted for the Northwestern Territory derive their whole obligatory effect from the ordinance of the old congress, and are, in fact, laws of the United States, although copied from state laws. All power and authority exercised in that territory have emanated from the United States; and all offenses there committed are against the authority of the United States. If, then, this is a case by the constitution cognizable by the judicial authority of the United States; if by the constitution, this court has appellate jurisdiction in all such cases, and if this case is not within any exception made by the constitution, or by any act of congress, nothing is wanting but to devise a mode to bring the cause before this court. The writ of error is the common and well-known process in like cases, and by the fourteenth section of the judiciary act of 1789, every court of the United States is expressly authorized "to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law." If, then, the court has jurisdiction, no difficulty can occur as to a mode of exercising it. The court quashed the writ of error on the ground that the act of congress had not authorized an appeal or writ of error from the general court of the Northwestern Territory, and, therefore, although from the manifest errors on the face of the record, they felt every disposition to support the writ of error, they were of opinion they could not take cognizance of the case." Clarke *v.* Bazadone, 1 Cranch 212, 2 L. Ed. 85.

5. United States *v.* Guinet, 2 Dall. 321, 1 L. Ed. 398; United States *v.* Goodwin, 7 Cranch 108, 3 L. Ed. 284; The San Pedro, 2 Wheat. 132, 4 L. Ed. 202.

6. An appeal is a process of civil-law origin, and removes causes, entirely subjecting the facts as well as the law to review and retrial; but a writ of error is a process of common-law origin, and it removes nothing for re-examination but the law. Wiscart *v.* Dauchy, 3 Dall. 321, 327, 1 L. Ed. 619, quoted with approval in United States *v.* Goodwin, 7 Cranch 108, 110, 3 L. Ed. 284.

7. United States *v.* Guinet, 2 Dall. 321, 1 L. Ed. 398; United States *v.* Goodwin, 7 Cranch 108, 110, 3 L. Ed. 284.

Appeal in criminal cases.—In Louisville, etc., R. Co. *v.* Clarke, 152 U. S. 230, 239, 38 L. Ed. 422, it is said: "An appeal, when spoken of as a criminal prosecution, denoted, according to Blackstone, an accusation by a private subject against another for some heinous crime—a 'private process for the punishment of public crimes,' having its origin in a custom, derived from the ancient Germans, of allowing a pecuniary satisfaction, called a weregild, to the party injured or his relations, 'to expiate enormous offenses.' 4 Bl. Com. 312, 313. Bacon defines it to be a 'vindictive' action, 'the party's private action seeking revenge for the injury done him, and, at the same time, prosecuting for the Crown in respect of the offense against the public.' Bacon Abridg., tit., Appeal. These appeals could be brought 'previous to an indictment and if the appellee be acquitted thereon, he could not be afterwards indicted for the same offense.' 4 Bl. Com. 315; Comyn's Dig., tit. Appeal, G. 11, 16. While, during the continuance of the custom referred to, a process was given for recovering the weregild by the party to whom it was due, 'it seems that when these offenses by degrees grew no longer redeemable, the private process was still continued, in order to insure the infliction of punishment on the offender, though the party was allowed no pecuniary compensation for the offense.' Bk. 4, 314. By statute of 59 Geo. 3, c. 46, appeals of murder, treason, felony, and other offenses were abolished."

tion without regard to the manner in which the cause was transmitted to that jurisdiction.[8]

Distinctions.—Appeals are distinguished from writs of error in that the former subjects both the facts and the law to a re-examination, while the latter is confined to a re-examination for review of questions of law.[9]

c. *Proceedings Reviewable by Appeal*—(1) *Proceedings in Equity*—aa. *In General.*—A writ of error in equity proceedings was given by the act of 1789.[10] But much inconvenience and embarrassment resulted from the use of this process to remove decrees in chancery, and so it was repealed by the act of March 2, 1803, and the ordinary mode of appeal substituted in the place of the writ of error.[11] And ever since cases of chancery jurisdiction have been removable to this court by technical appeal alone.[12] The remedy by appeal in its original sense was con-

8. United States *v.* Goodwin, 7 Cranch 108, 110, 3 L. Ed. 284; United States *v.* Tenbroek, 2 Wheat. 247, 248, 4 L. Ed. 231.

9. United States *v.* Guinet, 2 Dall. 321, 1 L. Ed. 398; United States *v.* Goodwin, 7 Cranch 108, 110, 3 L. Ed. 284; Dean *v.* Mason, 20 How. 198, 15 L. Ed. 876; Wiscart *v.* Dauchy, 3 Dall. 321, 327, 1 L. Ed. 619. See post, "Distinction between Appeals and Writs of Error as Regards the Scope of the Remedies," II, B, 9.

10. **Proceedings in equity.**—Hemmenway *v.* Fisher, 20 How. 255, 15 L. Ed. 799.

Originally, decrees in equity and admiralty were brought here for re-examination by a writ of error, under the twenty-second section of the judiciary act. This was changed by the act of March 3, 1803, by which appeals were substituted in place of the writs of error in cases of equity, admiralty, and prize; but the act provides "that the appeals shall be subject to the same rules, regulations, and restrictions as are prescribed in law in cases of writs of error. The Protector, 11 Wall. 82, 86, 20 L. Ed. 47.

This provision in the act of 1789 was repealed by the act of March 2, 1803, and the ordinary mode of appeal substituted in the place of the writ of error. Hemmenway *v.* Fischer, 20 How. 255, 15 L. Ed. 799.

11. Kenaday *v.* Sinnott, 179 U. S. 606, 613, 45 L. Ed. 339, citing and approving Ormsby *v.* Webb, 134 U. S. 47, 33 L. Ed. 805; Hayes *v.* Fischer, 102 U. S. 121, 26 L. Ed. 95; Bessette *v.* Conkey, 194 U. S. 324, 48 L. Ed. 997, reaffirmed in In re Lewis, 202 U. S. 614, 50 L. Ed. 1172.

The writ of error, from its form, and the principles which govern it, is peculiarly appropriate to judgments at common law, and is inconvenient and embarrassing when used as process to remove decrees in chancery and admiralty to a superior court. The ordinary and uniform mode of removing such decrees to the appellate and revising court, wherever such jurisdictions have been established, has been by appeal, with the single exception of this act of congress. And in order to remove the inconvenience and embarrassment which this provision in the act of 1789 created, it was repealed by the act of March 2, 1803, and the ordinary mode of appeal substituted in the place of the writ of error. Hemmenway *v.* Fischer, 20 How. 255, 15 L. Ed. 799.

Where a writ of error was brought to revise a decree in a suit in equity rendered in the United States circuit court, where the defendant in error consents to the dismissal of the writ, this court will issue its mandate that if the plaintiffs in error seasonably take and prosecute an appeal from that rendered by the circuit court, leave will be granted them to file as part of the return on such appeal the transcript of the record in this cause. Williams *v.* Passumpsic Sav. Bank, 141 U. S. 249, 35 L. Ed. 740.

12. Phillips *v.* Preston, 5 How. 278, 289, 12 L. Ed. 152, citing Livingston *v.* Story, 9 Pet. 632, 9 L. Ed. 255; McCollum *v.* Eager, 2 How. 61, 64, 11 L. Ed. 179; Bayard *v.* Lombard, 9 How. 530, 13 L. Ed. 245; The San Pedro, 2 Wheat. 132, 4 L. Ed. 202, 205; Hayes *v.* Fischer, 102 U. S. 121, 26 L. Ed. 95; Marin *v.* Lalley, 17 Wall. 14, 21 L. Ed. 596; Surgett *v.* Lapice, 8 How. 48, 12 L. Ed. 982; Idaho, etc., Land Co. *v.* Bradbury, 132 U. S. 509, 33 L. Ed. 433; Erwin *v.* Lowry, 7 How. 172, 183, 12 L. Ed. 655.

Cases in equity come here from the circuit courts, and the district courts sitting as circuit courts, by appeal, and not by writ of error. Rev. Stat., § 692. Blease *v.* Garlington, 92 U. S. 1, 4, 23 L. Ed. 521.

Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. It cannot be brought here for review by writ of error. Hayes *v.* Fischer, 102 U. S. 121, 26 L. Ed. 95.

Proceedings in chancery can only be reviewed by an appeal. Surgett *v.* Lapice, 8 How. 48, 12 L. Ed. 982, distinguishing United States *v.* King, 3 How. 773, 11 L. Ed. 824, 7 How. 833, 884, 12 L. Ed. 934, on the ground that in this case the suit was in the nature of an ejectment in the court of common law, and was therefore strictly an action at law.

"We dismiss every day (chancery and admiralty) cases brought here by writ of error to a circuit court, because they can only be brought here by appeal, and the writ of error does not extend to them. The San Pedro, 2 Wheat. 132, 4 L. Ed. 202; McCollum *v.* Eager, 2 How. 61, 11 L. Ed. 179; Minor *v.* Tillotson, 2 How. 392, 11 L.

fined to causes in equity, ecclesiastical, and admiralty jurisdiction.[13]

On the other hand where a proceeding is of a mixed character, partaking more of the nature of a proceeding in equity, than one at law, it may be brought here by writ of error. A writ of error in equity proceedings was allowed by the twenty-second section of the judiciary act of 1789.[14]

bb. *Particular Instances Considered.*—When a proceeding below is in its essential nature a foreclosure of a mortgage in chancery, an appeal is the only proper mode of bringing it here.[15]

An executory process, according to the Civil Code of Louisiana, made without previous notice, for the seizure and sale of mortgaged land to pay the mortgage debt, though in summary form, is in the nature of a bill in equity for the foreclosure of a mortgage, and clearly belongs on the equity side of that court. Therefore, it must be removed to this court by appeal and not by writ of error.[16]

Causes in the court of private land claims are in effect equity causes and brought to this court by appeal.[17]

Where an "action of jactitation" or "slander of title" was brought in a state court of Louisiana and removed into the circuit court of the United States by the defendant, who was a citizen of Mississippi (the persons who brought the action being in possession of the land under a legal title), and the defendant pleaded in reconvention, setting up an equitable title, and the court below decreed against the defendant, it was proper for him to bring the case to this court by appeal, and not by writ of error on the ground that "that was not an action of title to quiet the plaintiff in possession of his land, but was a petitory action brought by the United States to recover land which was in the possession of the defendant, and to which the United States claimed a legal title. The suit was in the nature of an ejectment in a court of common law, and was therefore strictly an action at law, and in no respect analogous to a proceeding in equity to remove a cloud from the title of a party who not only holds the legal title, but is also actually in possession of the land in dispute."[18]

A suit brought to enforce a mechanic's lien created by the statutes of a territory, which authorize the court in such a suit to order both a sale of the real estate that is subject to the lien, and judgment against the owner thereof for any deficiency in the proceeds of the sale, "in like manner and with like effect as in actions for the foreclosure of mortgages," is in the nature of a suit in equity, and is therefore reviewable by appeal and not by writ of error.[19]

Ed. 312; Brewster *v.* Wakefield, 22 How. 118, 16 L. Ed. 301." Murdock *v.* Memphis, 20 Wall. 590, 622, 22 L. Ed. 429.

13. United States *v.* Coe, 155 U. S. 76, 83, 39 L. Ed. 76.

14. Erwin *v.* Lowry, 7 How. 172, 183, 12 L. Ed. 655.

15. Marin *v.* Lalley, 17 Wall. 14, 21 L. Ed. 596, citing Walker *v.* Dreville, 12 Wall. 440, 20 L. Ed. 429, and distinguishing Levy *v.* Fitzpatrick, 15 Pet. 167, 170, 10 L. Ed. 699.

A proceeding in the nature of a bill in equity to foreclose a mortgage, in which the facts as well as the law are to be decided by the court, is to be brought before this court by an appeal and not a writ of error. Brewster *v.* Wakefield, 22 How. 118, 16 L. Ed. 301, 304.

A proceeding which is in its essential nature a foreclosure of a mortgage as a mortgage is foreclosed in a court of chancery, is a suit in equity, by whatever name it may be called; and when brought here by writ of error, the writ must be dismissed. Walker *v.* Dreville, 12 Wall. 440, 20 L. Ed. 429.

16. Fleitas *v.* Richardson, 147 U. S. 538, 37 L. Ed. 272, citing Brewster *v.* Wakefield, 22 How. 118, 128, 16 L. Ed. 301; Walker *v.* Dreville, 12 Wall. 440, 20 L. Ed. 429; Marin *v.* Lalley, 17 Wall. 14, 21 L. Ed. 596; Idaho, etc., Land Co. *v.* Bradbury, 132 U. S. 509, 515, 33 L. Ed. 433.

17. As observed by Chief Justice Ellsworth, in Wiscart *v.* Dauchy, 3 Dall. 321, 1 L. Ed. 619: "An appeal is a process of civil law original and removes a cause entirely; subjecting the fact, as well as the law to a review and retrial; but a writ of error is a process of common law and it removes nothing for examination but the law." United States *v.* Coe, 155 U. S. 76, 83, 39 L. Ed. 76.

18. Surgett *v.* Lapice, 8 How. 48, 65, 12 L. Ed. 982, distinguishing United States *v.* King, 3 How. 773, 11 L. Ed. 824; S. C., 7 How. 833, 844, 12 L. Ed. 934.

19. Idaho, etc., Land Co. *v.* Bradbury, 132 U. S. 509, 33 L. Ed. 433, citing Canal

It would seem that proceedings upon writs of prohibition being in equity, are reviewable only by appeal.[20]

Proceeding for Enforcing Mandate.—The question as to the form of proceeding which this court should adopt to enforce the execution of its own mandate in the court below may be reviewed by appeal, though the subject might without doubt be brought before us upon motion. But an appeal is more convenient and suitable, as it gives the adverse party notice that the question will be brought before this court, and affords him the opportunity of being prepared to meet it at an early day of the term.[21]

(2) *Cases of Admiralty and Maritime Jurisdiction.*—Final decrees in cases of equity and of admiralty and maritime jurisdiction were formerly required to be removed here for re-examination by a writ of error, but congress subsequently repealed those regulations, and provided that appeals should be allowed in all such cases.[22] Appeal and not writ of error is the proper process for removing a cause of admiralty and maritime jurisdiction into this court for re-examination.[23] It

Co. *v.* Gordon, 6 Wall. 561, 18 L. Ed. 894; Davis *v.* Alvord, 94 U. S. 545, 24 L. Ed. 283; Brewster *v.* Wakefield, 22 How. 118, 16 L. Ed. 301; Walker *v.* Dreville, 12 Wall. 440, 20 L. Ed. 429; Marin *v.* Lalley, 17 Wall. 14, 21 L. Ed. 596.

20. Prohibition.—"The supreme court of the District of Columbia having both common-law and equity powers, it would seem that the proceedings in this case must be considered as on the common-law side of that court, and that the proper mode of invoking the appellate jurisdiction of this court is by writ of error. In England, from long before the Declaration of Independence, writs of prohibition have usually issued from the courts of common law, and do not appear to have issued from a court of chancery in any case in which a court of law might issue them, except during vacation, when the courts of common law were not open. 2 Hale P. C. 147; Lord Holt, in Blackborough *v.* Davis, 1 P. Wms. 41, 43; Anon., 1 P. Wms. 476; Montgomery *v.* Blair, 2 Sch. & Lef. 136; In re Foster, 24 Beavan, 428; In re Bateman, L. R. 9 Eq. 660. And in this country, so far as we are informed, these writs have never been issued but by a court of common-law jurisdiction. But as the petitioner has both taken an appeal and sued out a writ of error, it is immaterial which is the proper form of bringing up the case." Smith *v.* Whitney, 116 U. S. 167, 174, 29 L. Ed. 601.

21. Perkins *v.* Fourniquet, 14 How. 313, 14 L. Ed. 435.

22. The Lady Pike, 21 Wall. 1, 22 L. Ed. 499; The Protector, 11 Wall. 82, 20 L. Ed. 47.

The 18th rule never applied to admiralty cases. By the judiciary act of 1789, decrees in chancery and admiralty, as well as judgments at common law in the circuit courts, were removable to this court by writ of error, and not in any other manner. Hemmenway *v.* Fisher, 20 How. 255, 15 L. Ed. 799.

But so much of the 20th section of the judiciary act as provided that such cases should be removed into this court by writs of error are repealed by the amendatory act. The Baltimore, 8 Wall. 377, 19 L. Ed. 463.

23. The San Pedro, 2 Wheat. 132, 142, 4 L. Ed. 202, 205.

An appeal is the natural and proper mode of removing an admiralty cause, and, in that case, there can be no doubt, that all the testimony which was produced in the court below, should also be produced in this court. Such an appeal is expressly sanctioned by the constitution; it may, therefore, clearly in the first view of the subject, be considered as the most regular process; and as there are not any words in the judicial act restricting the power of proceeding by appeal, it must be regarded as still permitted and approved. Wiscart *v.* Dauchy, 3 Dall. 321, 325, 1 L. Ed. 619, 621.

Cases of admiralty and maritime jurisdiction, since the passage of the act of the 3d of March, 1803, cannot be brought here for re-examination in any other mode than by appeal; and the provision is, "that upon such appeal, a transcript of the libel, answer, depositions, and all other proceedings, of what kind soever in the cause, shall be transmitted to" this court. Prior to that time, the judgments and decrees of the circuit courts in civil actions and suits in equity, whether brought there by original process, or transferred there from the courts of the several states, or from the district courts, could only be removed into this court for revision by writ of error; and the further provision was, that there should be no reversal in this court for any error in fact, which still continues to be the rule of law in respect to all cases brought here from the circuit courts by writs of error. The Baltimore, 8 Wall. 377, 381, 19 L. Ed. 463.

An information filed against a privateer in the district court, for the forfeiture of a schooner for exporting in her certain arms and ammunition, is a cause of admiralty and maritime jurisdiction, and is a civil cause in which no jury was neces-

has been held, that the term "civil actions" as used in the 22nd section of the judiciary act providing that final judgments and decrees in civil actions in a district court may be removed into the circuit court upon a writ of error, includes causes of admiralty and maritime jurisdiction.[24]

(3) *Decisions of Court of Claims.*—From the judgments of the court of claims appeals are allowed to this court (§ 707, Rev. Stat.), but no provision has been made for writs of error. Consequently, we cannot proceed by writ of error to review the decisions of that court.[25] Accordingly, where an appeal from the court of claims has been dismissed on the motion of the United States, because the court of claims has granted a new trial during the pendency of the appeal in this court, a writ of error will not be granted to compel that court to send here the proceedings subsequent to the appeal; but the appeal will be dismissed. After judgment has been finally rendered by the court of claims, the proceedings in which the new trial was obtained may be brought here by appeal alone and not by writ of error.[26]

(4) *Habeas Corpus Proceedings.*—Final orders of the circuit courts or district courts of the United States in habeas corpus can only be reviewed by appeal and not by writ of error.[27] Likewise, appeal and not writ of error is the proper remedy to review a judgment of the district or circuit court in habeas corpus cases, even since the passage of the act of March 3, 1891.[28]

d. *What Law Governs Appeals.*—**Act of March 3d, 1803.**—The act of congress of March 3d, 1803, provides that appeals in the federal courts shall be subject to the same rules, regulations and restrictions as are prescribed in law in case of writs of error.[29] The words of the act of congress of March 3rd, 1803 (2 U. S. Stat. 244), are, "that from all final judgments or decrees, rendered, or to be rendered, in any circuit court," "in any cases of equity," etc., "an appeal shall be allowed," subject to the same rules, regulations and restrictions as are prescribed in case of writs of error." A perfect analogy exists between the cases of appeals and of writs of error, as to the time in which they may be granted, and the judge who can grant the one may allow the other. The act of congress comprehends past cases as well as future.[30]

sary; and an appeal therein to the circuit court is regular. United States *v.* La Vengeance, 3 Dall. 297, 1 L. Ed. 610.

24. Wiscart *v.* D'Auchy, 3 Dall. 321, 1 L. Ed. 619.

25. United States *v.* Young, 94 U. S. 258, 259, 24 L. Ed. 153.

26. United States *v.* Young, 94 U. S. 258, 24 L. Ed. 153.

27. In re Morrissey, 137 U. S. 157, 34 L. Ed. 644, citing In re Neagle, 135 U. S. 1, 34 L. Ed. 55; Rice *v.* Ames, 180 U. S. 371, 373, 45 L. Ed. 577; Fisher *v.* Baker, 203 U. S. 174, 182, 51 L. Ed. 142.

Review of judgments of supreme court of Philippine Islands.—Under that part of § 10 of the Philippine Island act of July 1, 1902, 32 Stat., c. 1369, pp. 691, 695, providing that final judgments or decrees of the supreme court of the Philippine Islands may and can be reviewed, revised, reversed, modified or affirmed by the supreme court of the United States on appeal or writ of error by the party aggrieved, in the same manner under the same regulations and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts of the United States, final orders of the supreme court of the Philippine Islands in habeas corpus can only be reviewed by appeal and not by writ of error, because a proceeding in habeas corpus is a civil and not a criminal proceeding, and final orders of the circuit courts or district courts of the United States in habeas corpus can only be reviewed by appeal and not by writ of error. Fisher *v.* Baker, 203 U. S. 174, 51 L. Ed. 142.

28. Rice *v.* Ames, 180 U. S. 371, 45 L. Ed. 577, distinguishing Bucklin *v.* United States, 159 U. S. 682, 40 L. Ed. 305.

29. 2 Stat. at Large 244. Slaughter House Cases, 10 Wall. 273, 296, 19 L. Ed. 915; Hudgins *v.* Kemp, 18 How. 530, 15 L. Ed. 511; Merrill *v.* Petty, 16 Wall. 338, 342, 21 L. Ed. 499; The San Pedro, 2 Wheat 132, 140, 4 L. Ed. 202; United States *v.* Goodwin, 7 Cranch 108, 111, 3 L. Ed. 284; Wiscart *v.* D'Auchy, 3 Dall. 321, 328, 1 L. Ed. 619; The Sloop Betsey, 3 Dall. 6, 16, 1 L. Ed. 485; The Admiral, 3 Wall. 603, 612, 18 L. Ed. 58; Board of Commissioners *v.* Gorman, 19 Wall. 661, 664, 22 L. Ed. 226; Simpson *v.* Greeley, 20 Wall. 152, 22 L. Ed. 338; The Maria Martin, 12 Wall. 31, 40, 20 L. Ed. 251; Jerome *v.* McCarter, 21 Wall. 17, 28, 22 L. Ed. 515; Grigsby *v.* Purcell, 99 U. S. 505, 506, 25 L. Ed. 354; Rev. Stat., § 1012.

30. United States *v.* Hooe, 3 Cranch 73, 79, 2 L. Ed. 370, 372.

Under the judiciary act of the 24th of

Section 1012 of the Revised Statutes declares that appeals from the circuit courts, etc., shall be subject to the same rules, regulations, and restrictions as are or may be prescribed in law in cases of writs of error.[31]

By the act of May 23d, 1828 (4 Stat. at Large 284), relating to private land claims in Florida, appeals from the superior court of the territory of Florida are governed by the laws of 1789 and 1803, and the act of 1803 subjects appeals to the rules and regulations prescribed by law in cases of writs of error.[32]

2. WRIT OF ERROR—a. *Definition, Nature and Distinctions*—(1) *Definition.*—A writ of error is an original writ, and lies only when a party is aggrieved by some error in the foundation, proceedings, judgment, or execution, of a suit in a court of record, and is defined to be a commission, by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and, on such examination, to affirm or reverse.[33]

(2) *Nature.*—The words "action" and "cause of action" are not ordinarily applicable to writs of error. And this is so whether a writ of error be considered a new proceeding or a continuation of the original proceeding, as it is usually regarded in the federal courts.[34] But a writ of error to a judgment by an assignee

September, 1789, ch. 20, and the act of the 3d of March, 1803, ch. 93, causes of admiralty and maritime jurisdiction, or in equity cannot be removed, by writ of error, from the circuit court for re-examination in the supreme court. The appropriate mode of removing such causes is by appeal; and the rules, regulations, and restrictions contained in the 22d and 23d sections of the judiciary act, respecting the time within which a writ of error shall be brought, and in what instance it shall operate as a supersedeas; the citation to the adverse party, the security to be given by the plaintiffs in error for prosecuting his suit, and the restrictions upon the appellate court as to reversals in certain enumerated cases, are applicable to appeals under the act of 1803, and are to be substantially observed; except that where the appeal is prayed at the same term when the decree or sentence is pronounced, a citation is not necessary. The San Pedro, 2 Wheat. 132, 4 L. Ed. 202.

31. Kountze *v.* Omaha Hotel Co., 107 U. S. 378, 381, 27 L. Ed. 609; Farrar *v.* Churchill, 135 U. S. 609, 612, 34 L. Ed. 246.

Appeals from the circuit courts are "subject to the same rules, regulations, and restrictions as are or may be prescribed by law in cases of writs of error." Rev. Stat., § 1012. Danville *v.* Brown, 128 U. S. 503, 504, 32 L. Ed. 507.

"Appeals to this court from the circuit and district courts are 'subject to the same rules, regulations, and restrictions as are or may be prescribed by law in cases of writs of error.' Revised Statutes, § 1012." Moses *v.* Wooster, 115 U. S. 285, 287, 29 L. Ed. 391.

32. Villabolos *v.* United States, 6 How. 81, 12 L. Ed. 352.

33. Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978, 982; Cohens *v.* Virginia, 6 Wheat. 264, 410, 5 L. Ed. 257.

34. Cohen *v.* Virginia, 6 Wheat. 264, 410, 5 L. Ed. 257, 292; Nations *v.* Johnson, 24 How. 195, 205, 16 L. Ed. 628, 632; In re Chetwood, 165 U. S. 443, 461, 41 L. Ed. 782, 788; Bradford *v.* Southern R. Co., 195 U. S. 243, 49 L. Ed. 178.

A writ of error is defined to be a commission by which the judges of one court are authorized to examine a record upon which a judgment was given in another court, and, on such examination, to affirm or reverse the same according to law. If, says my Lord Coke, by the writ of error, the plaintiff may recover or be restored to anything, it may be released by the name of an action. In Bacon's Abridgment, tit. Error, L., it is laid down, that "where, by a writ of error, the plaintiff shall recover, or be restored to any personal thing, as debt, damage, or the like, a release of all actions personal is a good plea; and when land is to be recovered or restored in a writ of error, a release of actions real is a good bar; but where by a writ of error the plaintiff shall not be restored to any personal or real thing, a release of all actions, real or personal, is no bar. And for this we have the authority of Lord Coke, both in his Commentary on Littleton and in his reports. A writ of error, then, is in the nature of a suit or action when it is to restore the party who obtains it to the possession of anything which is withheld from him, not when its operation is entirely defensive." Cohens *v.* Virginia, 6 Wheat. 264, 409, 5 L. Ed. 257, 292.

"Strictly speaking, an error on which a writ lies is not a cause of action; for, as Lord Coke says, there is a distinction between writs and actions; and under this distinction he instances actions and writs of error. (2 Inst. 39, 40.) And yet, a release of all actions extends to writs of error, when anything may be recovered or taken by way of restitution under or in consequence of the writ of error. (Co. Litt. 288, b. Bac. Abr. Release (1) (2). This, however, I take it, proceeds rather

of a judgment rendered against a bankrupt in a state court is a suit within § 5057 of the Revised Statutes.[35]

As New Action.—According to the practice in this court, a writ of error has been treated rather as a continuation of the original litigation than the commencement of a new action.[36]

A writ of error is said to be an original writ, because, at common law, it was issued out of the court of chancery; but its operation is rather upon the record, than the person.[37]

But in Illinois a writ of error is the beginning of a new suit.[38]

(3) *Distinguished from Motion for New Trial.*—The writ of error is distinguishable from a motion for a new trial.[39]

b. *Proceedings Reviewable by Writ of Error*—(1) *Common-Law Proceedings*—aa. *In General.*—The proper mode of bringing a civil action on the common law side of the court to this court, is by writ of error, and not by appeal.[40] In a recent case it was said: Errors alleged to have been committed in an action at law can be reviewed here only by writ of error. This, in the absence of modification by statute, is the rule in respect to all courts whose records are brought here for review.[41] Where a case is brought up by an appeal from a judgment on the

upon an equitable, and therefore extended construction of the words in the release beyond their strict meaning; for they generally reach the original matter out of which the error arose, that being the direct subject of an action if the matter be thrown open by the writ of error. The original matter being released, therefore, the words are very properly construed as reaching indirectly and in liberal construction to the writ of error itself, because that depends upon the original matter. Yet, in strictness, no book holds the word action, or words cause of action, to be identical with a writ of error or cause of a writ of error." Bradford *v.* Southern Ry. Co., 195 U. S. 243, 249, 49 L. Ed. 178.

35. Jenkins *v.* International Bank, 106 U. S. 571, 27 L. Ed. 304.

36. Nations *v.* Johnson, 24 How. 195, 205, 16 L. Ed. 628; Cohens *v.* Virginia, 6 Wheat. 264, 410, 5 L. Ed. 257; In re Chetwood, 165 U. S. 443, 461, 41 L. Ed. 782; Clarke *v.* Mathewson, 12 Pet. 164, 170, 9 L. Ed. 1041; Pennoyer *v.* Neff, 95 U. S. 714, 734, 24 L. Ed. 565; Bradford *v.* Southern R. Co., 195 U. S. 243, 248, 49 L. Ed. 178.

37. Nations *v.* Johnson, 24 How. 195, 16 L. Ed. 628, 631.

38. Jenkins *v.* International Bank, 106 U. S. 571, 27 L. Ed. 304.

39. In the argument of the case, the counsel for the defendant objected to the proceeding by writ of error, alleging that, as the jury had found for the plaintiffs in the circuit court, the proper course would have been to move the court for a new trial, on the ground of the insufficiency of the damages; and that error would not lie, as this was no more than an application to the court for a new trial, on that ground. The objection that the proper remedy of the plaintiffs was by a motion for a new trial, and that the question now made on this writ of error is substantially a motion for a new trial seems not to be well founded; the amount of damages found by the jury is only referred to as showing that they considered their verdict as controlled by the direction of the court. Tracy *v.* Swartwout, 10 Pet. 80, 81, 9 L. Ed. 354.

40. United States *v.* Emholt, 105 U. S. 414, 26 L. Ed. 1077, citing Bevins *v.* Ramsey, 11 How. 185, 13 L. Ed. 657; Jones *v.* La Vallette, 5 Wall. 579, 18 L. Ed. 550; Comstock *v.* Eagleton, 196 U. S. 99, 49 L. Ed. 402; Act of July 4, 1840, c. 43, § 3; 5 Stat. 393; Rev. Stat., § 691; Dower *v.* Richards, 151 U. S. 658, 664, 38 L. Ed. 305; Saltmarsh *v.* Tuthill, 12 How. 387, 13 L. Ed. 1034.

This court, having separate jurisdiction in law and equity, can review cases in common law by writ of error only, and on bills of exception presenting questions of law. Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 265.

There can be no question that the only mode of giving this court jurisdiction for the correction of errors in a law case is by writ of error. An appeal cannot have this result. Brooks *v.* Norris, 11 How. 204, 13 L. Ed. 665; Barry *v.* Mercein, 5 How. 103, 12 L. Ed. 70; United States *v.* Curry, 6 How. 106, 12 L. Ed. 363.

Chief Justice Taney held in Sarchet *v.* United States, 12 Pet. 143, 9 L. Ed. 1033, that an action at law could not be brought to the supreme court by an appeal, but must come up on writ of error; in no other way could the court get jurisdiction. So, also, we have the same conclusion in Ballance *v.* Forsyth, 21 How. 389, 16 L. Ed. 143. See, also, Chase *v.* United States, 155 U. S. 480, 496, 39 L. Ed. 234.

41. Walker *v.* Dreville, 12 Wall. 440, 20 L. Ed. 429; United States *v.* Hailey, 118 U. S. 233, 30 L. Ed. 173; Deland *v.* Platte County, 155 U. S. 221, 39 L. Ed. 128; Comstock *v.* Eagleton, 196 U. S. 99,

common-law side of the circuit court, instead of by a writ of error, it must be dismissed.[42]

The acts of congress, relating to judicial proceedings in the territory of Florida, give the right of appeal to the supreme court of the United States, in cases of equity, of admiralty and maritime jurisdiction, and prize or no prize; but cases at law are to be brought up by writ of error, as provided for by the judiciary act of 1789. It has always been held, that a case at law cannot, under the act of 1803, be brought to the supreme court by appeal.[43]

Cases in Circuit Court.—It has been repeatedly determined that, under the acts of congress regulating the appellate jurisdiction of this court from the circuit courts, cases must be brought here by writ of error, and cannot be brought by appeal.[44] The removal of suits from the circuit court into the supreme court must be by writ of error in every case, whatever may be the original nature of the suits.[45]

bb. *Illustrative Cases.*—A suit at law on a bond cannot, under any circumstances, legally come before us on appeal; but must come up by writ of error in order to give us jurisdiction to try it.[46]

Since a mandamus is nothing more than an action at law between the parties, it cannot be reviewed on appeal; actions at law can be reviewed only by writ of error.[47]

Order Discharging Rule to Show Cause.—No appeal lies to this court from the circuit court for the discharge of a rule on the marshal, to show cause why he should not make to one—asserting himself to be a purchaser on execution, under a judgment, at a marshal's sale—a deed for real estate sold; and for an order on the person seeking to pay the costs. "Such a motion as the one first described and the rule granted under it are proceedings at law, and so, also, are the judgment and the order of the court directing that the petitioner should pay all costs, and the judgment cannot be removed into this court in any other way than by a writ of error."[48]

The proceedings under the act relating to a seizure of land present a case of common-law jurisdiction, the proceedings in which are to be conformed, in respect to trial by jury and exceptions to evidence, to the course of the common law, and a final decision in which can be reviewed here only on writ of error.[49]

49 L. Ed. 402; Behn *v.* Campbell, 205 U. S. 403, 407, 51 L. Ed. 857.

42. Bevins *v.* Ramsey, 11 How. 185, 13 L. Ed. 657.

43. Parish *v.* Ellis, 16 Pet. 451, 10 L. Ed. 1028.

44. Sarchet *v.* United States, 12 Pet. 143, 9 L. Ed. 1033; United States *v.* Girault, 11 How. 22, 32, 13 L. Ed. 587; Comstock *v.* Eagleton, 196 U. S. 99, 49 L. Ed. 402.

45. Blaine *v.* Carter, 4 Dall. 22, 1 L. Ed. 724.

46. The United States instituted a suit at law on a bond for duties in the district court of the southern district of New York and after a trial and verdict for the United States, judgment was given against the defendant; who thereupon prosecuted a writ of error to the circuit court for the southern district of New York, where the judgment of the district court was affirmed. The defendant then appealed to the supreme court. Held, that cases at law can only be brought from the circuit court by writ of error, and cannot be brought by appeal. Sarchet *v.* United States, 12 Pet. 143, 9 L. Ed. 1033.

47. Ward *v.* Gregory, 7 Pet. 633, 8 L. Ed. 810; Kentucky *v.* Dennison, 24 How. 66, 97, 16 L. Ed. 717.

A mandamus was issued by the superior court of appeals of the Eastern Middle District of Florida, directed to the register and receiver of the western land district of Florida, commanding them to permit the entry and purchase of certain lands. From this proceeding the register and receiver appealed to this court. The appeal was dismissed, the proceeding at mandamus being at common law, and therefore the removal to this court should have been by writ of error. Ward *v.* Gregory, 7 Pet. 633, 8 L. Ed. 810.

48. The Lucille, 15 Wall. 676, 682, 21 L. Ed. 247.

49. Armstrong's Foundry, 6 Wall. 766, 18 L. Ed. 882, followed in Garnett *v.* United States, 11 Wall. 256, 258, 20 L. Ed. 79.

Where a seizure of property on land is made under the acts of July 13th, 1861, or of August 6th, 1861, or July 17th, 1862, passed in suppression of the rebellion, the

Final judgments of the circuit court in actions of assumpsit can only be revised on writ of error, and not on appeal.[50]

It is well settled that a proceeding involving the exercise of the power of eminent domain is essentially but the assertion of a right legal in its nature, and therefore is reviewable only by writ of error. So, also, it has been settled, that a condemnation proceeding initiated before a court, conducted under its supervision, with power to review and set aside the verdict of the jury, and with the right of a review vested in an appellate tribunal, is, in its nature, an action at law.[51]

A petition of intervention and of third opposition under the Louisiana practice by a person claiming certain property to have been exempt from seizure and sale on execution, is a proceeding at law, and not a cause in equity, and is therefore properly brought up by writ of error.[52]

Proceeding Involving Original Probate of Will.—It is, of course, undisputed that a final decree in equity, in the court below, cannot be reviewed here by means of a writ of error. But a proceeding involving the original probate of a last will and testament is not strictly a proceeding in equity, although rights arising out of, or dependent upon, such probate have often been determined by suits in equity. In determining the question of the competency of the deceased to make a will, the parties have an absolute right to a trial by jury, and to bills of exceptions covering all the rulings of the court during the progress of such trial. These are not the ordinary features of a suit in equity.[53]

A proceeding for the probate of a will in the District of Columbia is not a suit in equity, but is a case in which the parties have a right to claim a trial by jury, and therefore is properly brought to this court by writ of error.[54]

Bankruptcy Proceedings.—Where a trial by jury is claimed by a person against whom an involuntary petition of bankruptcy has been filed under § 19 of the bankrupt act, on an issue of fact as to the existence of ground for adjudication, and the trial was a trial according to the course of common law, judgments therein rendered are revisable only on writ of error.[55]

Contempt Proceedings.—A person adjudged in contempt and fined therefor, who is not a party to the suit, can bring the matter to the circuit court of appeals only by writ of error and not by appeal.[56]

cc. *Actions Tried by Court.*—In an action at law where a jury has been waived and a trial had before the court, it is nevertheless an action at law although tried by the court upon a waiver of the jury, and must therefore be reviewed by writ of error and not appeal.[57] The manner of reviewing judgments, in civil cases,

claimants are entitled to trial by jury, though the suit be in form a libel of information; and the suit can be removed into this court by writ of error alone. Union Ins. Co. *v.* United States, 6 Wall. 759, 765, 18 L. Ed. 879, and Armstrong's Foundry, 6 Wall. 766, 769, 18 L. Ed. 882, affirmed in Morris' Cotton, 8 Wall. 507, 19 L. Ed. 481.

50. Deland *v.* Platte County, 155 U. S. 221, 39 L. Ed. 128.

51. Metropolitan R. Co. *v.* McFarland, 195 U. S. 322, 49 L. Ed. 219; Kohl *v.* United States, 91 U. S. 367, 376, 23 L. Ed. 449; Searl *v.* School District No. 2, 124 U. S. 197, 31 L. Ed. 415; Chappell *v.* United States, 160 U. S. 499, 513, 40 L. Ed. 510.

52. New Orleans *v.* Louisiana Construction Co., 129 U. S. 45, 32 L. Ed. 607, citing Van Norden *v.* Morton, 99 U. S. 378, 25 L. Ed. 453.

53. Ormsby *v.* Webb, 134 U. S. 47, 64, 33 L. Ed. 805, followed in Kenaday *v.* Sinnott, 179 U. S. 606, 613, 45 L. Ed. 339.

54. Campbell *v.* Porter, 162 U. S. 478, 40 L. Ed. 1044, following Ormsby *v.* Webb, 134 U. S. 47, 33 L. Ed. 805, distinguished in Kenaday *v.* Sinnott, 179 U. S. 606, 613, 45 L. Ed. 339.

55. Elliott *v.* Toeppner, 187 U. S. 327, 47 L. Ed. 200, citing Insurance Co. *v.* Comstock, 16 Wall. 258, 21 L. Ed. 493; Parsons *v.* Bedford, 3 Pet. 433, 448, 7 L. Ed. 732.

56. Walker *v.* Dreville, 12 Wall. 440, 20 L. Ed. 429; Deland *v.* Platte County, 155 U. S. 221, 39 L. Ed. 128; Bucklin *v.* United States, 159 U. S. 682, 40 L. Ed. 305; Bessette *v.* Conkey, 194 U. S. 324, 326, 48 L. Ed. 997, reaffirmed in In re Lewis, 202 U. S. 614, 50 L. Ed. 1172.

57. Deland *v.* Platt County, 155 U. S. 221, 39 L. Ed. 128; Oklahoma City *v.* Mc-

of the supreme court of the territory of Oklahoma is specially provided for by the 9th section of the act of May 2, 1890, 26 Stat. 81, 85, providing a territorial government for Oklahoma, and is not governed by the act of congress of 1874, 18 Stat. 27, 28, providing that where a case is tried by the court in a territorial court, and a jury has been waived by the parties, and appeal to this court is the only proper proceeding to obtain a review. The 9th section of the act of 1890 provides that writs of error and appeal from the final decision of the supreme court of the territory will be allowed and may be taken to the supreme court of the United States "in the same manner and under the same regulations as from the circuit courts of the United States." And an action tried before the court, a jury having been waived by consent, is an action at law, and can only be reviewed by writ of error because of the rule that a final judgment in an action at law in the circuit court of the United States can only be reviewed by writ of error.[58]

(2) *Proceedings in Equity.*—A writ of error in equity proceedings is not peculiar. The twenty-second section of the judiciary act of 1789 gave a writ of error in chancery cases, and so the law continued until 1803,[59] when it was repealed.[60] And the rule is well settled now that a writ of error is not the appropriate mode of bringing up, for review, a decree in chancery. It should be brought up by an appeal.[61]

c. *Review of Proceedings under Circuit Court of Appeals Act.*—By § 5 of the act of March 3, 1891, c. 517, 26 Stat. 826, "appeals or writs of error may be taken from the district courts or from the existing circuit courts" of the United States directly to this court, in certain enumerated cases, civil and criminal, among others, "in cases of conviction of a capital or otherwise infamous crime." There was no purpose by that act to abolish the general distinction, at common law, between an appeal and a writ of error.[62] Therefore, the final judgment of a court of the United States in a case of the conviction of a capital or otherwise infamous crime is not reviewable here except upon writ of error.[63] And this

Master, 196 U. S. 529, 49 L. Ed. 587; Comstock *v.* Eagleton, 196 U. S. 99, 49 L. Ed. 402.

58. Oklahoma City *v.* McMaster, 196 U. S. 529, 532, 49 L. Ed. 587, citing Deland *v.* Platt County, 155 U. S. 221, 39 L. Ed. 128.

Where an action of ejectment was tried in the district court of Oklahoma territory, a jury having been waived by the parties, the manner of reviewing this judgment, under the 9th section of the act of May 2, 1890 (26 Stat. at L. 81, 85, ch. 182), providing that writs of error and appeal from the final decision of the supreme court of the territory will be allowed and may be taken to the supreme court of the United States in the same manner and under the same regulations as from the circuit courts of the United States, it was held, that this case may be reviewed by a writ of error because it is an action at law, although tried by the court upon a waiver of a jury. Oklahoma City *v.* McMaster, 196 U. S. 529, 49 L. Ed. 587.

59. Erwin *v.* Lowry, 7 How. 172, 183, 12 L. Ed. 655.

60. Hemmenway *v.* Fisher, 20 How. 255, 15 L. Ed. 799.

61. McCollum *v.* Eager, 2 How. 61, 11 L. Ed. 179; Hayes *v.* Fischer, 102 U. S. 121, 26 L. Ed. 95; Brewster *v.* Wakefield, 22 How. 118, 16 L. Ed. 301.

62. Bucklin *v.* United States, 159 U. S. 680, 681, 40 L. Ed. 304, distinguished in Rice *v.* Ames, 180 U. S. 371, 45 L. Ed. 577; Fisher *v.* Baker, 203 U. S. 174, 182, 51 L. Ed. 142.

63. Bucklin *v.* United States, 159 U. S. 680, 681, 40 L. Ed. 304.

In the case of Bucklin *v.* United States, 159 U. S. 680, 40 L. Ed. 304, the appellant was convicted of the crime of perjury, and sought a review of the judgment against him by an appeal, which we held must be dismissed, upon the ground that criminal cases were reviewable here only by writ of error. Rice *v.* Ames, 180 U. S. 371, 373, 374, 45 L. Ed. 577.

The observation in reference to the court of appeals act of March, 1891, in the case of Bucklin *v.* United States, 159 U. S. 680, 40 L. Ed. 304, that "'There was no purpose by that act to abolish the general distinction, at common law, between an appeal and a writ of error,' may be supplemented by saying that it was no purpose of the act of 1891 to change the forms and remedies theretofore pursued." Ex parte Lennon, 150 U. S. 393, 37 L. Ed. 1120; Ekiu *v.* United States, 142 U. S. 651, 35 L. Ed. 1146; Gonzales *v.* Cunningham, 164 U. S. 612, 41 L. Ed. 572; Rice *v.* Ames, 180 U. S. 371, 374, 45 L. Ed. 577, reaffirmed in Fisher *v.* Bacon, 203 U. S. 174, 51 L. Ed. 142.

rule has been applied to the review of contempt cases by the court of appeals.[64]

3. Review of Proceedings in District of Columbia.—Writs of error from this court to the supreme court of the District of Columbia are sued out under the same regulations as in cases of judgments in the circuit court of the United States.[65]

The final judgment or decree of the supreme court of the District of Columbia in any case in which the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars, may be reviewed and reversed or affirmed in this court upon writ of error, if the judgment is at law; or upon appeal, if the decree is in equity.[66]

By § 8 of the act of February 9, 1893, 27 Stat. 434, ch. 74, final judgments or decrees of the court of appeals are to be re-examined by this court on writ of error or appeal in the same manner and under the same regulations as theretofore provided in cases of writs of error or appeals from judgments in the supreme court of the District of Columbia.[67] It has also been settled that the jurisdiction of this court prior to the act of 1893, to review the final judgments or decrees of the supreme court of the District of Columbia, did not give power to review by appeal a matter not of equitable cognizance.[68]

4. Review of Order Remanding Cause to State Court.—Prior to the act of congress taking away the right of this court to re-examine an order of the circuit court remanding a cause removed from a state court, such an order of a circuit court made in a suit at law, remanding a cause to a state court, was to be brought here by writ of error; and where the suit was in equity, an appeal was to be taken. That is the fair import of the phrase, "writ of error or appeal as the case may be."[69] But where no objection was made in the circuit court to the

64. Bessette *v.* Conkey Co., 194 U. S. 324, 48 L. Ed. 997, reaffirmed in In re Lewis, 202 U. S. 614, 50 L. Ed. 1172.

65. Brightly's Digest 234, § 5; 12 Stat. at Large, 764, § 11; Washington *v.* Dennison, 6 Wall. 495, 496, 18 L. Ed. 863.

66. Rev. Stat., §§ 691, 692, 705; Rev. Stat., D. C., §§ 846, 847; Act of March 3, 1885, ch. 366, 23 Stat. 443; Smith *v.* Whitney, 116 U. S. 167, 172, 29 L. Ed. 601.

The controversy raised by exceptions of the next of kin to the final decree of the court of appeals of the District of Columbia sitting as an orphans' court, approving the final account of an executrix, presents a case which is in itself of equitable cognizance and is properly reviewable on appeal rather than on writ of error. Kenaday *v.* Sinnott, 179 U. S. 606, 613, 45 L. Ed. 339, distinguishing Ormsby *v.* Webb, 134 U. S. 47, 33 L. Ed. 805.

"In Ormsby *v.* Webb, 134 U. S. 47, 33 L. Ed. 805, it was ruled that a writ of error would lie to review a judgment of the supreme court of the District of Columbia, admitting a will to probate, not merely because in that case a trial by jury had been actually had, but upon the more general grounds, thus stated by Mr. Justice Harlan: 'It is, of course, undisputed that a final decree in equity, in the court below, cannot be reviewed here by means of a writ of error. But a proceeding involving the original probate of a last will and testament is not strictly a proceeding in equity, although rights arising out of, or dependent upon, such probate have often been determined by suits in equity. In determining the question of the competency of the deceased to make a will, the parties have an absolute right to a trial by jury, and to bills of exceptions covering all the rulings of the court during the progress of such trial. These are not the ordinary features of a suit in equity. A proceeding in this district for the probate of a will, although of a peculiar character, is nevertheless a case in which there may be adversary parties, and in which there may be a final judgment affecting rights of property. It comes within the very terms of the act of congress defining the cases in the supreme court of this district, the final judgments in which may be re-examined here. If it be not a case in equity, it is to be brought to this court upon writ of error, although the proceeding may not be technically one at law, as distinguished from equity.' And see Campbell *v.* Porter, 162 U. S. 478, 40 L. Ed. 1044." Kenaday *v.* Sinnott, 179 U. S. 606, 613, 45 L. Ed. 339.

67. Kenaday *v.* Sinnott, 179 U. S. 606, 613, 45 L. Ed. 339.

68. Ormsby *v.* Webb, 134 U. S. 47, 64, 33 L. Ed. 805, 812; Metropolitan R. Co. *v.* MacFarland, 195 U. S. 322, 49 L. Ed. 219.

69. Babbitt *v.* Clark, 103 U. S. 606, 26 L. Ed. 507; England *v.* Gebhardt, 112 U. S. 502, 504, 28 L. Ed. 811.

Under the act of congress giving this court a right to review an order of the circuit court remanding an action removed thereto from a state court, it is

form of the proceeding for reviewing in this court an order of the circuit court remanding a suit removed thereto from a state court, this court will not delay a decision on the merits because of the irregularity which appears.[70]

5. Review of Proceedings in State Courts.—It has been the unquestioned practice under the act of 1789 from its passage until now, that decrees in chancery, and in admiralty also, if a state court shall entertain jurisdiction of a case essentially of admiralty cognizance, are to be removed into this court from the state court by writ of error as well as judgments at law.[71]

6. Review of Proceedings in Territorial Courts—a. *In General.*—Although the laws of the territory abolished the distinction between cases at law and cases in equity, and required all cases to be moved from an inferior to a higher court by writ of error, and not by appeal, yet such laws cannot regulate the process of this court.[72]

b. *Cases at Law and in Equity.*—The acts of congress, relating to judicial proceedings in the territory of Florida, give the right of appeal to the supreme court of the United States, in cases of equity, of admiralty and maritime jurisdiction, and prize or no prize; but cases at law are to be brought up by writ of error, as provided for by the judiciary act of 1789; it has always been held, that a case at law cannot, under the act of 1803, be brought to the supreme court by appeal.[73]

The manner of reviewing final judgments at law, of the supreme court of the territory of Oklahoma, under the 9th section of the act of May 2, 1890 (26 Stat. at L. 81, 85 ch. 182), is by writ of error and not appeal.[74] Therefore, an appeal is not the proper method to review a judgment in the supreme court of the territory of Oklahoma, affirming a judgment of the district court of Pawnee

held, that actions at law should be brought here by writ of error, and that where the suit is in equity an appeal should be taken. That is a fair import of the phrase "on writ of error or appeal, as the case may be." Babbitt *v.* Clark, 103, U. S. 606, 26 L. Ed. 507.

70. Babbitt *v.* Clark, 103 U. S. 606, 26 L. Ed. 507.

71. Murdock *v.* Memphis, 20 Wall. 590, 622, 22 L. Ed. 429. See post, "Over State Courts," III, D, 7.

72. Brewster *v.* Wakefield, 22 How. 118, 16 L. Ed. 301.

The laws of the territory have abolished the distinction between cases at law and cases in equity, and both are blended in the same proceeding, without any regard to forms and rules of proceeding, either at law or in equity, and a case cannot be removed from an inferior to an appellate territorial court, except by writ of error. "And it is urged that this case, under the laws of Minnesota, ought to be regarded as a case at law, and removable to this court by writ of error only, and not by appeal. But the case presented by the record is not a case at law, according to the meaning of those words, in courts which recognize the distinction between law and equity. On the contrary, it is a proceeding in the nature of a bill in equity to foreclose a mortgage, in which the facts as well as the law are to be decided by the court; and an appeal, and not a writ of error, was the appropriate mode of bringing the case before this court. The laws or practice of the territory cannot regulate the process by which this court exercises its appellate power. Nor, indeed, can there be any such thing as a suit at law, as contradistinguished from a suit in equity, in the courts of the territory, where legal rights and equitable rights must be blended together and prosecuted in the same suit, without any regard to the rules and practice of courts of common law or courts of equity." Brewster *v.* Wakefield, 22 How. 118, 16 L. Ed. 301, 304.

Where the jurisdiction of the court appears of record, the subsequent action of the court is the exercise of its judicial authority, and can only be questioned on appeal; the mode provided by the law of the territory for review of the determination of the court. Comstock *v.* Crawford, 3 Wall. 396, 18 L. Ed. 34.

73. Parish *v.* Ellis, 16 Pet. 451, 10 L. Ed. 1028.

74. Oklahoma City *v.* McMaster, 196 U. S. 529, 49 L. Ed. 587, reaffirmed in Meyer *v.* Campbell & Tauco, 200 U. S. 611, 50 L. Ed. 619; Comstock *v.* Eagleton, 196 U. S. 99, 49 L. Ed. 402.

In actions at law coming from the territory of Oklahoma where the case is tried without a jury, the proper way to review the judgments of the supreme courts of that territory is by writ of error. National, etc., Bank *v.* First National Bank, 203 U. S. 296, 51 L. Ed. 192, citing Comstock *v.* Eagleton, 196 U. S. 99, 49 L. Ed. 402; Oklahoma City *v.* McMaster, 196 U. S. 529, 49 L. Ed. 587; Guss *v.* Nelson, 200 U. S. 298, 50 L. Ed. 489.

county in that territory, sustaining a demurrer to and dismissing a petition in an action to recover damages for false imprisonment. Because the act of May 2, 1890, 26 Statutes at Large 81, ch. 182, provides that writs of error and appeals from the final decisions of the supreme court of the territory of Oklahoma shall be allowed and may be taken to the supreme court of the United States in the same manner and under the same regulations as from the circuit courts of the United States, and it is well settled that final judgments of the circuit courts of the United States in actions at law can only be revised on writs of error.[75] The act of 1874 regarding territorial courts is not applicable.[76]

c. *Form of Proceeding as Dependent on Whether or Not There Has Been Trial by Jury.*—By the act of congress "concerning the practice in territorial courts and appeals therefrom," approved April 7, 1874 (18 Stat., pt. 3, p. 27), the appellate jurisdiction of this court over the judgments and decrees of the territorial courts in cases of trial by jury is to be exercised by a writ of error, and in all other cases by appeal.[77]

In Cases of Trial by Jury.—The only proper way of bringing here for review a suit at law tried by a jury in the territorial court, is by writ of error.[78] But the provision of the act of April 7, 1874, c. 80, § 2, 18 Stat. 27, 28, regulating the appellate jurisdiction of this court over the territorial courts and permitting a writ of error "in cases of trial by jury" only, evidently has regard to a trial by jury, as in an action at common law, in which there is and must be a trial by jury, and the court is not authorized to try and determine the facts for itself, unless a jury is waived by the parties according to statute; and has no application to a trial of special issues submitted to a jury in a proceeding in the nature of a suit in equity, not as a matter of right, or to settle the issues of fact, but at the discretion of the court, and simply to inform its conscience, and to aid it in making up its own judgment upon the facts, and the real trial of the facts is by the court and not by a jury. In all proceedings in the territorial courts in the nature of suits in equity, therefore, as well as in those proceedings in the nature of actions at common law in which no trial by jury is had (either because a jury has been duly waived, or because the issues tried are issues of law only), the appellate jurisdiction of this court must be invoked by appeal, and not by writ of error.[79]

Where There Is No Trial by Jury.—Under the act of April 7, 1874, c. 80, § 2, 18 Stat. 27, the appropriate remedy to review the judgment of a territorial court, where there is no trial by jury, is by appeal and not by writ of error.[80] A

75. Comstock *v.* Eagleton, 196 U. S. 99, 49 L. Ed. 402.

76. Oklahoma City *v.* McMaster, 196 U. S. 529, 49 L. Ed. 587; Guss *v.* Nelson, 200 U. S. 298, 50 L. Ed. 489.

77. Stringfellow *v.* Cain, 99 U. S. 610, 611, 25 L. Ed. 421, reaffirmed in Cannon *v.* Pratt, 99 U. S. 619, 25 L. Ed. 446.

In allowing legal and equitable remedies to be sought in the same action before the territorial courts, congress saw fit to establish an inflexible rule by which it could be determined whether a case should be brought here from those courts for review by writ of error or appeal, and provided that cases tried by a jury should come on writ of error, and all others by appeal. This makes the form of proceeding depend on the single fact of whether there has been, or not, a trial by jury. Stringfellow *v.* Cain, 99 U. S. 610, 25 L. Ed. 421; Hecht *v.* Boughton, 105 U. S. 235, 236, 26 L. Ed. 1018, followed in Kahn *v.* Hamilton, 154 U. S. appx. 677, 27 L. Ed. 635.

78. United States *v.* Hailey, 118 U. S. 233, 30 L. Ed. 173, citing Stringfellow *v.* Cain, 99 U. S. 610, 25 L. Ed. 421; United States *v.* Railroad Co., 105 U. S. 263, 26 L. Ed. 1021; Hecht *v.* Boughton, 105 U. S. 235, 26 L. Ed. 1018; Woolf *v.* Hamilton, 108 U. S. 15, 27 L. Ed. 635.

79. Davis *v.* Alvord, 94 U. S. 545, 24 L. Ed. 283; Davis *v.* Fredericks, 104 U. S. 618, 26 L. Ed. 849; Story *v.* Black, 119 U. S. 235, 30 L. Ed. 341; Idaho, etc., Land Co. *v.* Bradbury, 123 U. S. 509, 514, 33 L. Ed. 433.

80. Bonnefield *v.* Price, 154 U. S., Appendix, 672, 26 L. Ed. 1022; Upton *v.* Steele, 154 U. S., Appendix, 675, 26 L. Ed. 1069; Upton *v.* Mason, 154 U. S., Appendix, 675, 26 L. Ed. 1069; Hecht *v.* Boughton, 105 U. S. 235, 26 L. Ed. 1018; United States *v.* Railroad Co., 105 U. S. 263, 26 L. Ed. 1021; Naeglin *v.* De Cordoba, 171 U. S. 638, 43 L. Ed. 315; Armijo *v.* Armijo, 181 U. S. 558, 561, 45 L. Ed. 1000; Woolf *v.* Hamilton, 108 U. S. 15, 27 L. Ed. 635; Story *v.* Black, 119 U.

writ of error to a territorial court where the case is not tried in the court below by a jury will be dismissed, because the act of April 7th, 1874, c. 80, § 18, Stat. 27, makes it necessary to bring the judgment here for review by appeal and not by writ of error.[81]

7. Agreement of Parties or Counsel.—Several cases decide that the agreement of the parties cannot authorize this court to revise a judgment of an inferior court in any other mode of proceeding than that which the law prescribes.[82] The distinction between writs of error and appeals cannot be overthrown by an agreement of counsel in the court below, that all the evidence in the cause shall be introduced and considered as a statement of facts.[83]

8. Rules of Practice in State Courts—a. *In General.*—The mode of removing a case from an inferior to an appellate court is regulated by acts of congress, and does not depend on the laws or practice of the state in which the court may happen to be held.[84] Neither the laws nor the practice of any state can authorize a proceeding in the courts of the United States different from that which was established by the acts of 1789 and 1803.[85] And although the state in which

S. 235, 236, 30 L. Ed. 341; Gregory, etc., Min. Co. *v.* Starr, 141 U. S. 222, 35 L. Ed. 715; Bierce *v.* Hutchins, 205 U. S. 340, 51 L. Ed. 828; Stringfellow *v.* Cain, 99 U. S. 610, 25 L. Ed. 421; Murphy *v.* Ramsey, 114 U. S. 15, 35, 29 L. Ed. 47.

Under the second section of the act of April 7, 1874, c. 80 (18 Stat., pt. 3, p. 27), an appeal is the proper proceeding by which to review in this court a judgment of a territorial court in a suit where there was not a trial by jury. Hecht *v.* Boughton, 105 U. S. 235, 26 L. Ed. 1018, reaffirmed in United States *v.* Railroad Co., 105 U. S. 263, 26 L. Ed. 1021.

A writ of error is not the appropriate remedy to bring here for review a judgment of the supreme court of the territory of Wyoming in a case where the trial was not by jury. The appropriate remedy under the act of April 7th, 1874, was by appeal. Bonnefield *v.* Price, 154 U. S. App. 672, 26 L. Ed. 1022, citing Hecht *v.* Boughton, 105 U. S. 235, 26 L. Ed. 1018; Upton *v.* Steele, 154 U. S. Appx. 675, 26 L. Ed. 1069; Upton *v.* Macon, 154 U. S. Appx. 675, 26 L. Ed. 1069.

81. Woolf *v.* Hamilton, 108 U. S. 15, 27 L. Ed. 635, citing Hecht *v.* Boughton, 105 U. S. 235, 26 L. Ed. 1018.

82. Mordecai *v.* Lindsay, 19 How. 119, 200, 15 L. Ed. 624; Merrill *v.* Petty, 16 Wall. 338, 346, 21 L. Ed. 499; Scott *v.* Sandford, 19 How. 393, 15 L. Ed. 691; Kelsey *v.* Forsyth, 21 How. 85, 16 L. Ed. 32; Montgomery *v.* Anderson, 21 How. 386, 16 L. Ed. 160.

Neither the consent of parties nor the allowance of the appeal in the court appealed from can enable this court to review the judgment of the circuit court in any other form of proceeding than the law prescribes. Kelsey *v.* Forsyth, 21 How. 85, 16 L. Ed. 32; Callan *v.* May, 2 Black 541, 17 L. Ed. 281; United States *v.* Emholt, 105 U. S. 414, 416, 26 L. Ed. 1077.

83. Minor *v.* Tillotson, 2 How. 392, 11 L. Ed. 312.

84. Hudgins *v.* Kemp, 18 How. 530, 15 L. Ed. 511; New Orleans *v.* Louisiana Construction Co., 129 U. S. 45, 32 L. Ed. 607.

Circuit courts may adopt the forms of pleading and practice of state courts, but no state legislation can be applied to the practice of this court, and the mode in which causes shall be brought into it for review. Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 265.

The decisions or practice of the courts of Virginia cannot affect the mode of removing a case from an inferior to an appellate court of the United States. Hudgins *v.* Kemp, 18 How. 530, 15 L. Ed. 511, 512, 514.

In Van Norden *v.* Morton, 99 U. S. 378, 25 L. Ed. 453, where a bill addressed to the circuit court of the United States for the District of Louisiana, sitting in chancery, alleged that complainant was the owner of a dredge boat, which had been seized on an execution against another party, and prayed for an injunction, for the quieting of title and possession and for damages, it was held, that, under the provisions of the Louisiana Code of Practice pertaining to the subject, the remedy was at law and not in equity, and the bill was for that reason dismissed. New Orleans *v.* Louisiana Construction Co., 129 U. S. 45, 46, 32 L. Ed. 607.

"In many jurisdictions an appeal from a court of general jurisdiction is in the nature of a writ of error, but that is not so in respect of the circuit courts of the United States, as to which the distinction between the two modes of review has generally, if not always, been observed in the acts of congress. Whatever the course pursued in the courts of the state of Missouri under the statutes of that state in relation to the allowance of appeals, the appellate jurisdiction of this court is regulated by the acts of congress." Deland *v.* Platte County, 155 U. S. 221, 222, 39 L. Ed. 128.

85. Campbell *v.* Boyreau, 21 How. 223, 16 L. Ed. 96.

the judgment was given allowed appeals, by statute, in similar cases arising in the courts of the state, yet it does not follow from the adoption of the forms of process in execution that the courts of the United States adopted the modes of reviewing the decisions of inferior courts.[86]

Effect of Uniformity Act.—Since the act of June 1, 1872, c. 255, § 5, indeed, the practice, pleadings, and forms and modes of proceeding, in actions at law in the circuit and district courts of the United States, are required to conform, as near as may be, to those existing at the time in like causes in the courts of record of the state within which they are held, any rule of court to the contrary notwithstanding.[87] But this act does not include the manner of bringing cases from a lower court of the United States to this court.[88]

b. *Review of Causes from Louisiana.*—This court has so often decided that notwithstanding the peculiarities of the Civil Code of Louisiana, the distinctions between law and equity must be preserved in the federal courts, and that equity causes from that circuit must come here by appeal, and common-law causes by writ of error, that we cannot now depart from that rule without overruling numerous decisions and a well-settled course of practice.[89] As the pleadings in the circuit court for the district of Louisiana are by petition and answer, both at law and in equity, the court must look at the essential nature of the proceeding to determine whether it belongs to the one or to the other.[90] Therefore, a judgment in the circuit court of Louisiana in the ordinary action by petition and summons upon a promissory note cannot be brought into this court by appeal. It must come here, if at all, on writ of error.[91]

9. Distinction between Appeals and Writs of Error as Regards the Scope of the Remedies.—**In General.**—The appropriate and only mode of bringing cases of law for review before this court is a writ of error. An appeal is applicable only in chancery cases. The distinction is obvious, and has been steadily observed and maintained by the United States supreme court for a century. Equity

86. Bayard *v.* Lombard, 9 How. 530, 13 L. Ed. 245.

87. 17 Stat. 197; Rev. Stat., § 914; Hudson *v.* Parker, 156 U. S. 277, 281, 39 L. Ed. 424.

88. In re Chateaugay Co., 128 U. S. 544, 32 L. Ed. 508; Fishburn *v.* Chicago, etc., R. Co., 137 U. S. 60, 34 L. Ed. 585; Hudson *v.* Parker, 156 U. S. 277, 281, 39 L. Ed. 424.

89. The San Pedro, 2 Wheat. 132, 4 L. Ed. 202; McCollum *v.* Eager, 2 How. 61, 11 L. Ed. 179; Minor *v.* Tillotson, 2 How. 392, 11 L. Ed. 312; Surgett *v.* Laplice, 8 How. 48, 12 L. Ed. 982; Brewster *v.* Wakefield, 22 How. 118, 16 L. Ed. 301; Thompson *v.* Railroad Companies, 6 Wall. 134, 18 L. Ed. 765; Walker *v.* Dreville, 12 Wall. 440, 442, 20 L. Ed. 429; Marin *v.* Lalley, 17 Wall. 14, 21 L. Ed. 596; Fleitas *v.* Richardson, 147 U. S. 538, 547, 37 L. Ed. 272.

In Louisiana, the courts of the United States have been compelled to adopt the forms of pleading and practice peculiar to the civil law and the Code. That system knows no distinction between law and equity. All cases are tried alike, on petition and answer, with or without the intervention of a jury, as the parties may elect. But this court having separate jurisdiction, both in equity and law, is compelled to distinguish. They can review cases in common law by writ of error only, and on bills of exception presenting questions of law. The circuit courts may adopt the forms of pleading and practice of the state courts, but no state legislation can be applied to the practice of this court, and the mode in which causes shall be brought into it for review. Graham *v.* Bayne, 18 How. 60, 61, 15 L. Ed. 265.

In Walker *v.* Dreville, 12 Wall. 440, 20 L. Ed. 429, the court, by Mr. Justice Miller, says: "We have so often decided that, notwithstanding the peculiarities of the Civil Code of Louisiana, the distinction between law and equity must be preserved in the federal courts, and that equity causes from that circuit must come here by appeal, and common-law causes by writ of error, that we cannot now depart from that rule without overruling numerous decisions and a well-established course of practice. The present case being a proceeding in equity brought here by writ of error, and not by appeal, the writ must be dismissed." In Bondurant *v.* Watson, 103 U. S. 281, 26 L. Ed. 447, and Ex parte Ralston, 119 U. S. 613, 30 L. Ed. 506, the same doctrine is reaffirmed, Chief Justice Waite in each case delivering the opinion.

90. Walker *v.* Dreville, 12 Wall. 440, 20 L. Ed. 429.

91. Jones *v.* La Vallette, 5 Wall. 579, 18 L. Ed. 550.

cases must be brought up by appeal, which brings up the entire record upon the facts as well as the law. Cases at law can only be brought up by writ of error, which simply brings up the record for the correction of errors of law; that is to say, a writ of error carries up nothing but questions of law, and these questions are to be determined according to the facts found in the record. An appeal carries up everything. It substitutes the higher court in place of the lower, and all questions, whether of fact or of law, depending upon evidence or law, may be re-examined by the appellate court, just as they were originally examined by the lower court having original jurisdiction. This was the practice in England at the time of the adoption of our constitution, and had been for a long time; but by some oversight or omission in the original judiciary act of September 24, 1789 (1 Stat. c. 20), this distinction was not preserved, and that statute (§ 22) provided generally for the review of cases going up from the circuit court, whether legal or equitable, by writ of error; so that in all cases, whether at law or in equity or admiralty, a writ of error was the proper proceeding to obtain a review in the supreme court. After this law had remained in force about 14 years, from September, 1789, to March, 1803, this distinction, which had always existed in the English practice, was found so important that congress changed the law, by act of March 3, 1803 (2 Stat. c. 40), by providing that, in cases of equity and admiralty and maritime jurisdiction, and of prize and no prize, an appeal should be allowed to the supreme court. The effect of this provision was to repeal, by implication, the law of 1789, so far as that allowed a writ of error in a case in equity or admiralty, and to harmonize the system of appellate jurisdiction, and make it conform to the ancient and well-established principles of judicial proceedings. The writ of error, in cases at common law, remains in force, and submits to the revision of the supreme court only the law. The remedy by appeal is confined to equity and admiralty cases, and brings before the appellate court the facts as well as the law. These remedies could never in the United States courts be used interchangeably.[92]

92. The San Pedro, 2 Wheat. 123, 4 L. Ed. 202; The Francis Wright, 105 U. S. 381, 384, 26 L. Ed. 1100; Bessette *v.* Conkey Co., 194 U. S. 324, 48 L. Ed. 997, reaffirmed in In re Lewis, 202 U. S. 614, 50 L. Ed. 1172.

"An appeal is a process of civil-law origin, and removes a cause entirely, subjecting the facts as well as the law to a review and retrial; but a writ of error is a suit of common-law origin, and it removes nothing for retrial but the law." Wiscart *v.* D'Auchy, 3 Dall. 321, 1 L. Ed. 619; Dower *v.* Richards, 151 U. S. 658, 38 L. Ed. 305; Elliott *v.* Toeppner, 187 U. S. 327, 47 L. Ed. 200; Minor *v.* Tillotson, 2 How. 392, 11 L. Ed. 312; Prentice *v.* Zane, 8 How. 470, 12 L. Ed. 1160.

This question appears to have been considered by the supreme court so early as the year 1796, in the case of Wiscart *v.* D'Auchy, 3 Dall. 321, 1 L. Ed. 619. Chief Justice Ellsworth, in delivering the opinion of the court in that case, expresses himself as follows: "The act of 1789 speaks of appeal and writ of error, but does not confound them. They are to be understood according to their ordinary acceptation. An appeal is a civil-law process, and removes a cause entirely, subjecting the law and fact to review and retrial. A writ of error is a common-law process, and removes for re-examination nothing but the law. This statute observes this distinction." Unted States *v.* Goodwin, 7 Cranch 108, 110, 3 L. Ed. 284, 285.

The appeal, which is the only mode by which a decree in chancery or in admiralty can be brought from an inferior federal court to this court, does bring up the whole case for re-examination on all the merits, whether of law or fact, and for consideration on these, as though no decree had ever been rendered. The writ of error is used to bring up for review all other cases, and when thus brought here, the cases are not open for re-examination on their whole merits, but every controverted question of fact is excluded from consideration, and only such errors as this court can see that the inferior court committed, and not all of these, can be the subject of this court's corrective power. Murdock *v.* Memphis, 20 Wall. 590, 621, 22 L. Ed. 429.

The word appeal in the 22d section of the judicial law of 1789 which provides for the review of final judgments and decrees in civil actions in the district and circuit court, is to be understood technically. Chief Justice Ellsworth, in delivering the opinion of the court in Wiscart *v.* D'Auchy, 3 Dall. 321, 1 L. Ed. 619, expresses himself as follows: "The act of 1789, speaks of appeal and writ of error,

In the language of Mr. Chief Justice Fuller: "The distinction between a writ of error which brings up matter of law only, and an appeal, which, unless expressly restricted, brings up both law and fact, has always been observed by this court, and been recognized by the legislation of congress from the foundation of the government."[93]

Mr. Powell, in his work on Appellate Procedure (§ 4, ch. 6), says: "Although the various modes of proceedings are prosecuted in different ways and called by different appellations, as 'appeal,' 'review,' 'error,' and the like, and these names often confounded and misapplied, yet the object to be attained is one or the other of two results, either by an appeal to obtain a rehearing and new trial of the case upon its facts and merits, or a review of alleged errors in law in the record of the judgment and proceedings which will result either in the reversal or

but does not confound them. They are to be understood according to their ordinary acceptation. An appeal is a civil-law process, and removes a cause entirely, subjecting the law and fact to a review and retrial. A writ of error is a common-law process, and removes for re-examination nothing but the law. This statute observes this distinction. In admiralty and maritime cases an appeal is allowed from the district to the circuit court, if the matter in dispute exceeds $300, and yet decrees and judgments in civil actions may be removed by writ of error, from the district to the circuit court though the value barely exceeds $50." And this technical distinction between a writ of error and an appeal, and between the different cases to which they were applicable, was clearly marked in the act of February 13, 1801, which was afterwards repealed by the act of March 8, 1802. United States *v.* Goodwin, 7 Cranch 108, 3 L. Ed. 284.

Under the first judiciary act passed September 24th, 1789, it was held, that a decree in admiralty could not be reviewed by this court in matter of fact; and Chief Justice Ellsworth, after laying down the rule that the appellate jurisdiction of this court could only be exercised within the regulations prescribed by congress, said: "It is to be considered, then, that the judicial statute of the United States speaks of an appeal and of a writ of error; but it does not confound the terms, nor use them promiscuously. They are to be understood, when used, according to their ordinary acceptation, unless something appears in the act itself to control, modify or change the fixed and technical sense which they have previously borne. An appeal is a process of civil-law origin, and removes a cause entirely, subjecting the fact, as well as the law, to a review and retrial; but a writ of error is a process of common-law origin, and it removes nothing for re-examination but the law." Wiscart *v.* D'Auchy, 3 Dall. 321, 327, 1 L. Ed. 619; The Perseverance, 3 Dall. 336, 1 L. Ed. 625; The Charles Carter, 4 Dall. 22, 1 L. Ed. 724; Dower *v.* Richards, 151 U. S. 658, 664, 38 L. Ed. 305.

In a late case Mr. Justice Woody said: "The defendant, having failed in its appeal, has now brought a writ of error and asks this court to review the facts to the same extent that they would be reviewed on appeal. But this overlooks the vital distinction between appeals and writs of error which has always been observed by this court, and recognized in legislation. An appeal brings up questions of fact as well as of law, but upon a writ of error only questions of law apparent on the record can be considered, and there can be no inquiry whether there was error in dealing with questions of fact. Wiscart *v.* D'Auchy, 3 Dall. 321, 1 L. Ed. 619; Generes *v.* Campbell, 11 Wall. 193, 20 L. Ed. 110; United States *v.* Dawson, 101 U. S. 569, 25 L. Ed. 791; England *v.* Gebhardt, 112 U. S. 502, 28 L. Ed. 811; Martinton *v.* Fairbanks, 112 U. S. 670, 28 L. Ed. 862; Dower *v.* Richards, 151 U. S. 658, 38 L. Ed. 305 (where the cases are reviewed by Mr. Justice Gray); Elliott *v.* Toeppner, 187 U. S. 327, 47 L. Ed. 200; § 1011, Rev. Stat." Behn *v.* Campbell, 205 U. S. 403, 407, 51 L. Ed. 857.

93. Dower *v.* Richards, 151 U. S. 658, 663, 38 L. Ed. 305; Wiscart *v.* D'Auchy, 3 Dall. 321, 1 L. Ed. 619; Elliott *v.* Toeppner, 187 U. S. 327, 334, 47 L. Ed. 200.

In the legislation of congress, from the foundation of the government, a writ of error, which brings up matter of law only, has always been distinguished from an appeal, which, unless expressly restricted, brings up both law and fact. Wiscart *v.* D'Auchy, 3 Dall. 321, 1 L. Ed. 619; United States *v.* Goodwin, 7 Cranch 108, 3 L. Ed. 284; Cohens *v.* Virginia, 6 Wheat. 264, 410, 5 L. Ed. 257; Hemmenway *v.* Fisher, 20 How. 255, 258, 15 L. Ed. 799; In re Neagle, 135 U. S. 1, 42, 34 L. Ed. 55; Dower *v.* Richards, 151 U. S. 658, 663, 38 L. Ed. 305.

The question of infringement or no infringement of a patent is one of law and susceptible of determination on a writ of error. Heald *v.* Rice, 104 U. S. 737, 26 L. Ed. 910; Market, etc., R. Co. *v.* Rowley, 155 U. S. 621, 625, 39 L. Ed. 284; Singer Mfg. Co. *v.* Cramer, 192 U. S. 265, 275, 48 L. Ed. 437.

affirming of the judgment, which are properly called 'proceedings in error.' By the first—appeal—when perfected in accordance with the statute and the rules of the court, the whole case with its record and proceedings is taken from the court below into the appellate court, there to be again tried upon the issues between the parties as though the case orignated in such appellate court; which appeal has the effect to set aside and vacate the original verdict and judgment in the case; and the result remains wholly dependent on the future judgment which may be rendered in the case upon the appeal and new trial. By the second proceedings—review and error—the result depends entirely upon the question whether the appellate court finds the alleged error in the record of the judgment and proceedings of the court below."

Agreement of Counsel.—The distinctions between writs of error and appeals cannot be overthrown by an agreement of counsel in the court below, that all the evidence in the cause shall be introduced and considered as a statement of facts. [94]

And although under the Louisiana practice a writ of error is considered as bringing all the facts before this court, as they stood before the circuit court, no such practice prevails in this court, in which a writ of error issues according to the course of the common law.[95]

The statute of Louisiana, requiring their courts to have the testimony taken down in all cases where an appeal lies to the supreme court, and the adoption of this rule by the court of the United States, includes only cases where an appeal (technically speaking) lies, and not cases which are carried to an appellate court by writ of error.[96]

Under Circuit Court of Appeals Act.—Our review of a final judgment of a court of the United States in a case of the conviction of a capital or otherwise infamous crime, brought here under the circuit court of appeals act by writ of error, is confined to questions of law, properly presented by a bill of exceptions, or arising upon the record.[97]

10. Election of Remedies.—Where, for any reason, a party is in doubt whether his case is one to be brought here by appeal or by writ of error, he may sue out a writ of error, and also obtain the allowance of an appeal, and this court, when it comes to examine the case, will determine whether it is properly here by appeal or by writ of error, and will proceed accordingly.[98] Thus, in an action brought under Rev. Stat., § 2326, for an adjudication of contested mining claims, there having been conflicting decisions as to whether such suits were at law or in equity, the defeated party is justified in taking the case up for review both by appeal and writ of error, to guard against a possible dismissal.[99]

C. Writ of Prohibition.—Where a remedy by appeal is open and available, the writ of prohibition will not issue, since the writ cannot be made to serve the purpose of a writ of error or certiorari.[1]

94. Minor *v.* Tillotson, 2 How. 392, 11 L. Ed. 312, citing Parsons *v.* Bedford, 3 Pet. 433, 445, 7 L. Ed. 732.

95. Minor *v.* Tillotson, 2 How. 392, 11 L. Ed. 312, citing Parsons *v.* Bedford, 3 Pet. 433, 445, 7 L. Ed. 732.

96. Phillips *v.* Preston, 5 How. 278, 12 L. Ed. 152, citing Parsons *v.* Armor, 3 Pet. 413, 425, 7 L. Ed. 724; Minor *v.* Tillotson, 2 How. 392, 394, 11 L. Ed. 312.

97. Bucklin *v.* United States, 159 U. S. 680, 40 L. Ed. 304.

98. Hurst *v.* Hollingsworth, 94 U. S. 111, 24 L. Ed. 31; Plymouth Gold Min. Co. *v.* Amador, etc., Canal Co., 118 U. S. 264, 30 L. Ed. 232; Smith *v.* Whitney, 116 U. S. 167, 29 L. Ed. 601.

Where a party sued out a writ of error, and obtained the allowance of an appeal, and duly filed a transcript of the record here, the court will not, on motion, dismiss the cause, but, when it comes on to be heard, will determine whether it is properly here by appeal or by writ of error, and proceed accordingly. Hurst *v.* Hollingsworth, 94 U. S. 111, 24 L. Ed. 31.

99. McFadden *v.* Mountain View Min., etc., Co., 97 Fed. Rep. 670, citing Hurst *v.* Hollingsworth, 94 U. S. 111, 24 L. Ed. 31; Hurst *v.* Hollingsworth, 100 U. S. 100, 25 L. Ed. 569; Plymouth Gold Min. Co. *v.* Amador, etc., Canal Co., 118 U. S. 264, 269, 30 L. Ed. 232.

1. Smith *v.* Whitney, 116 U. S. 167, 29 L. Ed. 601; Ex parte Pennsylvania, 109

D. Mandamus—1. In General.—It is an elementary principle that a mandamus cannot be used to perform the office of an appeal or writ of error.[2] Power is given to this court by the judiciary act, under a writ of error, or appeal, to affirm or reverse the judgment or decree of the circuit court, and in certain cases to render such judgment or decree as the circuit court should have rendered or passed, but no such power is given under a writ of mandamus, nor is it competent for the superior tribunal, under such a writ, to re-examine the judgment or decree of the subordinate court. Such a writ cannot perform the functions of an appeal or writ of error, as the superior court will not, in any case, direct the judge of the subordinate court what judgment or decree to enter in the case, as the writ does not vest in the superior court any power to give any such direction or to interfere in any manner with the judicial discretion and judgment of the subordinate court.[3]

U. S. 174, 27 L. Ed. 894; In re Cooper, 143 U. S. 472, 36 L. Ed. 232; In re Huguley Mfg. Co., 184 U. S. 297, 46 L. Ed. 549; Alexander *v.* Crollott, 199 U. S. 580, 50 L. Ed. 317.

A writ of prohibition is never to be issued unless it clearly appears that the inferior court is about to exceed its jurisdiction. It cannot be made to serve the purpose of a writ of error or certiorari, to correct mistakes of that court in deciding any question of law or fact within its jurisdiction. These rules have been always adhered to by this court, in the exercise of the power expressly conferred upon it by congress to issue writs of prohibition to the district courts sitting as courts of admiralty. United States *v.* Peters, 3 Dall. 121, 1 L. Ed. 535; Ex parte Easton, 95 U. S. 68, 24 L. Ed. 373; Ex parte Gordon, 104 U. S. 515, 26 L. Ed. 814; Ex parte Ferry Co., 104 U. S. 519, 26 L. Ed. 815; Ex parte Pennsylvania, 109 U. S. 174, 27 L. Ed. 894; Smith *v.* Whitney, 116 U. S. 167, 176, 29 L. Ed. 601.

2. Ex parte Loring, 94 U. S. 418, 24 L. Ed. 165; Ex parte Schwab, 98 U. S. 240, 241, 25 L. Ed. 105; Ex parte Perry, 102 U. S. 183, 186, 26 L. Ed. 43; Ex parte Flippin, 94 U. S. 348, 350, 24 L. Ed. 194; Ex parte Hoard, 105 U. S. 578, 580, 26 L. Ed. 1176; Ex parte Baltimore, etc., R. Co., 108 U. S. 566, 567, 27 L. Ed. 812; Ex parte Morgan, 114 U. S. 174, 29 L. Ed. 135; In re Rice, 155 U. S. 396, 39 L. Ed. 198; In re Pollitz, 206 U. S. 323, 51 L. Ed. 1081; Ex parte Whitney, 13 Pet. 404, 10 L. Ed. 221; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 379, 37 L. Ed. 486; In re Grossmayer, 177 U. S. 48, 49, 44 L. Ed. 665; In re Blake, 175 U. S. 114, 44 L. Ed. 94; In re Atlantic City Railroad Co., 164 U. S. 633, 41 L. Ed. 579; In re Huguley Mfg. Co., 184 U. S. 297, 301, 46 L. Ed. 549; Holloway *v.* Whitely, 4 Wall. 522, 18 L. Ed. 335; Ex parte Des Moines R., etc., Co., 103 U. S. 794, 796, 26 L. Ed. 461; In re Pennsylvania Co., 137 U. S. 451, 453, 34 L. Ed. 738; In re Morrison, 147 U. S. 14, 26, 37 L. Ed. 60; Virginia *v.* Paul, 148 U. S. 107, 124, 37 L. Ed. 386.

The general power of the court to issue a writ of mandamus to an inferior court, to take jurisdiction of a cause when it refuses to do so, is settled by a long train of decisions; but mandamus only lies, as a general rule, where there is no other adequate remedy; nor can it be availed of as a writ of error. In re Pennsylvania Co., 137 U. S. 451, 34 L. Ed. 738; In re Morrison, 147 U. S. 14, 37 L. Ed. 60; Ex parte Des Moines R., etc., Co., 103 U. S. 794, 26 L. Ed. 461; Ex parte Baltimore, etc., R. Co., 108 U. S. 566, 27 L. Ed. 812; In re Atlantic City Railroad, 164 U. S. 633, 635, 41 L. Ed. 579.

The decision of a court of competent jurisdiction refusing to do an act that involves the exercise of a judicial discretion, and not a ministerial duty, whether such decision be erroneous or not, cannot be examined by the supreme court in a proceeding by mandamus. Ex parte Many, 14 How. 24, 14 L. Ed. 311.

Nonjoinder of parties.—A judgment of a circuit court to which a writ of error had been sued out, with a supersedeas bond given, being affirmed here and remanded to the trial court in the usual way, that court, on motion, summoned in the sureties, and, although they proposed to interpose a plea of partial payment, proceeded to render judgment against them and the principal for the full amount of the original judgment with interest and costs. An appeal to the circuit court of appeals having been dismissed for nonjoinder of the original defendant, they applied to this court for a writ of mandamus, commanding the court below to vacate its judgment in so far as it was rendered against the sureties, and to execute the mandate by entering judgment and ordering execution against the principal only. Held, that that judgment was rendered in the exercise of judicial determination, and not in the discharge of a ministerial duty, and that the petitioners' remedy, if they deemed themselves aggrieved, was by writ of error. In re Humes, 149 U. S. 192, 37 L. Ed. 698, citing Ex parte Flippin, 94 U. S. 348, 24 L. Ed. 194.

3. Ex parte Crane, 5 Pet. 190, 194, 8 L. Ed. 92; Ex parte Bradstreet, 7 Pet. 634, 8 L. Ed. 810; Life and Fire Ins. Co.

It is an elementary rule that a writ of mandamus may be used to require an inferior court to decide a matter within its jurisdiction and pending before it for judicial determination, but not to control the decision.[4] If there is error in the judgment as rendered, it cannot be corrected by mandamus, but resort must be had to a writ of error or an appeal.[5] This court cannot, by mandamus, compel an inferior court to reverse a decision made by it in the exercise of its legitimate jurisdiction. "That is the office of a writ of error or an appeal, in cases to which such proceeding applies, but not of a writ of mandamus."[6]

Judgment Sustaining Plea to Jurisdiction.—It does not, therefore, lie to review a final judgment or decree of the circuit court, sustaining a plea to the jurisdiction, even if no appeal or writ of error is given by law.[7]

In the language of Mr. Chief Justice Fuller, the writ of mandamus cannot be used to perform the office of an appeal or writ of error, and does not lie to review a final judgment or decree sustaining a plea to the jurisdiction, even if no appeal or writ of error is given by law. It is not granted in doubtful cases, or where there is another adequate remedy, and whether it shall go or not usually rests in the sound discretion of the court.[8]

v. Wilson, 8 Pet. 291, 304, 8 L. Ed. 949; Ex parte Many, 14 How. 24, 25, 14 L. Ed. 311; Ex parte Newman, 14 Wall. 152, 169, 20 L. Ed. 877.

We cannot by writ of mandamus compel the court below to decide a matter before it in a particular way, nor can we, through the instrumentality of that writ, review its judicial action had in the exercise of legitimate jurisdiction. Ex parte Flippin, 94 U. S. 348, 24 L. Ed. 194; Ex parte Burtis, 103 U. S. 238, 26 L. Ed. 392; In re Morrison, 147 U. S. 14, 26, 37 L. Ed. 60; In re Hawkins, 147 U. S. 486, 490, 37 L. Ed. 251; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 379, 37 L. Ed. 486; In re Humes, 149 U. S. 192, 37 L. Ed. 698; In re Parsons, 150 U. S. 150, 156, 37 L. Ed. 1034.

4. Ex parte Flippin, 94 U. S. 348, 350, 24 L. Ed. 194; Ex parte Railway Co., 101 U. S. 720, 25 L. Ed. 872; Ex parte Burtis, 103 U. S. 238, 26 L. Ed. 392; Ex parte Morgan, 114 U. S. 174, 175, 29 L. Ed. 135; In re Blake, 175 U. S. 114, 117, 44 L. Ed. 94.

It was held, in Ex parte Whitney, 13 Pet. 404, 10 L. Ed. 221, that a writ of mandamus ought not to be used to correct orders made by a judge in the exercise of his authority, even though such orders "may seem to bear harshly or oppressively upon the party" complaining.

The writ of mandamus properly lies in cases where the inferior court refuses to take jurisdiction where by law it ought so to do, or where, having obtained jurisdiction in a cause, it refuses to proceed in the due exercise thereof; but it will not lie to correct alleged error occurring in the exercise of its judicial discretion while acting within its jurisdiction. Ex parte Parker, 120 U. S. 737, 30 L. Ed. 818, citing Ex parte Brown, 116 U. S. 401, 29 L. Ed. 676.

The mere fact that, in the administration of the assets of an insolvent corporation in the custody of receivers, summary proceedings are resorted to, does not in itself affect the jurisdiction of the circuit court as having proceeded in excess of its powers, and, where notice has been given and hearing had, the result cannot properly be interfered with by mandamus. In re Parsons, 150 U. S. 150, 37 L. Ed. 1034; In re Rice, 155 U. S. 397, 403, 39 L. Ed. 198.

5. Ex parte Loring, 94 U. S. 418, 24 L. Ed. 165; Ex parte Perry, 102 U. S. 183, 26 L. Ed. 43; Ex parte Morgan, 114 U. S. 174, 175, 29 L. Ed. 135.

6. Ex parte Flippin, 94 U. S. 348, 24 L. Ed. 194.

This court cannot by mandamus correct the judicial errors committed by an inferior court in the progress of a cause. If the object of the proceeding is to obtain from this court an order requiring the circuit court to reverse its former decision and grant the relief that was once refused, the petition for mandamus will be denied. This is the office of a writ of error or an appeal, and not of a writ of mandamus. Nor is the case changed because the appropriate remedy may involve an inconvenient delay. Ex parte Perry, 102 U. S. 183, 26 L. Ed. 43, citing Ex parte Schwab, 98 U. S. 240, 25 L. Ed. 105; Ex parte Flippin, 94 U. S. 348, 24 L. Ed. 194; Ex parte Loring, 94 U. S. 418, 24 L. Ed. 165.

7. Ex parte Newman, 14 Wall. 152, 20 L. Ed. 877; Ex parte Baltimore, etc., R. Co., 108 U. S. 566, 27 L. Ed. 321; In re Burdett, 127 U. S. 771, 32 L. Ed. 321; In re Pennsylvania Co., 137 U. S. 451, 453, 34 L. Ed. 738; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 379, 37 L. Ed. 486; In re Grossmayer, 177 U. S. 48, 49, 44 L. Ed. 665.

Judgment on plea to jurisdiction.—The judgment of the circuit court, on a plea to the jurisdiction, will not be reviewed here upon a petition for a mandamus. Ex parte Des Moines, etc., R. Co., 103 U. S. 794, 26 L. Ed. 461.

8. American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 379, 37

Reversal of Decision Denying Motion to Remand.—According to well-settled principles, a writ of mandamus will not issue from this court to compel a circuit court to reverse its decision denying a motion to remand a cause removed to it from a state court.[9]

Review of Interlocutory Decrees.—Least of all, can a writ of mandamus be granted to review a ruling or interlocutory order made in the progress of a cause; for, as observed by Chief Justice Marshall, to do this "would be a plain evasion of the provision of the act of congress that final judgments only should be brought before this court for re-examination;" would "introduce the supervising power of this court into a cause while depending in an inferior court, and prematurely to decide it;" would allow an appeal or writ of error upon the same question to be "repeated, to the great oppression of the parties;" and "would subvert our whole system of jurisprudence."[10]

Circuit Court of Appeals.—This court cannot, by mandamus, review the judicial action of a circuit court of appeals had in the exercise of legitimate jurisdiction. As, for example, upon an application for a writ of mandamus to compel the circuit court of appeals to receive and duly consider certain depositions or further proofs taken by petitioner on appeal in an admiralty cause pending in that court wherein he is the libelant and appellee.[11]

When the amount in controversy in a case decided in the circuit court is too small to come here by writ of error, this court is without power by writ of mandamus to compel the judge of the circuit court to reverse his own judgment.[12]

To Compel Vacation of Judgment.—This court will not by mandamus compel an inferior court to grant a motion to vacate an order setting aside a judgment of nonsuit. "For that, resort must be had to a writ of error after a final judgment has been rendered. The writ of mandamus has no such office to perform."[13]

Issuance of Execution in Conformity with Mandate.—Where no decree is entered against certain parties to an appeal before the appeal is taken to this court, this court will not review the decision of the circuit court under the mandamus in deciding whether execution should issue against those parties or not in conformity with the mandate. Error or appeal not mandamus is the only remedy to review this decision.[14]

Order of Dismissal for Want of Proper Assignment of Errors.—Where the court below entertains jurisdiction of the cause, but dismisses it for want of due prosecution; that is to say, because errors had not been assigned in accordance with the rules of practice applicable to the form of the action, this is a judgment which can only be reviewed by writ of error or appeal, as the case may be. Man-

L. Ed. 486; In re Rice, 155 U. S. 396, 403, 39 L. Ed. 198; High on Extr. Remedies, 3d ed., § 9; In re Key, 189 U. S. 84, 86, 47 L. Ed. 720.

9. In re Pollitz, 206 U. S. 323, 51 L. Ed. 1081, citing In re Hohorst, 150 U. S. 653, 37 L. Ed. 1211.

10. Bank of Columbia *v.* Sweeney, 1 Pet. 567, 569, 7 L. Ed. 265; Life, etc., Ins. Co. *v.* Adams, 9 Pet. 573, 602, 9 L. Ed. 234; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 379, 37 L. Ed. 486.

11. In re Hawkins, 147 U. S. 486, 37 L. Ed. 251, citing In re Morrison, 147 U. S. 14, 37 L. Ed. 60; Ex parte Morgan, 114 U. S. 174, 29 L. Ed. 135; Ex parte Burtis, 103 U. S. 238, 26 L. Ed. 392; Ex parte Schwab, 98 U. S. 240, 25 L. Ed. 105.

12. In re Burdett, 127 U. S. 771, 32 L. Ed. 321.

But in a late case the court uses the following language: "The amount of such interest calculated at the rate of six per cent. per annum from December 18, 1885, to June 9, 1890, was not quite $1,700. The amount involved was, therefore, too small to be the subject of a writ of error from this court. The only relief which the railroad company could obtain in the premises was, therefore, by a writ of mandamus. A mandamus will lie to correct such an error, where [illegible] other adequate remedy, and where there is no discretion to be exercised by the inferior court." Sibbald *v.* United States, 12 Pet. 488, 9 L. Ed. 1167; Ex parte Bradley, 7 Wall. 364, 376, 19 L. Ed. 214; Virginia *v.* Rives, 100 U. S. 313, 329, 25 L. Ed. 667; In re Washington, etc., R. Co., 140 U. S. 91, 95, 35 L. Ed. 339.

13. Ex parte Loring, 94 U. S. 418, 24 L. Ed. 165.

14. Ex parte Sawyer, 21 Wall. 235, 22 L. Ed. 617.

damus lies to compel a court to take jurisdiction in a proper case, but not to control its discretion while acting within its jurisdiction. This rule is elementary.[15]

If the court, after sufficient service on the defendant, erroneously declines to take jurisdiction of the case or to enter judgment therein, a writ of mandamus lies to compel it to proceed to a determination of the case, except where the authority to issue a writ of mandamus has been taken away by statute.[16]

The refusal of the lower court to strike off a plea which the court had permitted the defendant to put in, and compel the defendant to enter another plea, which the plaintiff's counsel deemed the proper plea, is not a proper case for mandamus. The revising power of this court in such case can be exercised only by a writ of error.[17]

Judgment Refusing Mandamus.—Mandamus from this court will not lie to reverse a judgment of a court below, refusing a mandamus against the secretary of the treasury, commanding him to pay a sum of money awarded to the relator by the secretary of war, in pursuance of a joint resolution of congress, and to compel such court below to issue one. "The party has mistaken his remedy, if he has any, which is by writ of error to the court below to reverse the judgment there rendered in the case. The authorities are uniform on the question."[18]

To Compel Reissue of Patents.—Where a statute directed the commissioner of patents to grant a reissue of patents in certain cases, to "assignees," it is the duty of the commissioner to decide whether the applicant is an assignee with such an interest as entitled him to a reissue within the meaning of the statutory provision on the subject; and if he has thoroughly examined and decided that the applicant is not so, a mandamus will not lie commanding him to refer the application to "the proper examiner or otherwise examine or cause the same to be examined according to law." The preliminary question was within the scope of his authority. If the mandamus had ordered the commissioner to allow an appeal, the order under which it issued would have been held correct.[19]

2. Adequacy of Other Remedies.—It is well settled, that a writ of mandamus, as a general rule, lies only where there is no other adequate remedy and it cannot be availed of as a writ of error.[20] Mandamus cannot be resorted to where the parties have ample remedy by appeal or writ of error.[21] Mandamus will not

15. Ex parte Morgan, 114 U. S. 174, 29 L. Ed. 135; Ex parte Brown, 116 U. S. 401, 402, 29 L. Ed. 676.

16. Ex parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853; In re Pennsylvania Co., 137 U. S. 451, 453, 34 L. Ed. 738; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 379, 37 L. Ed. 486; In re Hohorst, 150 U. S. 653, 664, 37 L. Ed. 1211; In re Grossmayer, 177 U. S. 48, 49, 44 L. Ed. 665.

17. Bank *v.* Sweeney, 1 Pet. 567, 7 L. Ed. 265.

18. Decatur *v.* Paulding, 14 Pet. 497, 10 L. Ed. 559; Kendall *v.* United States, 12 Pet. 524, 527, 9 L. Ed. 1181; Brashear *v.* Mason, 6 How. 92, 12 L. Ed. 357; United States *v.* Guthrie, 17 How. 284, 15 L. Ed. 102; Ex parte De Groot, 6 Wall. 497, 18 L. Ed. 887.

19. Commissioner *v.* Whitely, 4 Wall. 522, 18 L. Ed. 335.

20. In re Pennsylvania Co., 137 U. S. 451, 34 L. Ed. 738; In re Morrison, 147 U. S. 14, 26, 37 L. Ed. 60; Ex parte Des Moines, etc., R. Co., 103 U. S. 794, 26 L. Ed. 461; Ex parte Baltimore, etc., R. Co., 108 U. S. 566, 27 L. Ed. 812; In re Atlantic City R. Co., 164 U. S. 633, 41 L. Ed. 579; Ex parte Union Steamboat Co., 178 U. S. 317, 319, 44 L. Ed. 1084.

Where mandamus is the proper remedy, error will not lie. Insurance Co. *v.* Comstock, 16 Wall. 258, 21 L. Ed. 493, citing Ayres *v.* Carver, 17 How. 591, 15 L. Ed. 179.

21. In re Connecticut Mutual Life Ins. Co., 131 U. S. App. clxxx, 26 L. Ed. 561; United States *v.* Addison, 22 How. 174, 183, 16 L. Ed. 304; In re Blake, 175 U. S. 114, 44 L. Ed. 94; In re Pennsylvania Co., 137 U. S. 451, 453, 34 L. Ed. 738; In re Morrison, 147 U. S. 14, 26, 37 L. Ed. 60.

In the case of Ex parte Baltimore, etc., R. Co., 108 U. S. 566, 27 L. Ed. 812, it was sought to obtain a mandamus to compel a circuit court to take jurisdiction of a proceeding in replevin in which the supreme court had quashed the writ. It was held, that error would lie, and furnished an adequate remedy, and therefore, mandamus would not lie. Still the fact that appeal or error will lie does not always prevent the issuance of mandamus,

lie to compel a circuit court to hear and determine whether a master of the court shall execute to the relator a deed for certain lands bought under a sale ordered by that court, it nowhere appearing from the relator's own showing that the court had expressly refused such an order, and this on the ground that mandamus can only be resorted to when other remedies fail, and here the parties have ample remedy by appeal.[22]

That the remedy by writ of error is inappropriate and ineffectual will not entitle the parties to mandamus; it "may be a defect in the law; but we must administer the law as we find it."[23]

The mere fact that the parties are without remedy by appeal or writ of error, because the sum or value in controversy is less than the amount required to give that right, does not on that account entitle the parties to a writ of mandamus. "Mandamus will not lie, it is true, where the party may have an appeal or writ of error, but it is equally true that it will not lie in many other cases where the party is without remedy by appeal or writ of error. Such remedies are not given save in patent and revenue cases, except when the sum or value exceeds two thousand dollars, but the writ of mandamus will not lie in any case to a subordinate court unless it appears that the court of which complaint is made refused to act in respect to a matter within the jurisdiction of the court and where it is the duty of the court to act in the premises."[24] But a mandamus will lie to correct an error, where there is no other adequate remedy, and where there is no discretion to be exercised by the inferior court.[25]

E. Habeas Corpus—1. In General.—It has been too frequently decided, to be now open to question, that a writ of habeas corpus cannot be made use of to perform the functions of a writ of error or an appeal.[26] Habeas corpus is not

because the former, though it exist, is not always an adequate remedy.

The writ of mandamus cannot be issued to compel the court below to decide a matter before it in a particular way, or to review its judicial action had in the exercise of legitimate jurisdiction. The writ cannot be used to perform the office of an appeal or writ of error, even if no appeal or writ of error is given by law. American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 379, 37 L. Ed. 486; In re Rice, 155 U. S. 396, 403, 39 L. Ed. 198.

22. In re Connecticut Mutual Life Ins. Co., 131 U. S. App. clxxx, 26 L. Ed. 561.

23. United States *v.* Addison, 22 How. 174, 16 L. Ed. 304.

24. Ex parte Newman, 14 Wall. 152, 168, 20 L. Ed. 877.

25. Sibbald *v.* United States, 12 Pet. 488, 9 L. Ed. 1167; Ex parte Bradley, 7 Wall. 364, 376, 19 L. Ed. 214; Virginia *v.* Rives, 100 U. S. 313, 329, 25 L. Ed. 667; Perkins *v.* Fourniquet, 14 How. 313, 328, 14 L. Ed. 435; Ex parte Dubuque, etc., R. Co. *v.* Litchfield, 1 Wall. 69, 17 L. Ed. 514; Durant *v.* Essex Co., 101 U. S. 555, 556, 25 L. Ed. 961; Boyce *v.* Grundy, 9 Pet. 275, 9 L. Ed. 127; Gaines *v.* Rugg, 148 U. S. 228, 243, 37 L. Ed. 432.

26. Ex parte Kearney, 7 Wheat. 38, 43, 5 L. Ed. 391; Ex parte Terry, 128 U. S. 289, 32 L. Ed. 405; Ex parte Cuddy, 131 U. S. 280, 33 L. Ed. 154; In re Nielsen, 131 U. S. 176, 33 L. Ed. 118; Ex parte Tyler, 149 U. S. 164, 167, 37 L. Ed. 689; United States *v.* Pridgeon, 153 U. S. 48, 38 L. Ed. 631; In re Lennon, 166 U. S. 548, 552, 41 L. Ed. 1110; In re Wight, 134 U. S. 136, 33 L. Ed. 865; In re Green, 134 U. S. 377, 33 L. Ed. 951; Stevens *v.* Fuller, 136 U. S. 468, 478, 34 L. Ed. 461; Andersen *v.* Treat, 172 U. S. 24, 43 L. Ed. 351; In re Eckart, 166 U. S. 481, 485, 41 L. Ed. 1085; Day *v.* Conley, 179 U. S. 680, 45 L. Ed. 383; Crossley *v.* California, 168 U. S. 640, 42 L. Ed. 610; Whitney *v.* Dick, 202 U. S. 132, 50 L. Ed. 963; Ex parte Mirzan, 119 U. S. 584, 30 L. Ed. 513; In re Huntington, 137 U. S. 63, 34 L. Ed. 567; In re Lancaster, 137 U. S. 393, 34 L. Ed. 713; In re Chapman, 156 U. S. 211, 39 L. Ed. 401; Riggins *v.* United States, 199 U. S. 547, 50 L. Ed. 303; In re Lincoln, 202 U. S. 178, 182, 50 L. Ed. 984; Ex parte Tyler, 149 U. S. 164, 37 L. Ed. 689; In re Lennon, 150 U. S. 393, 400, 37 L. Ed. 1120; Felts *v.* Murphy, 201 U. S. 123, 50 L. Ed. 689, citing Ex parte Bigelow, 113 U. S. 328, 28 L. Ed. 1005; Valentina *v.* Mercer, 201 U. S. 131, 50 L. Ed. 693; Baker *v.* Grice, 169 U. S. 284, 42 L. Ed. 748; Tinsley *v.* Anderson, 171 U. S. 101, 104, 43 L. Ed. 91; Markuson *v.* Boucher, 175 U. S. 184, 44 L. Ed. 124; Minnesota *v.* Brundage, 180 U. S. 499, 45 L. Ed. 639; Storti *v.* Massachusetts, 183 U. S. 138, 141, 46 L. Ed. 120; Bissert *v.* Hagan, 183 U. S. 694, 46 L. Ed. 393; Hall *v.* Johnson, 186 U. S. 480, 46 L. Ed. 1259; In re Swan, 150 U. S. 637, 648, 37 L. Ed. 1207.

While the writ of habeas corpus is one of the remedies for the enforcement of the right to personal freedom, it will not

treated as a writ of error, and while it may be issued by one court to inquire into the action of a court of co-ordinate jurisdiction, yet the inquiry is only whether the action of the court in imposing punishment was within its jurisdiction.[27] And

issue, as a matter of course, and it should be cautiously used by the federal courts in reference to state prisoners. Being a civil process, it cannot be converted into a remedy for the correction of mere errors of judgment or of procedure in the court having cognizance of the criminal offense. Under the writ of habeas corpus, this court can exercise no appellate jurisdiction over the proceedings of the trial court or courts of the state, nor review their conclusions of law or fact, and pronounce them erroneous. The writ of habeas corpus is not a proceeding for the correction of errors. Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717; Ex parte Curtis, 106 U. S. 371, 27 L. Ed. 232; Ex parte Carll, 106 U. S. 521, 27 L. Ed. 288; Ex parte Bigelow, 113 U. S. 328, 28 L. Ed. 1005; Ex parte Yarbrough, 110 U. S. 651, 28 L. Ed. 274; Ex parte Wilson, 114 U. S. 417, 29 L. Ed. 89; Ex parte Royall, 117 U. S. 241, 29 L. Ed. 868; In re Snow, 120 U. S. 274, 30 L. Ed. 658; In re Coy, 127 U. S. 731, 32 L. Ed. 274; In re Wight, 134 U. S. 136, 33 L. Ed. 865; Stevens *v.* Fuller, 136 U. S. 468, 34 L. Ed. 461; In re Frederich, 149 U. S. 70, 75, 37 L. Ed. 653.

The writ of habeas corpus is not a writ of error, though in some cases in which the court issuing it has appellate power over the court by whose order the petitioner is held in custody, it may be used with the writ of certiorari for that purpose. Wales *v.* Whitney, 114 U. S. 564, 571, 29 L. Ed. 277.

Where an inferior court has jurisdiction of the cause and the person in a criminal suit, and no writ of error lies from this court, it will not, on habeas corpus, review the legality of the proceedings. It is only where the proceedings below are entirely void, either for want of jurisdiction, or other cause, that such relief will be given. Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787.

When the court below has jurisdiction of the cause, and the matter charged is indictable under a constitutional law, any errors committed by the inferior court can only be reviewed by writ of error; and, of course, cannot be reviewed at all if no writ of error lies. Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717.

Mere error in the judgment or irregularity in the proceedings under and by virtue of which the party is imprisoned, constitutes no ground for the issuance of the writ of habeas corpus. In other words a conviction and sentence by a court of competent jurisdiction is a lawful cause of imprisonment and such motion cannot be reviewed by habeas corpus. But this court will give relief on habeas corpus to a prisoner under conviction and sentence, in a case where there is want of jurisdiction in such court over the person or the cause, or some other matter redering its proceedings void. In short the distinction is between an erroneous judgment and one that is illegal or void. Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717.

The writ of habeas corpus cannot be used as a mere writ of error. Mere error in the judgment or proceedings, under and by virtue of which a party is imprisoned, constitutes no ground for the issue of the writ. Hence, upon a return to a habeas corpus, that the prisoner is detained under a conviction and sentence by a court having jurisdiction of the cause, the general rule is, that he will be instantly remanded. No inquiry will be instituted into the regularity of the proceedings, unless, perhaps, where the court has cognizance by writ of error or appeal to review the judgment. In such a case, if the error be apparent and the imprisonment unjust, the appellate court may, perhaps, in its discretion, give immediate relief on habeas corpus, and thus save the party the delay and expense of a writ of error. Ex parte Siebold, 100 U. S. 371, 375, 25 L. Ed. 717.

Whether a matter for which a party is indicted in the district court is, or is not, a crime against the laws of the United States, is a question within the jurisdiction of that court, which it must decide. Its decision will not be reviewed here by habeas corpus. Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787.

27. Bessette *v.* Conkey Co., 194 U. S. 324, 335, 48 L. Ed. 997, reaffirmed in In re Lewis, 202 U. S. 614, 50 L. Ed. 1172.

Power to order change of venue.—Whether the judge who made an order for the removal of a defendant to a district in another state, for trial, had jurisdiction to make it, and if he had, the question whether upon the merits he ought to have made it, is not one which can be reviewed by means of the writ of habeas corpus. Greene *v.* Henkel, 183 U. S. 249, 261, 46 L. Ed. 177, reaffirmed in Green *v.* MacDougall, 199 U. S. 601, 50 L. Ed. 328.

Waiver of trial by jury.—The supreme court of the district has jurisdiction and authority to determine the validity of the act which authorizes the waiver of a jury and to dispose of the question as to whether the record of a conviction before a judge without a jury, where the prisoner waived trial by jury according to statute, was legitimate proof of a first offense, and this being so, we cannot re-

this doctrine applies not only to original writs of habeas corpus issued by this court, but on appeals to it from courts below in habeas corpus proceedings.[28] The general rule is that the writ of habeas corpus will not issue unless the court, under whose warrant the petitioner is held, is without jurisdiction, and that it cannot be used to correct errors.[29] Therefore, leave to file petition for a writ of habeas corpus will be denied where the ground of the application does not go to the jurisdiction or authority of the court, but relates merely to errors in its proceeding.[30]

Decision of Committing Magistrate in Extradition Proceedings.—By repeated decisions of this court it is settled that a writ of habeas corpus cannot perform the office of a writ of error, and that, in extradition proceedings, if the committing magistrate has jurisdiction of the subject matter and of the accused, and the offense charged is within the terms of the treaty of extradition, and the

view the action of that court and the court of appeals in this particular on habeas corpus. Ex parte Belt, 159 U. S. 95, 99, 100, 40 L. Ed. 88.

A decision of the supreme court of the District of Columbia that the act of congress of July 23, 1892, c. 236, 27 Stat. 261, providing that in prosecutions in the police court of the district, in which, according to the constitution, the accused would be entitled to a jury trial, the accused might in open court expressly waive such trial by jury and request to be tried by the judge, in which case the trial should be by the judge, and the judgment and sentence should have the same force and effect as if entered and pronounced upon the verdict of a jury, was constitutional and valid; and that the record of a trial, conviction, and sentence by a judge under such a waiver was competent evidence on an indictment for a similar offense to prove that it was the defendant's second offense of the same kind cannot be reviewed in a habeas corpus proceeding, because the ground of the application is based on a mere allegation of error. Ex parte Belt, 159 U. S. 95, 97, 40 L. Ed. 88, citing In re Schneider, 148 U. S. 157, 162, 37 L. Ed. 404.

Insufficiency of indictment.—Even though there is a lack of technical precision in the indictment in failing to charge with sufficient certainty and fullness some particular fact, the holding by the trial court that the indictment was sufficient is simply an error of law, and not one which can be re-examined on habeas corpus. Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787; In re Coy, 127 U. S. 731, 32 L. Ed. 274; In re Eckart, 166 U. S. 481, 41 L. Ed. 1085; Dimmick *v.* Tompkins, 194 U. S. 540, 552, 48 L. Ed. 1110; Munsey *v.* Clough, 196 U. S. 364, 373, 49 L. Ed. 515; Ex parte Reggel, 114 U. S. 642, 29 L. Ed. 250; Pearce *v.* Texas, 155 U. S. 311, 39 L. Ed. 164.

Homicide.—This court cannot review by writ of habeas corpus the decision of a state court in a trial for murder committed within the state whether there was sufficient evidence that the accused was guilty of murder in the first degree; whether the evidence showed, or tended to show, that he was guilty, at most, of murder in the second degree, because these are mere matters of error. And it is well settled that a writ of habeas corpus cannot be made use of as a writ of error. Crossley *v.* California, 168 U. S. 640, 42 L. Ed. 610.

Sale of liquor in Indian Territory.—A person convicted in the district court of introducing and selling liquor in an Indian reservation should proceed by writ of error from the circuit court of appeals, and habeas corpus is not to be substituted for writ of error in such case. In re Lincoln, 202 U. S. 178, 50 L. Ed. 984.

28. In re Schneider, 148 U. S. 157, 162, 37 L. Ed. 404; Benson *v.* McMahon, 127 U. S. 457, 462, 32 L. Ed. 234; Stevens *v.* Fuller, 136 U. S. 468, 478, 34 L. Ed. 461; Gonzales *v.* Cunningham, 164 U. S. 612, 621, 41 L. Ed. 572.

29. Ex parte Watkins, 3 Pet. 193, 197, 7 L. Ed. 650; Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787; Ex parte Yarbrough, 110 U. S. 651, 28 L. Ed. 274; Ex parte Bigelow, 113 U. S. 328, 28 L. Ed. 1005; In re Coy, 127 U. S. 731, 756, 32 L. Ed. 274; In re Schneider, 148 U. S. 157, 162, 37 L. Ed. 404; In re Chapman, 156 U. S. 211, 215, 39 L. Ed. 401; Riggins *v.* United States, 199 U. S. 547, 50 L. Ed. 303; Ex parte Belt, 159 U. S. 95, 100, 40 L. Ed. 88.

The writ of habeas corpus cannot be availed of as a writ of error. Unless the writ or orders of a court for a violation of which petitioner in habeas corpus is being punished were absolutely void, an application for the writ of habeas corpus to relieve from restraint in punishment for contempt in the violation of such orders must be denied. In re McKenzie, 180 U. S. 536, 45 L. Ed. 657.

30. In re Schneider, 148 U. S. 157, 162, 37 L. Ed. 404, citing Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787; Ex parte Bigelow, 113 U. S. 328, 28 L. Ed. 1005; Ex parte Wilson, 114 U. S. 417, 29 L. Ed. 89; In re Nielson, 131 U. S. 176, 33 L. Ed. 118; Dimmick *v.* Tompkins, 194 U. S. 540, 552, 48 L. Ed. 1110.

magistrate, in arriving at a decision to hold the accused, has before him competent legal evidence on which to exercise his judgment as to whether the facts are sufficient to establish the criminality of the accused for the purposes of extradition, such decision cannot be reviewed on habeas corpus.[31]

2. Limitations of General Rule.—While it is true that a writ of habeas corpus cannot generally be made to subserve the purposes of a writ of error, yet when a prisoner is held without any lawful authority, and by an order beyond the jurisdiction of an inferior federal court to make, this court will, in favor of liberty, grant the writ, not to review the whole case, but to examine the authority of the court below to act at all.[32]

3. Adequacy of Other Remedies.—Ordinarily the writ will not lie where there is a remedy by writ of error or appeal.[33] Yet in rare and exceptional cases it may be issued although such remedy exists.[34] Accordingly when no writ of error or appeal will lie, if a petitioner is imprisoned under a judgment of the circuit court which had no jurisdiction of the person or of the subject matter, or authority to render the judgment complained of, then relief may be accorded.[35]

31. In re Lewis Oteiza Y. Cortes, 136 U. S. 330, 34 L. Ed. 464; Benson *v.* McMahon, 127 U. S. 457, 32 L. Ed. 234; Fong Yue Ting *v.* United States, 149 U. S. 698, 714, 37 L. Ed. 905; Ornelas *v.* Ruiz, 161 U. S. 502, 509, 40 L. Ed. 787.

"The writ of habeas corpus cannot perform the office of a writ of error, but the court issuing the writ may inquire into the jurisdiction of the committing magistrate in extradition proceedings. Ornelas *v.* Ruiz, 161 U. S. 502, 40 L. Ed. 787; Terlinden *v.* Ames, 184 U. S. 270, 46 L. Ed. 534." Wright *v.* Henkel, 190 U. S. 40, 57, 47 L. Ed. 948.

32. Ex parte Virginia, 100 U. S. 339, 343, 25 L. Ed. 676, citing United States *v.* Hamilton, 3 Dall. 17, 1 L. Ed. 490; Ex parte Burford, 3 Cranch 448, 2 L. Ed. 495; Ex parte Jackson, 96 U. S. 727, 24 L. Ed. 877; Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872.

"While the writ of habeas corpus cannot be converted into a writ of error, yet unless the court which tried the prisoner has jurisdiction to try and punish him for the offense, the prisoner may be discharged on such writ. In re Coy, 127 U. S. 731, 757, 32 L. Ed. 274." McClaughry *v.* Deming, 186 U. S. 49, 69, 46 L. Ed. 1049.

Where personal liberty is concerned, the judgment of an inferior court affecting it is not so conclusive but that the question of its authority to try and imprison the party may be reviewed on habeas corpus by a superior court or judge having power to award the writ. Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717.

It has always been held, that a mere error in point of law, committed by a court in a case properly subject to its cognizance, can only be reviewed by the ordinary methods of appeal, or writ of error; but that where the proceedings are not only erroneous, but entirely void—as where the court is without jurisdiction of the person or of the cause, and a pary is subjected to illegal imprisonment in consequence—the superior court, or judge invested with the prerogative power of issuing a habeas corpus, may review the proceedings by that writ, and discharge from illegal imprisonment. This is one of the modes in which this court exercises supervisory power over inferior courts and tribunals; but it is a special mode, and confined to a limited class of cases. Ex parte Parks, 93 U. S. 18, 21, 23 L. Ed. 787.

33. In re Frederich, 149 U. S. 70, 37 L. Ed. 653; Ex parte Tyler, 149 U. S. 164, 180, 37 L. Ed. 689; In re Swan, 150 U. S. 637, 648, 37 L. Ed. 1207; In re Chapman, 156 U. S. 211, 215, 39 L. Ed. 401; Riggins *v.* United States, 199 U. S. 547, 50 L. Ed. 303; Ex parte Belt, 159 U. S. 95, 100, 40 L. Ed. 88.

Recourse to the courts by habeas corpus is inadmissible to review the decision of a collector of customs denying the privilege of transit across the territory of the United States to a citizen of the Empire of China in the course of a journey to or from other countries, although he held a ticket from a point in a foreign country to a point of destination in another foreign country, since under the regulations of the treasury department of the United States in pursuance of the treaty with China made March 17, 1897 (28 Stat. 1211), the final decision as to permitting such transit is devolved on the collector of customs and no appeal provided for. Fok Yunk Yo *v.* United States, 185 U. S. 296, 46 L. Ed. 917, reaffirmed in Lee Gon Yung *v.* United States, 185 U. S. 306, 46 L. Ed. 921.

34. Ex parte Royall, 117 U. S. 241, 29 L. Ed. 868; New York *v.* Eno, 155 U. S. 89, 39 L. Ed. 80; In re Chapman, 156 U. S. 211, 215, 39 L. Ed. 401.

35. In re Frederich, 149 U. S. 70, 37 L. Ed. 653; Ex parte Tyler, 149 U. S. 164, 180, 37 L. Ed. 689; In re Swan, 150 U. S. 637, 648, 37 L. Ed. 1207; Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787; Ex parte Terry, 128 U. S. 289, 32 L. Ed. 405; In re Neilson, 131 U. S. 176, 33 L. Ed. 118.

F. Certiorari—1. In General.—By § 14 of the judiciary act of September 24, 1789 (1 Stat. 81, c. 20), carried forward as § 716 of the Revised Statutes, this court and the circuit and district courts of the United States were empowered by congress "to issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law."[36] And, under this provision, we can undoubtedly issue writs of certiorari in all proper cases.[37] But the writ of certiorari has not been issued as freely by this court as by the court of Queen's Bench in England.[38] It was never issued to bring up from an inferior court of the United States for trial a case within the exclusive jurisdiction of a higher court.[39] It was used by this court as an auxiliary process only, to supply imperfections in the record of a case already before it; and not, like a writ of error, to review the judgment of an inferior court.[40] In conclusion it may be said that this court has never decided that certiorari was to be resorted to in place of a writ of error whenever it suited the convenience of parties. There must be "circumstances imperatively demanding" a departure from the ordinary remedy by writ of error or appeal.[41]

2. Adequacy of Other Remedies.—When sought as between private persons, the general rule is that the writ of certiorari will be granted or denied, in the sound discretion of the court, on special cause or ground shown; and will be refused where there is a plain and equally adequate remedy by appeal or other-

36. In re Chetwood, 165 U. S. 443, 461, 41 L. Ed. 782; Act of September 24, 1789, c. 20, § 14, 1 Stat. 81; Rev. Stat., § 716; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 379, 37 L. Ed. 486.

37. American Construction Co. *v.* Jacksonville, etc., Co., 148 U. S. 372, 37 L. Ed. 486; In re Chetwood, 165 U. S. 443, 462, 41 L. Ed. 782; Whitney *v.* Dick, 202 U. S. 132, 138, 50 L. Ed. 963.

By § 716 of the Revised Statutes it is provided that: "The supreme court and the circuit and district courts shall have power to issue writs of scire facias. They shall also have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law." This undoubtedly authorized the issue of writs of certiorari in all proper cases. American Construction Co. *v.* Jacksonville, etc., Ry. Co., 148 U. S. 372, 37 L. Ed. 486; In re Tampa Suburban R. Co., 168 U. S. 583, 587, 42 L. Ed. 589.

38. Ex parte Vallandigham, 1 Wall. 243, 249, 17 L. Ed. 589; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 37 L. Ed. 486; Whitney *v.* Dick, 202 U. S. 132, 139, 50 L. Ed. 963.

39. Fowler *v.* Lindsey, 3 Dall. 411, 413, 1 L. Ed. 658; Patterson *v.* United States, 2 Wheat. 221, 225, 226, 4 L. Ed. 224; Ex parte Hitz, 111 U. S. 766, 28 L. Ed. 592; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 37 L. Ed. 486; Whitney *v.* Dick, 202 U. S. 132, 139, 50 L. Ed. 963.

40. Barton *v.* Petit, 7 Cranch 288, 3 L. Ed. 347; Ex parte Gordon, 1 Black 503, 17 L. Ed. 134; United States *v.* Adams, 9 Wall. 661, 19 L. Ed. 808; United States *v.* Young, 94 U. S. 258, 24 L. Ed. 153; Luxton *v.* North River Bridge Co., 147 U. S. 337, 341, 37 L. Ed. 194; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 37 L. Ed. 486; Whitney *v.* Dick, 202 U. S. 132, 139, 50 L. Ed. 963.

And although this writ has not been issued as freely by this court as by the court of Queen's Bench in England, and, prior to the act of March 3, 1891, ch. 511, 26 Stat. 826, had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition, the writ may be allowed, as at common law, to correct excesses of jurisdiction and in furtherance of justice. Tidd's Prac. 398; Bac. Ad., Certiorari. In re Chetwood, 165 U. S. 443, 462, 41 L. Ed. 782.

The writ of certiorari is only used in this court as auxiliary process to enable a court to obtain further information in respect to some matter already before it for adjudication. It cannot be used as an appellate proceeding for the re-examination of some action of an inferior tribunal. United States *v.* Young, 94 U. S. 258, 24 L. Ed. 153; Luxton *v.* North River Bridge Co., 147 U. S. 337, 341, 37 L. Ed. 194.

Leave to file petition for a writ of certiorari will be denied where the ground of the application does not go to the jurisdiction or authority of the court, but relates to mere errors in its proceeding. In re Schneider, 148 U. S. 157, 162, 37 L. Ed. 404, citing Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787; Ex parte Bigelow, 113 U. S. 328, 28 L. Ed. 1005; Ex parte Wilson, 114 U. S. 417, 29 L. Ed. 89; In re Nielsen, 131 U. S. 176, 33 L. Ed. 118.

41. Whitney *v.* Dick, 202 U. S. 132, 140, 50 L. Ed. 963.

wise.[42] A writ of certiorari will not be allowed by this court to bring up an interlocutory preliminary restraining order granted by a circuit court and an order appointing a receiver and continuing the injunction in aid of the receivership, on the ground that both these orders were void for want of power in the circuit judge to grant them outside of his circuit, because the parties have a plain and adequate remedy by appeal under the seventh section of the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, 828.[43]

3. Proceedings of Military Tribunals.—This court is not thereby empowered to review the proceedings of military tribunals by certiorari.[44]

4. Under Circuit Court of Appeals Act.—As appeal and writ of error are specifically prescribed in the court of appeals act as the process to bring up final decisions to that court for review, the authority to issue a certiorari must be found in the grant of power, "to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdiction, and agreeable to the usages and principles of law."[45] The only instance in which certiorari is named as the writ for the removal of cases from a lower to a higher court is in the authority given to the supreme court to bring up cases from the courts of appeals by certiorari.[46]

Power of Court of Appeals to Issue.—The procedure prescribed by the statute for bringing to the courts of appeals those final decisions of courts which they are authorized to review is by appeal or writ of error, and that in this country is the ordinary method by which review is obtained in an appellate court. Accordingly, although the power may sometimes exist in the court of appeals to issue a writ of certiorari to put an end to litigation, which power has sometimes been exercised by this court, yet as a rule the orderly way is to proceed by writ of error. And this court has never decided that certiorari was to be resorted to in place of a writ of error whenever it suited the convenience of the parties. There must be circumstances imperatively demanding a departure from the ordinary remedy by writ of error or appeal.[47] That certiorari may be used to bring up portions of a record not originally returned to a court of appeals is undoubted, for it may be necessary for the complete exercise of its appellate jurisdiction, but not otherwise, for every case of which that court may take jurisdiction can be carried up by appeal or writ of error.[48]

G. Bill in Equity.—With the proceedings and determinations of inferior boards or tribunals of special jurisdiction, courts of equity will not interfere, unless it should become necessary to prevent a multiplicity of suits or irreparable injury, or unless the proceeding sought to be annulled or corrected is valid upon its face, and the alleged invalidity consists in matters to be established by ex-

42. In re Tampa Suburban R. Co., 168 U. S. 583, 587, 42 L. Ed. 589; In re Huguley Mfg. Co., 184 U. S. 297, 301, 46 L. Ed. 549.

And In re Tampa Suburban R. Co., 168 U. S. 583, 42 L. Ed. 589, it was held, that "a writ of certiorari, such as is asked for in this case, will be refused when there is a plain and adequate remedy, by appeal or otherwise." Whitney *v.* Dick, 202 U. S. 132, 140, 50 L. Ed. 963.

43. In re Tampa Suburban R. Co., 168 U. S. 583, 42 L. Ed. 589.

44. In re Vidal, 179 U. S. 126, 127, 45 L. Ed. 118.

45. Whitney *v.* Dick, 202 U. S. 132, 138, 50 L. Ed. 963. See post, "Over Circuit Court of Appeals," III, D, 3.

46. Whitney *v.* Dick, 202 U. S. 132, 138, 50 L. Ed. 963.

47. Whitney *v.* Dick, 202 U. S. 132, 50 L. Ed. 963.

An indictment in the United States district court charged the introduction of liquor into the Indian country. It was not questioned that this was a criminal offense under the laws of the United States, but it was contended that the place of the alleged offense was not Indian country. The trial court ruled that it was. This ruling was excepted to, a bill of exceptions prepared and signed and the case put in proper condition for review in the court of appeals on writ of error. Held, that there was no necessity for a certiorari from the circuit court of appeals, and no reason why the ordinary procedure by the writ of error should not obtain. Whitney *v.* Dick, 202 U. S. 132, 140, 50 L. Ed. 963.

48. Whitney *v.* Dick, 202 U. S. 132, 138, 50 L. Ed. 963.

trinsic evidence. In other cases, the review and correction of the proceedings must be obtained by the writ of certiorari at law, and not by bill in equity.[49] The settled doctrine of this court is that a bill in chancery, brought by the United States to set aside and vacate a patent issued under its authority, is not to be treated as a writ of error.[50]

H. Motions.—A motion made in an inferior United States court for a rule to show cause is not the proper form of proceeding for revising the decisions of such court, whether they be correct or not.[51]

I. Cross Appeals.—In General.—Cross appeals to this court must be prosecuted like other appeals.[52]

Cross Writs of Error.—By rule 22 of this court appeals and cross appeals are heard together, and the practice is the same as to writs and cross writs of error.[53]

Under Circuit Court of Appeals Act.—Where there are cross appeals or cross writs of error in the circuit courts of appeals in cases in which the decrees or judgments are made final in that court by statute, and the case is brought here on certiorari, this court considers only the errors assigned by petitioner, unless a cross writ of certiorari is applied for and allowed.[54]

J. Successive or Double Appeals.—In General.—Two appeals are not allowed in the same case on the same question.[55]

Under Circuit Court of Appeals Act.—But where an appeal is given to this court as well as to the circuit court of appeals, counsel by taking an appeal to the circuit court of appeals, do not waive any right of appeal which they may have to this court.[56] The act of March 3, 1891, ch. 517, 26 Stat. 826, does not contemplate several separate appeals or writs of error, on the merits, in the same case and at the same time to two appellate courts, and, therefore, a writ of error to this court, which was taken while the case was pending in the circuit court of appeals, ought to be dismissed.[57] Where both defendants in the consolidated actions have brought a writ of error, but the verdicts and judgments are several, the writ of error sued out by the defendant jointly is superfluous, and may be dismissed without costs.[58]

49. Ewing *v.* St. Louis, 5 Wall. 413, 18 L. Ed. 657.

50. United States *v.* Marshall Mining Co., 129 U. S. 579, 589, 32 L. Ed. 734.

51. Ex parte Many, 14 How. 24, 14 L. Ed. 311.

52. Hilton *v.* Dickinson, 108 U. S. 165, 168, 27 L. Ed. 688, citing The S. S. Osborne, 105 U. S. 447, 26 L. Ed. 1065; Farrer *v.* Churchill, 135 U. S. 609, 34 L. Ed. 246.

53. Montana Min. Co. *v.* St. Louis, etc., Co., 186 U. S. 24, 31, 46 L. Ed. 1039.

54. Hubbard *v.* Tod, 171 U. S. 474, 43 L. Ed. 246; Montana Min. Co. *v.* St. Louis, etc., Co., 186 U. S. 24, 31, 46 L. Ed. 1039.

55. Wheeler *v.* Harris, 13 Wall. 51, 20 L. Ed. 531.

On appeal to the circuit court from a decree in the district court for the payment of money, the circuit court affirmed the judgment of the district court with costs to be taxed, from which affirmance the respondent took an appeal here. After the appeal here, another decree was rendered by the circuit court, in which, after reciting the former decree and taxation of costs, it was decreed in form that the appellee have judgment against the appellant for the amount decreed, together with costs, amounting to the sum of $5,444. On motion to dismiss this last appeal, on the ground of a former one pending in the same case, held, that under the circumstances, the first decree was not a final decree; and that it was the first appeal and not the second which should be dismissed. Wheeler *v.* Harris, 13 Wall. 51, 20 L. Ed. 531.

56. Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138, 43 L. Ed. 108; Montana Min. Co. *v.* St. Louis Min. Co., 204 U. S. 214, 51 L. Ed. 444.

57. Columbus Const. Co. *v.* Crane Co., 174 U. S. 600, 43 L. Ed. 1102, distinguishing Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138, 43 L. Ed. 108, in the following words: "An obvious distinction between that case and this is that there the appeal was first taken to this court. Accordingly the circuit court of appeals declined either to decide the case on its merits or to dismiss the appeal, while the case was pending on a prior appeal to this court, and continued the cause to await the result of the appeal to the supreme court. 39 U. S. App. 307."

58. New York, etc., Ins. Co. *v.* Hillmon, 145 U. S. 285, 36 L. Ed. 706.

K. Joinder of Separate Suits in One Appeal.—Two separate suits cannot be removed to this court by one appeal or writ of error, without consolidating them.[59]

III. Appellate Jurisdiction.

A. Acquisition and Extent—1. DEFINITION AND GENERAL CONSIDERATION. —Appellate jurisdiction is the jurisdiction which a superior court has to rehear causes which have been tried in inferior courts.[60] It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted and does not create that cause.[61] This court has appellate power in all cases arising under the constitution and laws of the United States, with such exceptions and regulations as congress may make, whether the cases arise in a state court or an inferior court of the United States. And, under the act of congress of 1789, when the decision of the state court is against the right claimed under the constitution or laws of the United States, a writ of error will lie to bring the judgment of the state court before this court for re-examination and revision.[62] In other words, the judicial action of all inferior federal courts may be subjected to the appellate jurisdiction of this court.[63]

59. "The court condemns as irregular, proceedings whereby the defendant in two separate suits, in the former of which judgment had been rendered before the latter had gone to trial, was permitted to file bills of exception purporting to be applicable to each case, and, without consolidating them, remove them to this court by one writ of error." Brown *v.* Spofford, 95 U. S. 474, 24 L. Ed. 508.

Where a motion is made by the defendants in the appeal to dismiss it, on the ground that "it is an appeal from several distinct decrees, in several separate suits, which are attempted to be united in this appeal; when there is no such record filed as is described in the appeal and citation thereon," the motion will be dismissed if it appears that by consent of the parties the suits above named were to be heard at the same time, and the papers and pleadings filed in one case should be considered and have full effect in all the cases, to enable the court to decide the controversies in all the cases on their respective merits. Walden *v.* Bodley, 14 Pet. 156, 10 L. Ed. 398.

Consolidation of appeals.—A motion is made by the defendants in the appeal, to dismiss it, on the ground "that it is an appeal from several distinct decrees, in several separate suits, which are attempted to be united in this appeal; when there is no such record filed as is described in the appeal and citation thereon." In the decree of the circuit court, it is stated that by consent of the parties, the suits above named were to be heard at the same time; and the papers and pleadings filed in one case should be considered and have full effect in all the cases, to enable the court to decide the controversies in all the cases on their respective merits." And it was expressly agreed "that the bill, answers, and orders, the entries, surveys, and patents, in the case of Bodley and Pogue should be sufficient, without recording the whole suits and papers in each of the cases; and that in the event of either party appealing, the clerk may copy all the papers in all the records; and that when they are so copied and certified, the transcript shall have the same effect as if there were full and separate records made out in each and all of the cases; and this agreement was declared to be entered into, with the leave of the court, to avoid expenses in the cases, as they all involve the same questions." These agreements cover the apparent irregularities in the record, as it regards the decrees and the proceedings in the different cases stated, and obviate the objections on which the motion to dismiss is founded. Walden *v.* Bodley, 14 Pet. 156, 10 L. Ed. 398.

"We are advised that, according to the practice in Mississippi, as authorized by its statutes (Code of Miss. of 1880, § 2434), which, by §§ 914 and 915, Rev. Stat., are adopted as the practice of the circuit court of the United States in that district, the proceeding which resulted in the verdict sustaining the attachment, and the verdict and judgment on the merits of the cause of action are separate, and, consequently, may be separately considered on error." Fitzpatrick *v.* Flannagan, 106 U. S. 648, 660, 27 L. Ed. 211.

60. 1 Bouv. L. Dict. 151.

61. Ex parte Bollman, 4 Cranch 75, 105, 2 L. Ed. 554, 565, following Marbury *v.* Madison, 1 Cranch 137, 175, 2 L. Ed. 60.

Power to review and reverse the decision of the court below authorizing a sale of a decedent's estate, is clearly appellate in its character, and can be exercised only by an appellate tribunal in a proceeding had directly for that purpose. Cornett *v.* Williams, 20 Wall. 226, 250, 22 L. Ed. 254.

62. Ableman *v.* Booth, 21 How. 506, 16 L. Ed. 169.

63. "As wherever the United States exercise the power of government, whether under specific grant, or through

Original and Appellate.—The constitution, distributing the judicial power of the United States, vests in the supreme court an original as well as an appellate jurisdiction. The original jurisdiction, however, is confined to cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party. In all other cases, only an appellate jurisdiction is given to the court; and even the appellate jurisdiction is, likewise, qualified; inasmuch as it is given "with such exceptions, and under such regulations, as the congress shall make."[64] The constitution defines the jurisdiction of none of the federal courts but the supreme court. Of that court it is said, after giving it a very limited original jurisdiction, that "in all other cases before mentioned, the supreme court shall have appellate jurisdiction both as to law and fact, with such exceptions and under such regulations as the congress may prescribe." This latter clause has been the subject of construction in this court many times, and the uniform and established doctrine is, that congress having by the act of 1789 defined and regulated this jurisdiction in certain classes of cases, this affirmative expression of the will of that body is to be taken as excepting all other cases to which the judicial power of the United States extends, than those enumerated.[65]

2. Burden of Showing Jurisdiction.—It is incumbent upon the plaintiff in error to show that this court has jurisdiction of the case.[66] Accordingly, the supreme court of the United States are precluded from an inquiry into the merits or even into the jurisdiction taken by the circuit court under Rev. Stat., §§ 1977, 1979, until the jurisdiction of this court to entertain the appeal is established.[67]

3. Source of Appellate Power.—By article III of the constitution, the judicial power of the United States was "vested in one supreme court, and in such inferior courts as the congress may from time to time ordain and establish."[68] Thus it will be seen, that the appellate powers of the supreme court of the United States are given by the constitution.[69] The supreme court alone possesses jurisdiction derived immediately from the constitution, and of which the legislative power cannot deprive it.[70] But its appellate powers are limited and regulated by the judicial act and other acts passed by congress on the subject. Accordingly, it is well settled that this court has an appellate jurisdiction only in those cases in which it is affirmatively given by the acts of congress.[71]

the dominion and sovereignty of plenary authority as over the territories, Shively *v.* Bowlby, 152 U. S. 1, 48, 38 L. Ed. 331, that power includes the ultimate executive, legislative, and judicial power, it follows that the judicial action of all inferior courts established by congress may, in accordance with the constitution, be subjected to the appellate jurisdiction of the supreme judicial tribunal of the government." United States *v.* Coe, 155 U. S. 76, 86, 39 L. Ed. 76.

64. Wiscart *v.* D'Auchy, 3 Dall. 321, 1 L. Ed. 619, 622.

65. Wiscart *v.* D'Auchy, 3 Dall. 321, 1 L. Ed. 619; Durousseau *v.* United States, 6 Cranch 307, 3 L. Ed. 232; The Lucy, 8 Wall. 307, 19 L. Ed. 394; Ex parte McCardle, 6 Wall. 318, 18 L. Ed. 816; Ex parte McCardle, 7 Wall. 506, 19 L. Ed. 264; Murdock *v.* Memphis, 20 Wall. 590, 619, 22 L. Ed. 429.

66. United States *v.* The Brig Union, 4 Cranch 216, 2 L. Ed. 600.

The burden is on the appellants to show the jurisdiction of this court, and we cannot entertain the case unless they have done so. Dugger *v.* Bocock, 104 U. S. 596, 26 L. Ed. 846.

67. Mansfield, etc., R. Co. *v.* Swan, 111 U. S. 379, 382, 28 L. Ed. 462; Anglo-American Provision Co. *v.* Davis Provision Co., 191 U. S. 373, 376, 48 L. Ed. 225.

68. Ex parte Wisner, 203 U. S. 449, 455, 51 L. Ed. 264.

69. Durousseau *v.* United States, 6 Cranch 307, 3 L. Ed. 232.

The appellate jurisdiction of this court, conferred by the constitution, extends to all other cases within the judicial power of the United States. This appellate jurisdiction is subject to such exceptions, and must be exercised under such regulations as congress, in the exercise of its discretion, has made or may see fit to make. Ex parte Yerger, 8 Wall. 85, 98, 19 L. Ed. 332.

70. United States *v.* Hudson, 7 Cranch 32, 3 L. Ed. 259; Ex parte Wisner, 203 U. S. 449, 455, 51 L. Ed. 264.

71. Wiscart *v.* D'Auchy, 3 Dall. 321, 1 L. Ed. 619; Clarke *v.* Bazadone, 1 Cranch 212, 2 L. Ed. 85; United States *v.* More, 3 Cranch 159, 2 L. Ed. 397; Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 391; Barry *v.* Mercin, 5 How. 103, 12 L. Ed. 70; United States *v.* Cox, 11 Pet. 162, 9 L. Ed. 671; Walker *v.* United States, 4 Wall. 163, 18 L. Ed. 319; Crawford *v.* Points, 13 How. 11, 14 L. Ed. 29; Chapman *v.*

The statement of Mr. Chief Justice Ellsworth in Wiscart *v.* D'Auchy, 3 Dall. 321, 1 L. Ed. 619, that the appellate jurisdiction of the supreme court can only be exercised in conformity with the regulations prescribed by congress, was the beginning of the rule, which has always been acted on since, that while the appellate power of this court under the constitution extends to all cases within the judicial power of the United States, actual jurisdiction under the power is confined within such limits as congress sees fit to prescribe. As was said by Mr. Chief Justice Marshall in Durousseau *v.* United States, 6 Cranch 307, 314, 3 L. Ed. 232: "The appellate powers of this court are not given by the judicial act. They are given by the constitution. But they are limited and regulated by the judicial act, and by such other acts as have been passed on the subject." The language of the constitution is that "the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as congress shall make." Undoubtedly, if congress should give an appeal in admiralty causes, and say no more, the facts as well as the law, would be subjected

United States, 164 U. S. 436, 446, 41 L. Ed. 504; Falk *v.* United States, 180 U. S. 636, 45 L. Ed. 709; Durousseau *v.* United States, 6 Cranch 307, 3 L. Ed. 232; United States *v.* Nourse, 6 Pet. 470, 495, 8 L. Ed. 467; Ex parte Dorr, 3 How. 103, 11 L. Ed. 514; Ex parte Christy, 3 How. 292, 317, 11 L. Ed. 603; Nelson *v.* Carland, 1 How. 265, 268, 11 L. Ed. 126; Ex parte Watkins, 7 Pet. 568, 8 L. Ed. 786; Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650; United States *v.* Boisdore, 8 How. 113, 116, 12 L. Ed. 1009; United States *v.* Curry, 6 How. 106, 113, 12 L. Ed. 363; Ex parte Vallandigham, 1 Wall. 243, 251, 17 L. Ed. 589; United States *v.* Young, 94 U. S. 258, 259, 24 L. Ed. 153.

The appellate jurisdiction of this court is defined by the acts of congress. United States *v.* Rider, 163 U. S. 132, 135, 41 L. Ed. 101.

By the constitution of the United States, in cases to which the judicial power of the United States extends, and of which original jurisdiction is not conferred on this court, "the supreme court shall have appellate jurisdiction, with such exceptions and under such regulations as the congress shall make." Constitution, art. 3, § 2. This court, therefore, as it has always held, can exercise no appellate jurisdiction, except in the cases, and in the manner and form, defined and prescribed by congress. Wiscart *v.* D'Auchy, 3 Dall. 321, 1 L. Ed. 619; Durousseau *v.* United States, 6 Cranch 307, 314, 3 L. Ed. 232; Barry *v.* Mercein, 5 How. 103, 119, 12 L. Ed. 70; United States *v.* Young, 94 U. S. 258, 24 L. Ed. 153; The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100; National Exchange Bank *v.* Peters, 144 U. S. 570, 572, 36 L. Ed. 545; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 378, 37 L. Ed. 486.

The supreme court has appellate jurisdiction, under the constitution, in all cases to which the judicial power extends (other than those in respect of which it has original jurisdiction), "with such exceptions and under such regulations as the congress shall make." United States *v.* American Bell Telephone Co., 159 U. S. 548, 549, 40 L. Ed. 255.

To come properly before us, the case must be within the appellate jurisdiction of this court. In order to create such jurisdiction in any case, two things must concur; the constitution must give the capacity to take it, and an act of congress must supply the requisite authority. Marbury *v.* Madison, 1 Cranch 137, 2 L. Ed. 60; Sheldon *v.* Sill, 8 How. 441, 448, 12 L. Ed. 1147. The original jurisdiction of this court, and its power to receive appellate jurisdiction, are created and defined by the constitution; and the legislative department of the government can enlarge neither one nor the other. But it is for congress to determine how far, within the limits of the capacity of this court to take, appellate jurisdiction shall be given, and when conferred, it can be exercised only to the extent and in the manner prescribed by law. In these respects it is wholly the creature of legislation. Durousseau *v.* United States, 6 Cranch 307, 314, 3 L. Ed. 232; United States *v.* More, 3 Cranch 159, 2 L. Ed. 397; Barry *v.* Mercein, 5 How. 103, 119, 12 L. Ed. 70; Daniels *v.* Chicago, etc., R. Co., 3 Wall. 250, 254, 18 L. Ed. 224.

We have no jurisdiction of this appeal, unless it has been allowed by some act of congress, and has been brought in substantial conformity with the legislative directions. The appellate jurisdiction of this court is, indeed, derived from the constitution; but, by the express terms of the constitutional grant, it is subjected to such exceptions and to such regulations as congress may make. In the judiciary act of 1789, and in many acts since, congress has provided for its exercise in such cases and classes of cases, and under such regulations as seemed to the legislative wisdom convenient and appropriate. The court has always regarded appeals in other cases as excepted from the grant of appellate power, and has always felt itself bound to give effect to the regulations by which congress has prescribed the manner of its exercise. We

to review and retrial; but the power to except from—take out of—the jurisdiction, both as to law and fact, clearly implies a power to limit the effect of an appeal to a review of the law as applicable to facts finally determined below. Appellate jurisdiction is invoked as well through the instrumentality of writs of error as of appeals. Whether the one form of proceeding is to be used or another depends ordinarily on the character of the suit below; but the one as well as the other brings into action the appellate powers of the court whose jurisdiction is reached by what is done. What those powers shall be, and to what extent they shall be exercised are, and always have been, proper subjects of legislative control. Authority to limit the jurisdiction necessarily carries with it authority to limit the use of the jurisdiction. Not only may whole classes of cases be kept out of the jurisdiction altogether, but particular classes of questions may be subjected to re-examination and review, while others are not. To our minds it is no more unconstitutional to provide that issues of fact shall not be retried in any case, than that neither issues of law nor fact shall not be retried in cases where the value of the matter in dispute is less than $5,000. The general power to regulate implies power to regulate in all things. The whole of a civil-law appeal may be given, or a part. The constitutional requirements are all satisfied if one opportunity is had for the trial of all parts of a case.[72]

Northwest Territory.—In accordance with these rules it was held, that a writ of error did not lie from the supreme court of the United States to the general court for the territory northwest of the Ohio, because the act of congress had not authorized it.[73]

For the same reason, no appeal or writ of error would lie in a criminal case, from the judgment of the circuit court of the District of Columbia.[74]

Bankruptcy.—Formerly an appeal would not lie to this court, from the decision of a district court in a case of bankruptcy. "For we can exercise no appellate power, unless it is conferred by law; and there is no act of congress authorizing an appeal to this court from the decision of a district court in a case of bankruptcy."[75]

4. Jurisdiction of Inferior Court.—For the purpose of an appeal, this court need not inquire when the circuit court first obtained jurisdiction of the suit. It is sufficient if that court had jurisdiction when the decree appealed from was rendered.[76]

5. Consent as Conferring Jurisdiction.—**In General.**—Consent cannot confer jurisdiction upon an appellate court; the regulations prescribed by congress must be followed.[77]

here use the word appeals in its largest sense, comprehending writs of error, and every other form in which appellate jurisdiction may be invoked or brought into action. Castro *v.* United States, 3 Wall. 46, 49, 18 L. Ed. 163.

"From Wiscart *v.* D'Auchy, 3 Dall. 321, 1 L. Ed. 619, to American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 37 L. Ed. 486, it has been held, in an uninterrupted series of decisions, that this court exercises appellate jurisdiction only in accordance with the acts of congress upon that subject." Colorado, etc., Mining Co. *v.* Turck, 150 U. S. 138, 141, 37 L. Ed. 1030.

72. The "Francis Wright," 105 U. S. 381, 385, 26 L. Ed. 1100, opinion of Mr. Chief Justice Waite.

73. Clarke *v.* Bazadone, 1 Cranch 212, 2 L. Ed. 85.

74. "If Congress had erected inferior courts, without saying in what cases a writ of error or appeal should lie from such courts to this, your argument would be irresistible; but when the constitution has given congress power to limit the exercise of our jurisdiction, and to make regulations respecting its exercise; and congress, under that power, has proceeded to erect inferior courts, and has said in what cases a writ of error or appeal shall lie, an exception of all other cases is implied. And this court is as much bound by an implied as an express exception." United States *v.* More, 3 Cranch 159, 2 L. Ed. 397.

75. Nelson *v.* Carland, 1 How. 265, 11 L. Ed. 126; Ex parte Christy, 3 How. 292, 314, 315, 11 L. Ed. 603; Crawford *v.* Points, 13 How. 11, 14 L. Ed. 29. See the title BANKRUPTCY.

76. Pacific R. Co. *v.* Ketchum, 101 U. S. 289, 25 L. Ed. 932.

77. Kelsey *v.* Forsyth, 21 How. 85, 16 L. Ed. 32; Sampson *v.* Welch, 24 How.

For example, consent cannot give this court jurisdiction over an interlocutory decree.[78] Nor dispense with the necessity for taking an appeal in the district court.[79] Several cases expressly decide that the agreement of the parties cannot authorize this court to revise a judgment of an inferior court in any other mode of proceeding than that which the law prescribes.[80] No mere agreement of counsel can substitute evidence of facts in place of facts, or require the opinion of this court on an imperfect statement of them. A writ of error cannot by these methods be converted into a chancery appeal, nor a court of appeal into appellate arbitrators.[81] Nor can a case be brought to this court by agreement of parties, without the issuing or service of a writ of error. An appeal allowed or a writ of error served is essential to the exercise of appellate jurisdiction of this court.[82]

207, 16 L. Ed. 632; Ex parte McCardle, 7 Wall. 506, 512, 19 L. Ed. 264; Washington County *v.* Durant, 7 Wall. 694, 19 L. Ed. 164; The Lucy, 8 Wall. 307, 19 L. Ed. 394; Merrill *v.* Petty, 16 Wall. 338, 342, 21 L. Ed. 499. And see Hudgins *v.* Kemp, 18 How. 530, 15 L. Ed. 511; New Orleans *v.* Gaines, 22 How. 141, 16 L. Ed. 295; Mills *v.* Brown, 16 Pet. 525, 10 L. Ed. 1055; Ballance *v.* Forsyth, 21 How. 389, 16 L. Ed. 143; Montgomery *v.* Anderson, 21 How. 386, 16 L. Ed. 160; Oliver *v.* Alexander, 6 Pet. 143, 148, 8 L. Ed. 349, 351; Gruner *v.* United States, 11 How. 163, 13 L. Ed. 647.

No consent of counsel can give jurisdiction.—Appellate jurisdiction in the federal courts depends on the constitution and the acts of congress. When these do not confer it, courts of the United States cannot exercise it. The Lucy, 8 Wall. 307, 19 L. Ed. 394.

The court has no jurisdiction of a cause transferred here from the circuit court by consent of parties. The Alicia, 7 Wall. 571, 572, 19 L. Ed. 84, affirmed in The Nonesuch, 9 Wall. 504, 19 L. Ed. 663.

The judicial power of the United States must not be exerted in a case to which it does not extend, even if both parties desire to have it exerted. Cutler *v.* Rae, 7 How. 729, 12 L. Ed. 890; Mansfield, etc., R. Co. *v.* Swan, 111 U. S. 379, 384, 28 L. Ed. 462.

For the purposes of an appeal, we need not inquire when the circuit court first got jurisdiction of this suit. It is sufficient if it had jurisdiction when the decree appealed from was rendered. As no objections were made by the parties in the progress of the cause to the right of the court to proceed, and the decree when rendered was consented to, it is enough for the purposes of this appeal if the record shows that when the consent was acted on by the court jurisdiction was complete. Consent cannot give the courts of the United States jurisdiction, but it may bind the parties and waive previous errors, if when the court acts, jurisdiction has been obtained. Pacific R. Co. *v.* Ketchum, 101 U. S. 289, 298, 25 L. Ed. 932.

Consent of parties can never confer jurisdiction upon a federal court. If the record does not affirmatively show jurisdiction in the circuit court, we must, upon our own motion, so declare, and make such order as will prevent that court from exercising an authority not conferred upon it by statute. Mansfield, etc., R. Co. *v.* Swan, 111 U. S. 379, 382, 28 L. Ed. 462; Robertson *v.* Cease, 97 U. S. 646, 24 L. Ed. 1057; King Bridge Co. *v.* Otoe County, 120 U. S. 225, 30 L. Ed. 623; Parker *v.* Ormsby, 141 U. S. 81, 35 L. Ed. 654; Mattingly *v.* Northwestern Va. R. Co., 158 U. S. 53, 57, 39 L. Ed. 894; Great Southern Fire Proof Hotel Co. *v.* Jones, 177 U. S. 449, 453, 44 L. Ed. 842; Continental National Bank *v.* Buford, 191 U. S. 119, 48 L. Ed. 119; Defiance Water Co. *v.* Defiance, 191 U. S. 184, 194, 48 L. Ed. 140; Minnesota *v.* Northern Securities Co., 194 U. S. 48, 63, 48 L. Ed. 870.

According to the practice in Illinois an infant's next friend or guardian ad litem may consent to the hearing of his case in some other grand division from the one in which it was decided, or at a term of the supreme court earlier than such appeal or writ of error would ordinarily be heard. Kingsbury *v.* Buckner, 134 U. S. 650, 33 L. Ed. 1047.

78. Montgomery *v.* Anderson, 21 How. 386, 16 L. Ed. 160.

79. Where an appeal is dismissed by the United States supreme court because it did not appear that an appeal had been taken in the district court, such appeal will not be reinstated, on a motion supported by a written agreement, signed by the counsel for the appellant and appellee, consenting to reinstate the case, to waive all irregularities, and try the case on the merits, because consent of parties cannot give jurisdiction to the United States supreme court, where the law does not give it. Ballance *v.* Forsyth, 21 How. 389, 16 L. Ed. 143.

80. Scott *v.* Sandford, 19 How. 393, 15 L. Ed. 691; Kelsey *v.* Forsyth, 21 How. 85, 16 L. Ed. 32; Montgomery *v.* Anderson, 21 How. 386, 16 L. Ed. 160; Mordecai *v.* Lindsay, 19 How. 199, 200, 15 L. Ed. 624; Merrill *v.* Petty, 16 Wall. 338, 346, 21 L. Ed. 499.

81. Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 265, 267.

82. Washington County *v.* Durant, 131 U. S., Appx. lxxx, 18 L. Ed. 169.

Although consent of the parties to a suit cannot give jurisdiction to the courts of the United States, the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission.[83]

6. Construction of Statutes Conferring Right of Appeal.—a. *In General.*—When an instrument organizing fundamentally a judicial system, divides it into one supreme and so many inferior courts as the legislature may ordain and establish; then enumerates its powers, and proceeds so far to distribute them, as to define the jurisdiction of the supreme court by declaring the cases in which it shall take original jurisdiction, and that in others it shall take appellate jurisdiction; the plain import of the words seem to be, that in one class of cases its jurisdiction is original, and not appellate; in the other it is appellate, and not original. If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.[84] Where an act of congress gives, as part of the general system of organization of a court, an appeal from any final judgment or decree which may hereafter be rendered by it, an appeal lies from a judgment rendered under an act which gives the court jurisdiction to pass, in the usual way, and not by any special proceedings, upon a class of cases additional to those of which it already had jurisdiction, even though nothing be said in such act about an appeal.[85] Where the appellate jurisdiction is described in general terms so as to comprehend the particular case, no presumption can be indulged of an intention to oust or to restrict such jurisdiction; and any statute claimed to have that effect must be examined in the light of the objects of the enactment, the purposes it is to serve and the mischiefs it is to remedy, bearing in mind the rule that the operation of such a statute must be restrained within narrower limits than its words import, if the court is satisfied that the literal meaning of its language would extend to cases which the legislature never intended to include in it.[86]

A right of appeal, though not given in terms in a special act, authorizing the submission of a suit to a particular tribunal, may be inferred from the general character of the act and its particular indications.[87]

b. *Affirmative and Negative Description.*—It was early held, that in the passage of the judiciary act of 1789, congress was executing the power of making exceptions to the exercise of appellate jurisdiction, and that the affirmative description of the cases to which the appellate power extended was to be understood as implying a negative on the exercise of such appellate power as was not comprehended within it, but that as this restriction rested on implication founded on the manifest intent of the legislature, it could be sustained only when that manifest intent appeared.[88] Nearly seventy years ago, Mr. Chief Justice Marshall

83. Railway Co. *v.* Ramsey, 22 Wall. 322, 22 L. Ed. 823.

84. Marbury *v.* Madison, 1 Cranch 137, 2 L. Ed. 60.

85. Ex parte Zellner, 9 Wall. 244, 19 L. Ed. 665, followed in Ex parte Pargoud, 154 U. S. 567, 19 L. Ed. 620.

86. Petri *v.* Commercial Nat. Bank, 142 U. S. 644, 650, 35 L. Ed. 1144; Brewer *v.* Blougher, 14 Pet. 178, 10 L. Ed. 408; Reiche *v.* Smythe, 13 Wall. 162, 164, 20 L. Ed. 566; Market Company *v.* Hoffman, 101 U. S. 112, 25 L. Ed. 782; United States *v.* American Bell Telephone Co., 159 U. S. 548, 550, 40 L. Ed. 255.

87. Vigo's Case, 21 Wall. 648, 22 L. Ed. 690.

88. Durousseau *v.* United States, 6 Cranch 307, 3 L. Ed. 232; United States *v.* American Bell Telephone Co., 159 U. S. 548, 549, 40 L. Ed. 255; United States *v.* More, 3 Cranch 159, 2 L. Ed. 397.

Negative and affirmative description.—Inasmuch as the appellate power of the court is conferred by the constitution, with such exceptions and under such regulations as congress shall make, the rule of construction is that the negative of any other jurisdiction in that respect is implied from the intent manifested by the affirmative description contained in that section of the judiciary act. Durousseau *v.* United States, 6 Cranch 307, 318, 3 L. Ed. 232; Merrill *v.* Petty, 16 Wall. 338, 346, 21 L. Ed. 499; Ex parte McCardle, 7 Wall. 506, 513, 19 L. Ed. 264; Maynard *v.* Hecht, 151 U. S. 324, 325, 38 L. Ed. 179, followed in Moran *v.* Hagerman, 151 U. S. 329, 38 L. Ed. 181.

The appellate jurisdiction of this court is conferred by the constitution, and not derived from acts of congress; but is conferred "with such exceptions, and under such regulations, as congress may make;"

said, in Durousseau *v.* United States, 6 Cranch 307, 3 L. Ed. 232, that this "court implies a legislative exception from its constitutional appellate power in the legislative affirmative description of those powers. Thus, a writ of error lies to the judgment of a circuit court, where the matter in controversy exceeds the value of $2,000. There is no express declaration that it will not lie where the matter in controversy shall be of less value. But the court considers this affirmative description as manifesting the intent of the legislature to except from its appellate jurisdiction all cases decided in the circuits where the matter in controversy is of less value and implies negative words." There has been no departure from this rule, and it has universally been held, that our appellate jurisdiction can only be exercised in cases where authority for that purpose is given by congress.[89] In accordance with the general rule that the affirmative description of the cases in which appellate jurisdiction may be exercised implies a negative on the exercise of such power in other cases, it was held, that § 846 of the Revised Statutes of the District of Columbia providing that "Any final judgment, order or decree of the supreme court of the district may be re-examined and reversed or affirmed in the supreme court of the United States, upon writ of error or appeal, in the same cases and in like manner as provided by law in reference to the final judgments, orders and decrees of the circuit court of the United States," cannot be construed so as to make it include all subsequent legislation touching jurisdiction over circuit courts of the United States; as, for example, to the extent of giving this court jurisdiction over judgments of the supreme court of the District of Columbia in criminal cases by virtue of that section of the circuit court of appeals act providing that appeals and writs of error may be taken from the district courts or from the existing circuit courts directly to this court in cases of conviction of a capital or otherwise infamous crime.[90]

c. *Repealing Acts.*—Where a statute provides for a writ of error to a specified court of appeals, it must be regarded as a repeal of any previous statute which provided for a writ of error to another and different court.[91] When congress enacts that this court shall have appellate jurisdiction over final decisions of the circuit courts, in certain cases, the act operates as a negation or exception of such jurisdiction in other cases; and the repeal of the act necessarily negatives jurisdiction under it of these cases also. The repeal of such an act, pending an appeal provided for by it, is not an exercise of judicial power by the legislature, no matter whether the repeal takes effect before or after argument of the appeal.[92] Therefore, the act of 27th of March, 1868, repealing that provision of the act of 5th of February, 1867, to amend the judicial act of 1789, which authorized appeals to this court from the decisions of the circuit courts, in cases of habeas corpus, does not except from the appellate jurisdiction of this court any cases but appeals under the act of 1867. It does not affect the appellate jurisdiction which was previously exercised in cases of habeas corpus.[93] The general rule, supported by the best elementary writers, is, that "when an act of the legislature is repealed, it must be considered, except as to transactions past and closed, as if it never existed." And the effect of repealing acts upon suits under acts re-

and, therefore, acts of congress affirming such jurisdiction, have always been construed as excepting from it all cases not expressly described and provided for. Ex parte McCardle, 7 Wall. 506, 19 L. Ed. 264.

Although the appellate powers of this court are given by the constitution, they are nevertheless limited and regulated by acts of congress. Durousseau *v.* United States, 6 Cranch 307, 314, 3 L. Ed. 232. In that case it was held that the affirmative description of jurisdiction implied a "negative on the exercise of such appellate power as is not comprehended within it." National Exchange Bank *v.* Peters, 144 U. S. 570, 573, 36 L. Ed. 545.

89. Baltimore, etc., R. Co. *v.* Grant, 98 U. S. 398, 401, 25 L. Ed. 231.

90. In re Heath, 144 U. S. 92, 36 L. Ed. 358, distinguishing Wales *v.* Whitney, 114 U. S. 564, 29 L. Ed. 277.

91. Brown *v.* United States, 171 U. S. 631, 637, 43 L. Ed. 312.

92. Ex parte McCardle, 7 Wall. 506, 19 L. Ed. 264.

93. Ex parte McCardle, 7 Wall. 506, 19 L. Ed. 264.

pealed, has been determined by the adjudications of this court. In these cases, it was held, that no judgment could be rendered in a suit after the repeal of the act under which it was brought and prosecuted.[94]

7. What Law Governs.—**In General.**—The appellate jurisdiction of this court is regulated by, and is altogether dependent upon, the acts of congress, and the mere adoption of a state statute as to the mode of procedure in a particular case will not govern the right of appeal in opposition to the acts of congress in defining its appellate jurisdiction.[95]

Where a jury is waived, and questions of law and fact decided by the court in Louisiana, the rules of the state appellate court require that the whole evidence should be put into the record. But where a case is brought up to this court, by writ of error from the circuit court of the United States for Louisiana, the rules of this court only require that so much of the evidence should be inserted as is necessary to explain the legal questions decided by the court. Consequently, the mere fact that some of the evidence given below is omitted from the record, is not of itself sufficient to prevent this court from examining the questions of law presented by the record.[96]

The Uniformity Act.—While, since the act of 1872, ch. 255 (17 Stat. 196, now § 914, Rev. Stat.), the practice, pleadings, and forms and modes of proceedings in civil causes, other than equity and admiralty causes, in the circuit and district courts, must conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, the review of a case in this court is regulated by the acts of congress and not by the laws of the states.[97]

The laws of practice of a territory cannot regulate the process by which this court exercises its appellate power.[98]

In regard to motions for a new trial, and bills of exceptions, the courts of the United States are independent of any statute or practice prevailing in the courts of the state in which the trial is had.[99]

94. Ex parte McCardle, 7 Wall. 506, 514, 19 L. Ed. 264, citing Norris *v.* Crocker, 13 How. 429, 14 L. Ed. 210; Insurance Company *v.* Ritchie, 5 Wall. 541, 18 L. Ed. 540.

95. Baltimore, etc., R. Co. *v.* Sixth Presbyterian Church, 19 Wall. 62, 23 L. Ed. 97.

Questions reviewable.—The authority of this court to review the judgments of the circuit court by bill of exceptions and writ of error is regulated exclusively by the acts of congress and the practice of the courts of the United States, without regard to the statutes of the state or the practice of its courts. In re Chateaugay Co., 128 U. S. 544, 32 L. Ed. 508. The right of review is limited to questions of law appearing on the face of the record, and does not extend to matters of fact or of discretion; questions of law arising upon the trial of an issue of fact cannot be made part of the record by bill of exceptions, unless the trial is by jury, or by the court after due waiver in writing of a jury trial. Andes *v.* Slauson, 130 U. S. 435, 438, 32 L. Ed. 989.

96. Arthurs *v.* Hart, 17 How. 6, 15 L. Ed. 30.

97. "The doubt we have is whether the act of 1872 enlarged the existing modes of subjecting cases to review here. There is no express provision of that kind, and on its face the act is confined to the practice, pleadings and modes of proceedings in the circuit and district courts. Any allusion to a review here seems to have been studiously avoided." Boogher *v.* New York Life Ins. Co., 103 U. S. 90, 26 L. Ed. 310, citing United States *v.* King, 7 How. 833, 12 L. Ed. 934.

The practice and rules of the state court do not apply to proceedings in a circuit court taken for the purpose of reviewing in this court the judgment of the circuit court. Section 914 of the Revised Statute which requires "the practice, pleadings and forms and modes of proceeding to conform as near as may be to those existing at the time in like causes in the courts of record in the state," does not extend to the means of enforcing or revising a decision once made by the circuit court. The manner or the time of taking proceedings as a foundation for the removal of a case by a writ of error from one federal court to another, is a matter to be regulated exclusively by acts of congress, or, when they are silent, by methods derived from the common law, from ancient English statute, or from the rules and practice of the courts of the United States. In re Chateaugay Co., 128 U. S. 544, 32 L. Ed. 508.

98. Brewster *v.* Wakefield, 22 How. 118, 16 L. Ed. 301.

99. Indianapolis, etc., R. Co. *v.* Horst,

8. Where Jurisdiction Is Assumed Sub Silentio.—Although this court may have exercised jurisdiction in a certain case, yet if no question was made in that case as to the jurisdiction, but it is passed sub silentio, we do not consider that case as binding precedent.[1]

9. Determination of This Court's Jurisdiction.—Without attempting to cite the many authorities in which this proceeding has been followed, it may be merely stated that the question of jurisdiction always precedes any inquiry into the merits.[2] It is not in the power of the circuit court to determine the extent and limits of our jurisdiction, for that is a matter which this court must finally decide for itself.[3]

B. Loss or Divesture of Jurisdiction.—In General.—It has long been established, that when the jurisdiction of a court of the United States has once attached, no subsequent change in the condition of the parties would oust it.[4] Appellants are not entitled to insist upon an objection in this court, to sustain which would curtail the relief to which appellee was entitled as against them or overthrow the jurisdiction of the circuit court.[5]

From Courts Since Dissolved.—A decree of the provisional court of Louisiana, which was established by order of the president, during the rebellion, having been transferred into the circuit court, in pursuance of an act of congress, must be regarded, in respect to appeal, as a decree of the circuit court.[6]

Where Statute Giving Jurisdiction Expires Pending the Appeal.—If laws which give this court jurisdiction have expired, its jurisdiction over them

93 U. S. 291, 23 L. Ed. 898; Newcomb *v.* Wood, 97 U. S. 581, 24 L. Ed. 1085; In re Chateaugay Co., 128 U. S. 544, 32 L. Ed. 508; Missouri Pacific R. Co. *v.* Chicago, etc., R. Co., 132 U. S. 191, 33 L. Ed. 309; Fishburn *v.* Chicago, etc., R. Co., 137 U. S. 60, 61, 34 L. Ed. 585.

Nothing is better settled in this court than the proposition that "in regard to * * * bills of exceptions, courts of the United States are independent of any statute or practice prevailing in the courts of the state in which the trial was had." Fishburn *v.* Chicago, etc., R. Co., 137 U. S. 60, 34 L. Ed. 585; Van Stone *v.* Stillwell, etc., Mfg. Co., 142 U. S. 128, 133, 35 L. Ed. 961.

1. New *v.* Oklahoma, 195 U. S. 252, 49 L. Ed. 182, citing Queenan *v.* Oklahoma, 190 U. S. 548, 47 L. Ed. 1175; United States *v.* Simms, 1 Cranch 252, 2 L. Ed. 98; United States *v.* More, 3 Cranch 159, 2 L. Ed. 397.

In United States *v.* More, 3 Cranch 159, 172, 2 L. Ed. 397, it was held, that this court was without jurisdiction, under the law as it then was, to review the final judgment of the circuit court of the District of Columbia in a criminal case. It was suggested at the bar, in that case, that this court had, in a previous case, exercised appellate jurisdiction in a criminal case. Chief Justice Marshall met that suggestion by saying: "No question was made in that case as to the jurisdiction. It passed sub silentio, and the court does not consider itself as bound by that case." To the same effect, substantially, are United States *v.* Sanges, 144 U. S. 310, 319, 36 L. Ed. 445, and Cross *v.* Burke, 146 U. S. 82, 36 L. Ed. 896. Louisville Trust Co. *v.* Knott, 191 U. S. 225, 236, 48 L. Ed. 159, reaffirmed in Shoesmith *v.* Boot & Shoe Mfg. Co., 198 U. S. 582, 49 L. Ed. 1172.

2. See Oregon *v.* Hitchcock, 202 U. S. 60, 68, 50 L. Ed. 935; Whitney *v.* Dick, 202 U. S. 132, 50 L. Ed. 963.

3. Rector *v.* Lipscomb, 141 U. S. 557, 558, 35 L. Ed. 857.

4. Morgan *v.* Morgan, 2 Wheat. 290, 4 L. Ed. 242; Clarke *v.* Mathewson, 12 Pet. 164, 165, 9 L. Ed. 1041; Kanouse *v.* Martin, 15 How. 198, 208, 14 L. Ed. 660; Kirby *v.* American Soda Fountain Co., 194 U. S. 141, 145, 48 L. Ed. 911.

5. Keller *v.* Ashford, 133 U. S. 610, 626, 33 L. Ed. 667; McGahan *v.* Bank, 156 U. S. 218, 237, 39 L. Ed. 403.

6. The Grapeshot, 7 Wall. 563, 19 L. Ed. 83.

When, upon the close of the war, and the consequent dissolution of the provisional court established by the president, congress, in the exercise of its general authority in relation to the national courts, directed that causes pending in the provisional court, and judgments, orders and decrees rendered by it, which, under ordinary circumstances, would have been proper for the jurisdiction of the circuit court of the United States, should be transferred to that court and have effect as if originally brought, or rendered therein, a decree in admiralty rendered in the provisional court, as upon appeal from the district court, became at once, upon transfer, the decree of the circuit court; and an appeal was properly taken from it to this court. The Grapeshot, 9 Wall. 129, 19 L. Ed. 651.

ceases, although the appeal is actually pending in this court when they expire.[7]

C. Jurisdiction In Particular Proceedings—1. In Criminal Cases—a. *In General.*—The judiciary act made no provision for the revision of judgments of the circuit or district courts in criminal cases; and as the cases in which the appellate jurisdiction of this court can be exercised depend upon the regulation of congress, it followed that no appeal or writ of error would lie.[8] In short, this court has no appellate jurisdiction confided to it in criminal

7. United States *v.* Boisdore, 8 How. 113, 120, 12 L. Ed. 1009; McNulty *v.* Batty, 10 How. 72, 79, 13 L. Ed. 333.

"In the case of the United States *v.* Boisdore, 8 How. 113, 121, 12 L. Ed. 1009, it is said, that, as this court can exercise no appellate power, over cases, unless conferred upon it by act of congress, if the act conferring the jurisdiction has expired, the jurisdiction ceases, although the appeal or writ of error be actually pending in the court at the time of the expiration of the act. The cases on this point are referred to in the brief in that case, and afford full authority for the principle, if any were needed. (1 Hill, 328; 9 Barn. & Cress., 750; 3 Burr., 1456; 4 Moore & Payne, 341.) The writ of error, therefore, fell with the abrogation of the statute upon which it was founded." McNulty *v.* Batty, 10 How. 72, 13 L. Ed. 333, reaffirmed Preston *v.* Bracken, 10 How. 81, 13 L. Ed. 336.

In 1824, congress passed an act (4 Stat. at Large, 52), entitled "An act enabling the claimants to lands within the limits of the state of Missouri and territory of Arkansas to institute proceedings to try the validity of their claims." The second section provided that, in "all cases, the party against whom the judgment or decree of the said district court may be finally given, shall be entitled to an appeal, within one year from the time of its rendition, to the supreme court of the United States;" and the fifth section enacted that any claim which shall not be brought by petition before the said courts within two years from the passing of the act, or which, after being brought before the said courts, shall, on account of the neglect or delay of the claimant, not be prosecuted to a final decision within three years, shall be forever barred. In 1844, congress passed another act (5 Stat. at Large 676), entitled: "An act to provide for the adjustment of land claims within the state of Missouri, Arkansas, and Louisiana, and in those parts of the states of Mississippi and Alabama, south of the thirty-first degree of north latitude, and between the Mississippi and Perdido rivers." It enacted, "that so much of the expired act of 1824 as related to the state of Missouri be, and is hereby revived and re-enacted, and continued in force for the term of five years, and no longer; and the provisions of that part of the aforesaid act hereby revived and re-enacted shall be, and hereby are, extended to the states of Louisiana and Arkansas, and to so much of the states of Mississippi and Alabama as is included in the district of country south of the thirty-first degree of north latitude, and between the Mississippi and Perdido rivers." The act of 1824, revived and re-enacted by the act of 1844, did not expire in five years from the passage of the act of 1844, so far as regards appeals from the district court to this court. It will continue in force until all the appeals regularly brought up from the district courts shall be finally disposed of. United States *v.* Boisdore, 8 How. 113, 12 L. Ed. 1009.

8. United States *v.* More, 3 Cranch 159, 2 L. Ed. 397; Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 391; Forsyth *v.* United States, 9 How. 571, 578, 13 L. Ed. 262, reaffirmed in Simpson *v.* United States, 9 How. 578, 13 L. Ed. 265; Cotton *v.* United States, 9 How. 579, 13 L. Ed. 265; Tinsley *v.* Anderson, 171 U. S. 101, 105, 43 L. Ed. 91; New Orleans *v.* Steamship Co., 20 Wall. 387, 392, 22 L. Ed. 354; United States *v.* Sanges, 144 U. S. 310, 319, 36 L. Ed. 445; Ex parte Gordon, 1 Black, 503, 17 L. Ed. 134; Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650.

No jurisdiction ever existed in this court to review by writ of error or appeal the judgment of a circuit court in a criminal case. Farnsworth *v.* Montana, 129 U. S. 104, 113, 32 L. Ed. 616.

We have, of course, no general authority to review, on error or appeal, the judgments of the circuit courts of the United States in cases within their criminal jurisdiction, or those of the supreme court of the District of Columbia or of the territories; and when such jurisdiction is intended to be conferred, it should be done in clear and explicit language. Farnsworth *v.* Montana, 129 U. S. 104, 32 L. Ed. 616; United States *v.* Sanges, 144 U. S. 310, 320, 36 L. Ed. 445; United States *v.* More, 3 Cranch 159, 2 L. Ed. 397; Cross *v.* United States, 145 U. S. 571, 574, 36 L. Ed. 821.

The judiciary act of 1789 made no provision for the revision, by this court, of judgments of the circuit or district courts in criminal cases; and the act of 1802 (2 Stat. at Large, 156) only embraced cases in which the opinions of the judges were opposed in criminal cases. There is, therefore, no general law giving appellate jurisdiction to this court in such cases. "The judiciary act of 1789 (1 Stat. at Large, 73) made no provision for the re-

cases, by the laws of the United States. It cannot entertain a writ of error, to revise the judgment of the circuit court, in any case where a party has been convicted of a public offense.[9]

vision of judgments of the circuit or district courts in criminal cases; and as the cases in which the appellate jurisdiction of this court can be exercised depend upon the regulation of congress, it followed that no appeal or writ of error would lie. (United States *v.* More, 3 Cranch 159, 2 L. Ed. 397; Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 391; Ex parte Watkins, 3 Pet. 201, 7 L. Ed. 650.) The act of congress passed 29th of April, 1802 (2 Stat. at Large, 156), which provided for a certificate to this court of the point, in case of a division of opinion in the circuit court, embraced cases in which the opinions were opposed in criminal as well as in civil trials; and since that act, questions of law in criminal cases have occasionally been the subject of examination here for the instruction of the courts below. (Ibid., p. 159, § 6, United States *v.* Tyler, 7 Cranch 285, 3 L. Ed. 344; United States *v.* Wiltberger, 5 Wheat. 76, 5 L. Ed. 37; United States *v.* Smith, 5 Wheat. 153, 5 L. Ed. 37; United States *v.* Holmes, 5 Wheat. 412, 5 L. Ed. 122; United States *v.* Marigold, 9 How. 560, 12 L. Ed. 257.) There is no general law, therefore, upon which a revision of the judgment in this case can be maintained; and the only question is, whether, in a peculiar class of cases, to which this belongs, a writ of error is specially provided for by the act of congress passed February 22, 1847 (Sess. Laws, 1847, ch. 17). It is insisted, on the part of the plaintiff in error, that the case is embraced in the eighth section of that act." Forsyth *v.* United States, 9 How. 571, 572, 13 L. Ed. 262, reaffirmed Simpson *v.* United States, 9 How. 578, 13 L. Ed. 265; Cotton *v.* United States, 9 How. 579, 13 L. Ed. 265.

"With what propriety can this court look into an indictment found in the circuit court, and which has passed into judgment before that court? We have no power to examine the proceedings on a writ of error, and it would be strange, if, under color of a writ to liberate an individual from an unlawful imprisonment, the court could substantially reverse a judgment which the law has placed beyond its control; an imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity, if the court has general jurisdiction of the subject, although it should be erroneous." Ex parte Watkins, 3 Pet. 193, 7 L. Ed. 650.

Forfeiture under excise laws.—It was held, in United States *v.* Emholt, 105 U. S. 414, 26 L. Ed. 1077, that where the judges of the circuit court are divided in opinion upon the trial of an information or forfeiture under the excise laws, such a case cannot be brought to this court from the circuit court by appeal. The court said that if it is to be considered as a civil action, the proper mode of bringing it up is by writ of error, and not by appeal. On the other hand, if it should be treated as in the nature of a criminal proceeding, it is hard to see how it could be brought to this court at all, except upon a certificate of division of opinion. Citing Bevins *v.* Ramsey, 11 How. 185, 13 L. Ed. 657; Jones *v.* La Vallette, 5 Wall. 579, 18 L. Ed. 550; Clifton *v.* United States, 4 How. 242, 11 L. Ed. 957; Ex parte Gordon, 1 Black 503, 17 L. Ed. 134.

Case overruled.—The appellate jurisdiction of this court rests wholly on the acts of congress. For a long time after the adoption of the constitution, congress made no provision for bringing any criminal case from a circuit court of the United States to this court by writ of error. At February term, 1803, indeed, this court, no objection being made, took jurisdiction of a writ of error sued out by the United States to the circuit court for the District of Columbia in a criminal case. United States *v.* Simms, 1 Cranch 252, 2 L. Ed. 98. But at February term, 1805, in a like case, this court, upon full argument and consideration, held that it had no jurisdiction of a writ of error in a criminal case, and overruled United States *v.* Simms, Chief Justice Marshall saying: "No question was made in that case as to the jurisdiction. It passed sub silentio, and the court does not consider itself as bound by that case." United States *v.* More, 3 Cranch 159, 172, 2 L. Ed. 397. And it was thenceforth held to be settled that criminal cases could not be brought from a circuit court of the United States to this court by writ of error, but only by certificate of division of opinion upon specific questions of law. Ex parte Kearney, 7 Wheat. 38, 42, 5 L. Ed. 391; Ex parte Gordon, 1 Black 503, 17 L. Ed. 134; Ex parte Yarbrough, 110 U. S. 651, 28 L. Ed. 274; Farnsworth *v.* Montana, 129 U. S. 104, 113, 32 L. Ed. 616; United States *v.* Perrin, 131 U. S. 55, 33 L. Ed. 88; United States *v.* Sanges, 144 U. S. 310, 319, 36 L. Ed. 445. See Louisville Trust Co. *v.* Knott, 191 U. S. 225, 236, 48 L. Ed. 159, explaining United States *v.* More, 3 Cranch 159, 2 L. Ed. 397.

9. Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 391; Bessette *v.* Conkey Co., 194 U. S. 324, 331, 48 L. Ed. 997, reaffirmed in In the Matter of Lewis, 202 U. S. 614, 50 L. Ed. 1172.

b. *Treason.*—"It is necessary to premise that the case of treason is one in which this court possesses neither original nor appellate jurisdiction."[10]

c. *Contempt Proceedings*—(1) *In General.*—At common law it was undoubted that no court reviewed the proceedings of another court in contempt matters.[11] It is a general rule of law that judgments committing a person for contempt are not reviewable either on appeal or error in this court.[12] Or to state the rule more fully, the judgments in independent proceedings for contempt in the circuit courts of the United States are not reviewable here on appeal or error, because such judgments are considered as judgments in criminal cases, in which this court has no appellate jurisdiction.[13] This court has no power to reverse, on

10. Ex parte Bollman, 4 Cranch 75, 105, 2 L. Ed. 554, 564. See the title TREASON.

11. Bessette *v.* Conkey Co., 194 U. S. 324, 330, 48 L. Ed. 997, reaffirmed in In the Matter of Lewis, 202 U. S. 614, 50 L. Ed. 1172.

12. In re Chetwood, 165 U. S. 443, 41 L. Ed. 782; Hayes *v.* Fischer, 102 U. S. 121, 26 L. Ed. 95; In re Debs, 158 U. S. 564, 39 L. Ed. 1092; Tinsley *v.* Anderson, 171 U. S. 101, 43 L. Ed. 91.

A judgment committing a prisoner for contempt is considered a judgment in a criminal case, and hence this court has no jurisdiction to review by appeal or error a judgment of the circuit court of the United States. Tinsley *v.* Anderson, 171 U. S. 101, 43 L. Ed. 91.

13. Tinsley *v.* Anderson, 171 U. S. 101, 43 L. Ed. 91, citing In re Chetwood, 165 U. S. 443, 41 L. Ed. 782; Hayes *v.* Fischer, 102 U. S. 121, 26 L. Ed. 95; In re Debs, 158 U. S. 564, 39 L. Ed. 1092; 159 U. S. 251; Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 391; New Orleans *v.* Steamship Co., 20 Wall. 387, 22 L. Ed. 354; Newport Light Co. *v.* Newport, 151 U. S. 527, 539, 38 L. Ed. 259; Bessette *v.* Conkey Co., 194 U. S. 324, 48 L. Ed. 997, reaffirmed in In the Matter of Lewis, 202 U. S. 614, 50 L. Ed. 1172; Ex parte Fisk, 113 U. S. 713, 28 L. Ed. 1117; Worden *v.* Searls, 121 U. S. 14, 30 L. Ed. 852; O'Neal *v.* United States, 190 U. S. 36, 47 L. Ed. 945.

A proceeding in the court below for contempt, which is independent of and separate from the original suit, cannot be re-examined here either by writ of error or appeal, because such judgments are considered as judgments in criminal cases. Hayes *v.* Fischer, 102 U. S. 121, 26 L. Ed. 95, citing Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 591; New Orleans *v.* Steamship Co., 20 Wall. 387, 22 L. Ed. 354; In re Chetwood, 165 U. S. 443, 41 L. Ed. 782; In re Debs, 158 U. S. 564, 39 L. Ed. 1092; Tinsley *v.* Anderson, 171 U. S. 101, 43 L. Ed. 91.

In Ex parte Fisk, a case of habeas corpus, 113 U. S. 713, 718, 28 L. Ed. 1117, Mr. Justice Miller, speaking for the court, declared: "There can be no doubt of the proposition, that the exercise of the power of punishment for contempt of their orders by courts of general jurisdiction is not subject to review by writ of error or appeal to this court. Nor is there, in the system of federal jurisprudence, any relief against such orders, when the court has authority to make them, except through the court making the order, or possibly by the exercise of the pardoning power. This principle has been uniformly held to be necessary to the protection of the court from insults and oppressions while in the ordinary exercise of its duties, and to enable it to enforce its judgments and orders necessary to the due administration of law and the protection of the rights of suitors." Bessette *v.* Conkey Co., 194 U. S. 324, 333, 48 L. Ed. 997, reaffirmed in In the Matter of Lewis, 202 U. S. 614, 50 L. Ed. 1172.

In McMicken *v.* Perin, 20 How. 133, 15 L. Ed. 857, the plaintiff in error was attached for contempt in refusing to make a conveyance after a tender and deposit of money in court had been made in compliance with a mandate of this court. He appealed to this court, and it was held, that the proceedings in contempt involved no new question or decision, but were the ordinary means of enforcing the original decree, and in no sense was it a final decree upon which an appeal could be sustained. It was, in effect, the same as ordering an execution on a judgment at law which had been affirmed on error and remanded for execution to the circuit court. New Orleans *v.* Steamship Co., 20 Wall. 387, 22 L. Ed. 354, was a suit by a steamship company in the circuit court of the United States for an injunction restraining a city from interfering with its possession of certain premises. Pending this suit, the mayor of the city applied to a state court for an injunction restraining the company from rebuilding an inclosure of the premises which the city had destroyed, and the injunction was granted. At this time the city was the only party defendant in the circuit court, although service upon it had been made by delivering process to the mayor. Subsequently the mayor was made a party defendant by a supplemental bill. A final decree was entered against the defendants, and, as a part thereof, was an order adjudging the mayor guilty of contempt in suing out the injunction in the state court and imposing a fine therefor. Held, not reviewable by this court. Bessette *v.* Conkey Co.,

appeal, the imposition of a fine decreed by the circuit court for contempt of it. "Contempt of court is a specific criminal offense. The imposition of the fine was a judgment in a criminal case."[14] But they may be reached by certiorari in the absence of any other adequate remedy.[15]

Summary.—From these decisions it is apparent that the uniform ruling of this court has been against the right to review the decisions of the lower court in contempt proceedings by writ of error, or by appeal except in cases of purely remedial and interlocutory orders.[16] The thought underlying the denial by this court of the right of review by writ of error or appeal has not been that there was something in contempt proceedings which rendered them not properly open to review, but that they were of a criminal nature and no provision had been made for a review of criminal cases. This was true in England as here. In that country, as is well known, there was no review of criminal cases by appeal or writ of error.[17]

Limitations of General Rule.—It is established by the decisions of this court, that while "the exercise of the power of punishment for contempt of their orders, by courts of general jurisdiction, is not subject to review by writ of error or appeal to this court," yet, when "a court of the United States undertakes by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void;" and that, "when the proceeding for contempt in such a case results in imprisonment, this court will, by its writ of habeas corpus, discharge the prisoner."[18] Where in a suit in equity on a patent a prelim-

194 U. S. 324, 332, 48 L. Ed. 997, reaffirmed in In the Matter of Lewis, 202 U. S. 614, 50 L. Ed. 1172.

Hayes *v.* **Fischer, 102 U. S. 121**, 26 L. Ed. 95, was a suit in equity to restrain the use of a patented device. An interlocutory injunction was granted. The defendant was fined for contempt in violating this injunction, and the entire amount of the fine ordered to be paid over to the plaintiff in reimbursement. Held, not reviewable by this court on writ of error or appeal. Bessette *v.* Conkey Co., 194 U. S. 324, 332, 48 L. Ed. 997, reaffirmed in In the Matter of Lewis, 202 U. S. 614, 50 L. Ed. 1172.

In Worden *v.* Searls, 121 U. S. 14, 30 L. Ed. 853, a final decree was entered in a suit for infringement of a patent, in favor of the plaintiff, and from that decree the defendants appealed. A preliminary injunction had been granted, and prior to the final decree the defendants were adjudged guilty of a contempt in violating it, and ordered to pay the complainant the sum of $250 as a fine therefor together with the costs of the contempt proceedings. This court was of opinion that the decree in favor of the plaintiff was erroneous, and reversed it; and in addition to directing a dismissal of the bill, set aside the order imposing the fines in the contempt proceedings, saying in respect thereto (p. 25): "We have jurisdiction to review the final decree in the suit and all interlocutory decrees and orders. These fines were directed to be paid to the plaintiff. We say nothing as to the lawfulness or propriety of this direction. But the fines were, in fact, measured by the damages the plaintiff had sustained and the expenses he had incurred. They were incidents of his claims in the suit. His right to them was, if it existed at all, founded on his right to the injunction, and that was founded on the validity of his patent." But, while setting aside the orders imposing the fines, it was "without prejudice to the power and right of the circuit court to punish the contempt referred to in those orders by a proper proceeding." Bessette *v.* Conkey Co., 194 U. S. 324, 333, 48 L. Ed. 997, reaffirmed in In the Matter of Lewis, 202 U. S. 614, 50 L. Ed. 1172.

14. New Orleans *v.* Steamship Co., 20 Wall. 387, 22 L. Ed. 354.

15. In re Chetwood, 165 U. S. 443, 462, 41 L. Ed. 782; Bessette *v.* Conkey Co., 194 U. S. 324, 332, 48 L. Ed. 997, reaffirmed in In the Matter of Lewis, 202 U. S. 614, 50 L. Ed. 1172; In re Watts and Saches, 190 U. S. 1, 47 L. Ed. 933.

16. Bessette *v.* Conkey Co., 194 U. S. 324, 335, 48 L. Ed. 997, reaffirmed in In the Matter of Lewis, 202 U. S. 614, 50 L. Ed. 1172.

17. Bessette *v.* Conkey Co., 194 U. S. 324, 335, 48 L. Ed. 997, reaffirmed in In the Matter of Lewis, 202 U. S. 614, 50 L. Ed. 1172, reviewed in Doyle *v.* London Guarantee, etc., Co., 204 U. S. 599, 51 L. Ed. 641.

18. Ex parte Fisk, 113 U. S. 713, 718, 28 L. Ed. 1117; In re Ayers, 123 U. S. 443, 485, 31 L. Ed. 216.

inary injunction has been granted and violated, and the circuit court enters two orders, by one of which the defendants are directed to pay a fine to the plaintiffs, and by the other the defendants are directed to pay a fine to the clerk, the fine being made up partly of the profits made by the infringement, and partly by the expenses of the plaintiff in the contempt proceedings, this court has jurisdiction to review the orders imposing such fine. Because the proceedings, though nominally those of contempt, were really proceedings to award damages to the plaintiff, and to reimburse him his expenses. The fines were in fact measured by the damages the plaintiff had sustained and the expenses he had incurred. They were incidents of his claims in the suit.[19]

(2) *Error to State Court.*—The proposition that judgments in contempt cases are not reviewable here on appeal or error applies only to such judgments in independent proceedings for contempt in the circuit courts of the United States, and does not apply to a judgment of the highest state court depriving a person of rights claimed under the constitution, treaties or laws of the United States.[20]

(3) *Effect of Circuit Court of Appeals Act.*—While the act creating the court of appeals, March 3, 1891, 26 Stat. 826, authorized a review of criminal cases, yet it limited the jurisdiction of this court to cases of a conviction for a capital or otherwise infamous crime—since limited to capital cases—(29 Stat. 492), and gave the right of review of all other criminal cases to the circuit courts of appeal, and of course, a proceeding in contempt cannot be considered as an infamous crime.[21] Under the act of March 3rd, 1891, the final decisions in contempt cases in the circuit and district courts are subject to review by the circuit courts of appeals.[22]

d. *Exceptions to General Rule*—(1) *Appeals from State Courts.*—But the rule that this court has no jurisdiction in criminal cases applies to proceedings in the circuit court of the United States. The appellate jurisdiction of this court from a state court applies to criminal as well as civil cases.[23]

(2) *Appeals by the State.*—An order discharging a prisoner after conviction is appealable by the state.[24]

(3) *Proceedings on Writ of Prohibition.*—In accordance with the general rule that a writ of prohibition cannot issue from this court in cases where there is no appellate power given by law, nor any special authority to issue the writ,[25] it will

19. Worden *v.* Sealrs, 121 U. S. 14, 15, 30 L. Ed. 853, distinguishing Ex parte Kearney, 7 Wheat. 38, 39, 5 L. Ed. 391; New Orleans *v.* Steamship Co., 20 Wall. 387, 22 L. Ed. 354.

20. Tinsley *v.* Anderson, 171 U. S. 101, 43 L. Ed. 91.

"It was argued in behalf of Tinsley that the judgment committing him for contempt was not reviewable by this court; citing the statement in In re Chetwood, 165 U. S. 443, 462, 41 L. Ed. 782, that 'judgments in proceedings in contempt are not reviewable here on appeal or error. Hayes *v.* Fischer, 102 U. S. 121, 26 L. Ed. 95; In re Debs, 158 U. S. 564, 573, 39 L. Ed. 1092, and in re Debs (mem.), 159 U. S. 251.' But that statement was made in regard to such judgments in independent proceedings for contempt in the circuit courts of the United States, and the reason is, as in cases referred to in Hayes *v.* Fischer above cited, that such judgments were considered as judgments in criminal cases, in which this court had no appellate jurisdiction from those courts. Ex parte Kearney, 7 Wheat. 38, 42, 5 L. Ed. 391; New Orleans *v.* Steamship Co., 20 Wall. 387, 392, 22 L. Ed. 354." Tinsley *v.* Anderson, 171 U. S. 101, 105, 43 L. Ed. 91.

21. Bessette *v.* Conkey Co., 194 U. S. 324, 335, 48 L. Ed. 997, reaffirmed in In the Matter of Lewis, 202 U. S. 614, 50 L. Ed. 1172.

22. Bessette *v.* Conkey Co., 194 U. S. 324, 326, 48 L. Ed. 997, reaffirmed in In the Matter of Lewis, 202 U. S. 614, 50 L. Ed. 1172.

23. Tinsley *v.* Anderson, 171 U. S. 101, 105, 43 L. Ed. 91.

24. Holmes *v.* Jennison, 14 Pet. 540, 10 L. Ed. 579.

25. The jurisdiction of this court was maintained in one case under the first section of the act of 1885, of an appeal from, and a writ of error to, the supreme court of the District of Columbia, in a case where that court, by its judgment, had dismissed a petition for a writ of prohibition to a court martial, convened to try an officer for an offense punishable by dismissal from the service and the deprivation of a salary which, during the term of his office, would exceed the sum of $5,000. A writ of prohibition is a civil remedy,

not lie in a criminal case.[1]

(4) *Habeas Corpus Proceedings.*—That this court has no general authority to review on error or appeal the judgments of the circuit courts of the United States in cases within their criminal jurisdiction is beyond question; but it is equally well settled, when a prisoner is held under the sentence of any court of the United States in regard to a matter wholly beyond or without the jurisdiction of that court, it is not only within the authority of the supreme court, but it is its duty to inquire into the cause of commitment when the matter is properly brought to its attention, and if found to be as charged, a matter of which such a court had no jurisdiction, to discharge the prisoner from confinement.[26]

(5) *Certificate of Division of Opinion.*—Formerly the only mode of bringing a criminal case to this court from the circuit court was upon a certificate of the judges of the circuit court that their opinions are opposed upon a question raised at the trial.[27] But even this is no longer allowable under the circuit court of appeals act. See post, "Certificate of Division of Opinion," V.

(6) *Territorial Courts of Florida.*—The judiciary act of 1789 made no provision for the revision, by this court, of judgments of the circuit or district courts in criminal cases; and the act of 1802 (2 Stat. at Large 156) only embraced cases in which the opinions of the judges were opposed in criminal cases. There is therefore, no general law giving appellate jurisdiction to this court in such cases. But the act of congress passed on the 22d of February, 1847 (Sess. Laws, 1847, ch. 17), providing that certain cases might be brought from territorial courts of Florida to this court, included all cases, whether of civil or criminal jurisdiction. Under this act, this court can revise a judgment of the superior court of the district of West Florida in a criminal case, which originated in October, 1845, and was transferred to the district court of the United States for the northern district of Florida.[28]

given in a civil action, as much so as a writ of habeas corpus, which this court has held to be a civil and not a criminal proceeding, even when instituted to arrest a criminal prosecution. Smith *v.* Whitney, 116 U. S. 167, 29 L. Ed. 601; Ex parte Tom Tong, 108 U. S. 556, 27 L. Ed. 826; cited in Farnsworth *v.* Montana, 129 U. S. 104, 113, 32 L. Ed. 606; Chesapeake, etc., R. Co. *v.* White, 111 U. S. 134, 28 L. Ed. 378; Ex parte Christy, 3 How. 292, 11 L. Ed. 603.

1. Ex parte Gordon, 1 Black 503, 17 L. Ed. 134.

26. Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 391; Ex parte Wells, 18 How. 307, 15 L. Ed. 421; Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787; Ex parte Yarbrough, 110 U. S. 651, 653, 28 L. Ed. 274. See post, "In Habeas Corpus Proceedings," III, C, 3.

27. Ex parte Gordon, 1 Black 503, 17 L. Ed. 134; Clifton *v.* United States, 4 How. 242, 11 L. Ed. 957.

This court can take cognizance of a criminal case only upon a certificate of division in opinion. New Orleans *v.* Steamship Co., 20 Wall. 387, 392, 22 L. Ed. 354.

This court have repeatedly decided that they have no appellate jurisdiction in criminal cases from the circuit courts of the United States; writs of error and appeals are given from those courts only in civil cases. But, even in those courts, where the judges are divided on any point in a criminal case, the point may be brought before this court, under a general provision in cases of division of opinion. Worcester *v.* State of Georgia, 6 Pet. 515, 8 L. Ed. 483, 503.

When the circuit court renders a final judgment refusing to discharge the prisoner, he may bring the case here by writ of error; and if the judges of the circuit court being opposed in opinion, can render no judgment, he may have the point upon which the disagreement happens certified to this tribunal. Ex parte Milligan, 4 Wall. 2, 3, 18 L. Ed. 281.

Neither a writ of error, nor certiorari will lie from this court to a circuit court of the United States, in a criminal case. The only mode of bringing a criminal case into this court is upon a certificate of the judges of the circuit court that their opinions are opposed upon a question raised at the trial. No party has a right to ask for such certificate, nor can it be made consistently with the duty of the court, if the judges are agreed and do not think there is doubt enough upon the question to justify them in submitting it to the judgment of this court. Ex parte Gordon, 1 Black 503, 17 L. Ed. 134.

28. Forsyth *v.* United States, 9 How. 571, 13 L. Ed. 262, reaffirmed in Simpson *v.* United States, 9 How. 578, 13 L. Ed. 265; Cotton *v.* United States, 9 How. 579, 13 L. Ed. 265.

e. *Statutory Provisions.*—**In General.**—Nor was there in our federal system a review in criminal cases prior to the act of February 6, 1889, 25 Stat. 656, which provided for a writ of error from this court in capital cases.[29]

The first act of congress which authorized a criminal case to be brought from the circuit court of the United States to this court, except upon a certificate of division of opinion, was the act of February 6, 1889, c. 113, § 6, 25 Stat. 655, by which it was enacted that "in all cases of conviction" of a "capital crime in any court of the United States," the final judgment "against the respondent" might, on his application, be examined, reversed or affirmed by this court on writ of error. Up to that time this court had no general authority to review on error or appeal the judgments of the circuit courts of the United States in cases within their criminal jurisdiction.[30] The act of congress of February 6, 1889, entitled "An act to abolish circuit court powers of certain district courts of the United States and to provide for writs of error in capital cases and for other purposes," refers only to circuit and district courts of the United States.[31]

Over Territories.—In view of the terms of this whole section, the allowance of a writ of error to any appellate tribunal was not contemplated, but merely to review the judgment of the trial court. Therefore, this court cannot exercise appellate jurisdiction over the judgments of the supreme court of Oklahoma in capital cases by virtue of this statute.[32] And does not give the supreme court appellate jurisdiction over capital cases from the United States court for the northern district of the Indian Territory.[33]

The act of congress approved on the third of March, 1885, entitled "An act regulating appeals from the supreme court of the District of Columbia and the supreme courts of the several territories," 23 Stat. 443, c. 355, provides in the first section, "That no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, or in the supreme court of any of the territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars;" and the second section, that the first section should not

29. Bessette *v.* Conkey Co., 194 U. S. 324, 335, 48 L. Ed. 997, reaffirmed in In the Matter of Lewis, 202 U. S. 614, 50 L. Ed. 1172.

30. United States *v.* Sanges, 144 U. S. 310, 319, 36 L. Ed. 445; Cross *v.* United States, 145 U. S. 571, 574, 36 L. Ed. 821; United States *v.* Rider, 163 U. S. 132, 138, 41 L. Ed. 101.

31. Obiter opinion of Mr. Chief Justice Fuller in Cross *v.* United States, 145 U. S. 571, 36 L. Ed. 821.

In Cross *v.* United States, 145 U. S. 571, 36 L. Ed. 821, Mr. Chief Justice Fuller, in deciding that the act of congress of February 6, 1889, entitled "An act to abolish circuit court powers of certain district courts of the United States and to provide for writs of error in capital cases and for other purposes," did not apply to the review of capital cases in the supreme court of the District of Columbia, uses the following language: "The difficulty with the section is that it manifestly does not contemplate the allowance of a writ of error to any appellate tribunal, but only to review the final judgment of the court before which the respondent was tried, where such judgment could not otherwise be reviewed by writ of error or appeal. It is the final judgment of the trial court that may be re-examined upon the application of the respondent, and it is to that court the cause is to be remanded, and by that court that the judgment of this court is to be carried into execution. The obvious object was to secure a review by some other court than that which passed upon the case at nisi prius. Such review by two other courts was not within the intention, as the judiciary act of March 3, 1891, shows. This is made still clearer by the further provision that no such writ of error 'shall be sued out or granted unless a petition therefor shall be filed with the clerk of the court in which the trial shall have been had during the same term or within such time, not exceeding sixty days next after the expiration of the term of the court at which the trial shall have been had, as the court may for cause allow by order entered of record.' This language is entirely inapplicable to the prosecution of a writ of error to the judgment of an appellate tribunal affirming the judgment of the trial court."

32. New *v.* Oklahoma, 195 U. S. 252, 49 L. Ed. 182, citing Cross *v.* United States, 145 U. S. 571, 36 L. Ed. 821.

33. Brown *v.* United States, 171 U. S. 631, 43 L. Ed. 312; Binyon *v.* United States, 195 U. S. 623, 49 L. Ed. 349.

apply to any case "wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute."[34] The act does not apply in either section to any criminal case.[35] But is applicable to all judgments or decrees in suits at law or in equity in which there is a pecuniary matter in dispute, and it inhibits any appeal or writ of error therefrom except as stated.[36] Clearly, the act of March 3, 1885, amending § 764 of the Revised Statutes, in respect of circuit courts, cannot be held to give a jurisdiction in respect of the supreme court of the district denied by the act of March 3, 1885, relating to the latter court.[37]

By the circuit court of appeals act appellate jurisdiction was given in all criminal cases by writ of error either from this court or from the circuit courts of appeals.[38]

2. In Prize Causes.[39]—Prior to the passage of the act of March 3, 1863, the supreme court had no appellate jurisdiction in prize causes, except where the same were removed here from the circuit court.[40] A case in prize, carried by appeal from a district court into a circuit court, before the statute of March 3, 1863, allowing appeals in prize directly from the district courts to this court, is properly here on appeal from the circuit court.[41] But since the act of March 3, 1863, appeals in prize lie directly from the district courts to this court.[42]

It is well settled that this court has no original jurisdiction in prize causes; the jurisdiction in such causes is appellate only.[43] Under the constitution, this court can exercise, in prize causes, appellate jurisdiction only.[44] In prize causes this court has an appellate jurisdiction only, and a claim cannot for the first time be interposed here; but where the court below had proceeded to adjudication before the above period had elapsed, the cause was remanded to that court, with directions to allow a claim to be filed therein, and the libel to be amended, etc.[45]

It is the practice of this court, in prize causes, to hear the cause, in the first instance, upon the evidence transmitted from the circuit court, and to decide, upon that evidence, whether it is proper to allow further proof.[46]

Under § 5 of the act of March 3, 1891, appeals or writs of error may be taken from the district courts or from the existing circuit courts direct to the supreme court, from final sentences and decrees in prize causes, without regard to the matter in dispute.[47]

3. In Habeas Corpus Proceedings[48]—a. *Power of This Court to Issue the Writ.*—**In General.**—That this court is authorized to exercise appellate jurisdiction by habeas corpus directly is a position sustained by abundant authority. It has general power to issue the writ, subject to the constitutional limitations of its jurisdiction, which are, that it can only exercise original jurisdiction in cases affecting ambassadors, public ministers

34. Cross *v.* Burke, 146 U. S. 82, 87, 36 L. Ed. 896.

35. Farnsworth *v.* Montana, 129 U. S. 104, 32 L. Ed. 616; United States *v.* Sanges, 144 U. S. 310, 36 L. Ed. 445; Cross *v.* Burke, 146 U. S. 82, 87, 36 L. Ed. 896.

36. Cross *v.* Burke, 146 U. S. 82, 87, 36 L. Ed. 896.

37. Cross *v.* Burke, 146 U. S. 82, 87, 36 L. Ed. 896.

38. United States *v.* Rider, 163 U. S. 132, 138, 41 L. Ed. 101.

39. See the title PRIZE.

40. The Admiral, 3 Wall. 603, 18 L. Ed. 58.

41. The Admiral, 3 Wall. 603, 18 L. Ed. 58.

42. The Admiral, 3 Wall. 603, 18 L. Ed. 58; 12 Statutes at Large 760.

43. The William Bagaley, 5 Wall. 377, 412, 18 L. Ed. 583, citing The Harrison, 1 Wheat. 298, 4 L. Ed. 95; Marbury *v.* Madison, 1 Cranch 137, 173, 2 L. Ed. 60

44. The Alicia, 7 Wall. 571, 573, 19 L. Ed. 84.

45. The Harrison, 1 Wheat. 298, 4 L. Ed. 95.

46. The London Packet, 2 Wheat. 371, 4 L. Ed. 264.

47. The Paquete Habana, 175 U. S. 677, 44 L. Ed. 320.

48. See the title HABEAS CORPUS.

and consuls, and cases in which a state is a party; but has appellate jurisdiction in all other cases of Federal cognizance, "with such exceptions and under such regulations as congress shall make." Having this general power to issue the writ, the court may issue it in the exercise of original jurisdiction where it has original jurisdiction; and may issue it in the exercise of appellate jurisdiction where it has such jurisdiction, which is in all cases not prohibited by law except those in which it has original jurisdiction only.[49] Congress not only has not excepted writs of habeas corpus and mandamus from this appellate jurisdiction, but has expressly provided for the exercise of this jurisdiction by means of these writs.[50]

In What Cases.—The appellate jurisdiction of this court, exercisible by the writ of habeas corpus, extends to a case of imprisonment upon conviction and sentence of a party by an inferior court of the United States, under and by virtue of an unconstitutional act of congress, whether this court has jurisdiction to review the judgment of conviction by writ of error or not.[51] In all cases where a circuit court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this court, in the exercise of its appellate jurisdiction, may, by the writ of habeas corpus, aided by the writ of certiorari, revise the decision of the circuit court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded.[52] Where a person under a conviction of the circuit court, sues out a habeas corpus for discharge from the conviction, the writ, if rightfully issued by a justice of this court, is returnable before himself, and he has the right, if it can be done without injury to the prisoner, to refer the matter to this court for its determination, it being a case which involves the exercise of appellate jurisdiction. Had the case involved original jurisdiction only, this court could not have taken jurisdiction of it.[53]

49. Ex parte Bollman, 4 Cranch 75, 100, 101, 2 L. Ed. 554; Ex parte Watkins, 3 Pet. 193, 202, 7 L. Ed. 650; Ex parte Watkins, 7 Pet. 568, 8 L. Ed. 786; Ex parte Wells, 18 How. 307, 328, 15 L. Ed. 421; Ableman *v.* Booth, 21 How. 506, 16 L. Ed. 169; Ex parte Yerger, 8 Wall. 85, 19 L. Ed. 332; Ex parte Siebold, 100 U. S. 371, 374, 25 L. Ed. 717.

50. Ex parte Yerger, 8 Wall. 85, 98, 19 L. Ed. 332.

51. "It is objected that the case is one of original and not appellate jurisdiction, and, therefore, not within the jurisdiction of this court. But we are clearly of opinion that it is appellate in its character. It requires us to revise the act of the circuit court in making the warrants of commitment upon the convictions referred to. This, according to all the decisions, is an exercise of appellate power. Ex parte Burford, 3 Cranch 448, 2 L. Ed. 495; Ex parte Bollman, 4 Cranch 75, 100, 101, 2 L. Ed. 554; Ex parte Yerger, 8 Wall. 85, 19 L. Ed. 332." Ex parte Siebold, 100 U. S. 371, 374, 25 L. Ed. 717.

52. Ex parte Yerger, 8 Wall. 85, 19 L. Ed. 332.

The only ground on which this court, or any court, without some special statute authorizing it, will give relief on habeas corpus to a prisoner under conviction and sentence of another court is the want of jurisdiction in such court over the person or the cause, or some other matter rendering its proceedings void. This distinction between an erroneous judgment and one that is illegal or void is well illustrated by the two cases of Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; and Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787. In the former case, we held that the judgment was void, and released the petitioner accordingly; in the latter, we held that the judgment, whether erroneous or not, was not void, because the court had jurisdiction of the cause; and we refused to interfere. Ex parte Siebold, 100 U. S. 371, 375, 25 L. Ed. 717.

In ex parte Yerger, 8 Wall. 85, 103, 19 L. Ed. 332, it was held, "that, in all cases where a circuit court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, this court, in the exercise of its appellate jurisdiction, may, by the writ of habeas corpus, aided by the writ of certiorari, review the decision of the circuit court, and if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded." The jurisdiction is acquired by this court in such a case through its own writ of habeas corpus, and, until that is issued, there is no power to proceed. Ex parte Royall, 112 U. S. 181, 182, 28 L. Ed. 690.

53. Ex parte Clarke, 100 U. S. 399, 25 L. Ed. 715.

Rules Governing Allowance of Writ.—When application is made to this court for the allowance of a writ of error to the highest court of a state, the writ will not be allowed if it appear from the face of the record that the decision of the federal question which is complained of was so clearly right as not to require argument.[54] And the same rule governs an application to us for the writ of habeas corpus, which must be denied, if it be apparent that the only result, if the writ were issued, would be the remanding of the petitioner to custody, for the object of the writ is to ascertain whether the prisoner applying for it can legally be detained, and it is the duty of the court, justice or judge, granting the writ, on hearing, "to dispose of the party as law and justice may require."[55]

Original Jurisdiction.—It has long been settled that ordinarily this court cannot issue a writ of habeas corpus except under its appellate jurisdiction.[56]

Effect of Issuance of Writ.—It is for the trial judge or the supreme court of a state to determine whether or not its judgment shall be stayed or superseded by an appeal to the highest tribunal of the state, and with such determination it is not our province through a writ of habeas corpus to interfere, nor do the statutes of a state which provide that execution under a sentence of death shall not be stayed by an appeal to the highest tribunal of the state unless a certificate of probable cause be granted as provided, in themselves, involve any infraction of the constitution or laws of the United States.[57] Where an appeal from a final order of the circuit court, denying a writ of habeas corpus and dismissing the petition therefor of a person confined under state authority, has been sued out to this court, and the order of the circuit court affirmed, this court will not grant a writ of habeas corpus because the state court after judgment here proceeds before our mandate issues.[58]

b. *Review of Judgments of the Circuit Courts.*—Under the act of February 5th, 1867 (14 Stat. at Large 385), to amend the judiciary act of 1789, an appeal lies to this court on judgments in habeas corpus cases rendered by circuit courts in the exercise of original jurisdiction.[1]

But this right of appeal was taken away by the act of March 27, 1868, ch. 34, 15 Stat. 44.[59] The act of 27th of March, 1868, repealing that provision of the act of 5th of February, 1867, to amend the judicial act of 1789, which au-

54. Spies *v.* Illinois, 123 U. S. 131, 31 L. Ed. 80.

55. Rev Stat., § 761; Iasigi *v.* Van De Carr, 166 U. S. 391, 41 L. Ed. 1045; Ekiu *v.* United States, 142 U. S. 651, 35 L. Ed. 1146; In re Boardman, 169 U. S. 39, 43, 42 L. Ed. 653.

The action of the circuit court in refusing to grant an appeal from a final order denying a petition for habeas corpus, cannot be revised by this court on application for a writ of habeas corpus. In re Boardman, 169 U. S. 39, 42 L. Ed. 653.

56. Ex parte Bollman, 4 Cranch 75, 2 L. Ed. 554; Ex parte Watkins, 7 Pet. 568, 8 L. Ed. 786; Ex parte Yerger, 8 Wall. 85, 19 L. Ed. 332; Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872; Ex parte Parks, 93 U. S. 18, 23 L. Ed. 787; Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676; Ex parte Siebold, 100 U. S. 371, 25 L. Ed. 717. Section 751 of the Revised Statutes, which re-enacts a similar provision in the judiciary act of 1789 (§ 14), gives this court authority to issue the writ, but except in cases affecting ambassadors, other public ministers, or consuls, and those in which a state is a party, it can only be done for a review of the judicial decision of some inferior officer or court. Ex parte Hung Hang, 108 U. S. 552, 27 L. Ed. 811.

57. In re Boardman, 169 U. S. 39, 42 L. Ed. 653, citing Kohl *v.* Lehlback, 160 U. S. 293, 40 L. Ed. 432; Bergemann *v.* Backer, 157 U. S. 655, 39 L. Ed. 845; Andrews *v.* Swartz, 156 U. S. 272, 39 L. Ed. 422.

58. In re Boardman, 169 U. S. 39, 42 L. Ed. 653, citing In re Shibuya Jugiro, 140 U. S. 291, 35 L. Ed. 510.

1. Ex parte McCardle, 6 Wall. 318, 16 L. Ed. 816.

59. This court has no jurisdiction, under the form of an appeal or writ of error, to review a decision of a circuit court upon a writ of habeas corpus in the case of a person "alleged to be restrained of his liberty in violation of the constitution or of any law or treaty of the United States." Such an appeal was given by the act of February 5, 1867, ch. 28, 14 Stat. 385, but it was taken away by the act of March 27, 1868, ch. 34, 15 Stat. 44. Ex parte Royall, 112 U. S. 181, 182, 28 L. Ed. 690.

The act of February 5, 1867, ch. 28, § 1, conferring power upon the judges of the national courts to issue writs of habeas corpus in cases of persons re-

thorized appeals to this court from the decisions of the circuit courts, in cases of habeas corpus, does not except from the appellate jurisdiction of this court any cases but appeals under the act of 1867. It does not affect the appellate jurisdiction which was previously exercised in cases of habeas corpus.[60]

An act approved March 3, 1885, Laws 2d Sess. 48th Cong., ch. 353, page 437, restored the appellate jurisdiction to this court in habeas corpus cases over decisions of the circuit courts and this necessarily included jurisdiction over similar judgments of the supreme court of the District of Columbia.[61] The act of March 3, 1885, c. 353, 23 Stat. 437, gives an appeal to this court in habeas corpus proceedings only from the final decision of the circuit court sitting as a court and not when sitting as a judge. And the mere form of the docket entry does not change the character of the proceeding, and the order of the judge that the papers be filed, and the order recorded in the circuit court does not make his decision as judge a decision of the court.[62] An appeal may be taken to the supreme court from a final decision on a habeas corpus in the United States circuit court, in the case of any person alleged to be restrained of his liberty in violation of the constitution or of any law or treaty of the United States.[63]

strained of their liberty in violation of the constitution, or of any treaty or law of the United States, expressly gave an appeal to this court from the judgment of a circuit court in such cases. 14 Stat. 385. Shortly after the passage of this act, Mr. Justice Nelson refused to allow an appeal from a judgment of the circuit court for the Southern District of New York upon a writ of habeas corpus issued under the 14th section of the judiciary act of 1789, because no appeal was provided by law in the case of a habeas corpus issued under that act, and the appeal given by the act of 1867 was confined to cases begun under it. In re Heinrich, 5 Blatchford 414, 427. And within two years afterwards it was determined by this court that, independently of the act of 1867 (which was repealed by the act of March 27, 1868, ch. 34, 15 Stat. 44), this court (except in a small class of cases of commitments for acts done or omitted under alleged authority of a foreign government, as to which provision was made by the act of August 29, 1842, ch. 257, 5 Stat. 539), had no jurisdiction by direct appeal to revise the judgments of inferior courts in cases of habeas corpus, but could only do so by itself issuing writs of habeas corpus and certiorari under the general powers conferred by the judiciary act of 1789. Ex parte McCardle, 6 Wall. 318, 18 L. Ed. 816; and 7 Wall. 506, 19 L. Ed. 264; Ex parte Yerger, 8 Wall. 85, 19 L. Ed. 332. See, also, Ex parte Royall, 112 U. S. 181, 28 L. Ed. 690; Wales *v.* Whitney, 114 U. S. 564, 29 L. Ed. 277; Kurtz *v.* Moffitt, 115 U. S. 487, 497, 29 L. Ed. 458.

60. Ex parte McCardle, 7 Wall. 506, 19 L. Ed. 264.

The second section of the act of March 27th, 1868, repealing so much of the act of February 5th, 1867, as authorized appeals from the circuit courts to the supreme court, does not take away or affect the appellate jurisdiction of this court by habeas corpus, under the constitution and the acts of congress prior to the date of the last named act. Ex parte Yerger, 8 Wall. 85, 19 L. Ed. 332.

61. Wales *v.* Whitney, 114 U. S. 564, 29 L. Ed. 277.

Since the act of March 3, 1885, 23 Stat. 437, however, an appeal lies to this court from the judgments of the circuit courts in habeas corpus cases. Ex parte Mirzan, 119 U. S. 584, 586, 30 L. Ed. 513.

Under the statutes of the United States an appeal may be taken to this court from the final decision upon habeas corpus of a circuit court of the United States, in the case of any person alleged to be restrained of his liberty in violation of the constitution or any law or treaty of the United States. In re Shibuya Jugiro, 140 U. S. 291, 294, 295, 35 L. Ed. 510; Rev. Stat., §§ 751, 752, 753, 761, 762, 763, 765; Act of March 3, 1885, c. 353, 23 Stat. 437; McKane *v.* Durston, 153 U. S. 684, 685, 38 L. Ed. 867.

62. Carper *v.* Fitzgerald, 121 U. S. 87, 30 L. Ed. 882.

63. In re Jugiro, 140 U. S. 291, 35 L. Ed. 510; McKane *v.* Durston, 153 U. S. 684, 38 L. Ed. 867.

Under existing statutory provisions appeals may be taken to this court from final decisions of the circuit courts in habeas corpus, in cases, among others, where the applicant for the writ is alleged to be restrained of his liberty in violation of the constitution or of some law or treaty of the United States, and if the restraint is by any state court or by or under the authority of any state, further proceedings cannot be had against him pending the appeal. Rev. Stat., §§ 763, 764, 766; act of March 3, 1885, ch. 353, 23 Stat. 437; Craemer *v.* Washington State, 168 U. S. 124, 127, 42 L. Ed. 407, reaffirmed in Durrant *v.* Hale, 168 U. S. 705, 42 L. Ed. 1213; and Nordstrom *v.* Moyer, 170 U. S. 703, 704, 42 L. Ed. 1218.

Under the judiciary act of March 3, 1891, 26 Stat. 826, appeals from decrees of circuit courts on habeas corpus can no longer be taken directly to this court, but only in the classes mentioned in the fifth section of that act.[64] While the right of appeal from the judgments of circuit courts on habeas corpus directly to this court, in all cases, is taken away by the act of March 3, 1891, that right still exists in the cases designated in § 5 of that act, and upon such appeals the amendment may operate.[65] By the act of March 3, 1891, establishing the circuit court of appeals, it was provided that appeals or writs of error may be taken from the district courts or from the circuit courts direct to the supreme court of the United States in certain cases, among others "in any case that involves the construction or application of the constitution of the United States." 26 Stat. 826, 828, c. 517, § 5.[66] An appeal lies directly to the supreme court of the United States from the decision of a district court of the United States in a habeas corpus case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question.[67] Accordingly, an appeal directly to this court from the decision of the circuit court denying the writ of habeas corpus is proper under the averments contained in a petition, that the imprisonment of the appellant is in violation of the federal constitution.[68]

Custody of Prisoners on Habeas Corpus.—Pending an appeal from the final decision of any court or judge declining to grant the writ of habeas corpus, the custody of the prisoner shall not be disturbed. Pending an appeal from the final decision of any court or judge discharging the writ after it has been issued, the prisoner shall be remanded to the custody from which he was taken by the writ, or shall, for good cause shown, be detained in custody of the court or judge, or be enlarged upon recognizance, as hereinafter provided. Pending an appeal from the final decision of any court or judge discharging the prisoner, he shall be enlarged upon recognizance, with surety, for appearance to answer the judgment of the appellate court, except where, for special reasons sureties ought to be required.[69]

Decisions Reviewable.—This rule does not have the effect of giving this court jurisdiction of an appeal from the circuit court in habeas corpus proceedings where the judge is sitting as a judge, and not as a court. "The purpose of that rule was to regulate proceedings on appeals under § 763, from the decision of a judge to the circuit court of the district, as well as under § 764, as amended by the act of March 3, 1885, from a circuit court to this court. Power to make

64. Lau Ow Bew *v.* United States, 144 U. S. 47, 36 L. Ed. 340; Horner *v.* United States, 143 U. S. 570, 36 L. Ed. 266; Cross *v.* Burke, 146 U. S. 82, 88, 36 L. Ed. 896; Ex parte Lennon, 150 U. S. 393, 37 L. Ed. 1120.

65. In re Lennon, 150 U. S. 393, 399, 37 L. Ed. 1120.

66. Boske *v.* Comingore, 177 U. S. 459, 465, 44 L. Ed. 846.

In Ekiu *v.* United States, 142 U. S. 651, 35 L. Ed. 1146, jurisdiction of an appeal on habeas corpus directly from the circuit court was taken, as it was in Horner *v.* United States (No. 2), 143 U. S. 570, 36 L. Ed. 266, upon the ground that the constitutionality of a law of the United States was drawn in question; and this would be so in any case that involves, within the intent and meaning of the statute, the construction or application of the constitution of the United States, or where the constitution or law of a state was claimed to be in contravention of the constitution, and the disposition of the case turned upon such constitution or law. These would be cases within the classes enumerated in § 5. Ex parte Lennon, 150 U. S. 393, 399, 37 L. Ed. 1120.

67. Rice *v.* Ames, 180 U. S. 371, 45 L. Ed. 577, reaffirmed in Fisher *v.* Baker, 203 U. S. 174, 51 L. Ed. 142.

"Prior to the court of appeals act of 1891, provision was made for an appeal to the circuit court in habeas corpus cases 'from the final decision of any court, justice or judge inferior to the circuit court.' Rev. Stat., § 763; and from the final decision of such circuit court an appeal might be taken to this court. Rev. Stat., § 764, as amended March 3, 1885, ch. 353, 23 Stat. 437." Rice *v.* Ames, 180 U. S. 371, 373, 45 L. Ed. 577.

68. Craemer *v.* Washington State, 168 U. S. 124, 127, 42 L. Ed. 407; Dimmick *v.* Tompkins, 194 U. S. 540, 546, 48 L. Ed. 1110.

69. Rule 34, 117 U. S. App. 708, promulgated March 29, 1886, and as amended May 10, 1886.

such a regulation was given to this court by § 765 of the Revised Statutes."[70] But although the original order was made at chambers, yet if the final order overruling the return of the sheriff and discharging the prisoner from custody was a decision of the circuit court, an appeal will lie to this court.[71]

Hearing and Determination.—An appeal to the supreme court of the United States from a judgment of a circuit court dismissing a petition for habeas corpus for want of jurisdiction is governed by § 761 of the Revised Statutes, which provides, as to habeas corpus cases, that the court "shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require."[1]

Scope of Review.—Every question of substance which the circuit court could decide upon the return of the habeas corpus, including the question of its own jurisdiction, may be revised here on appeal from its final judgment.[72] It will be observed that in both the provisions of the Revised Statutes and of the act of Congress of March 3rd, 1885, 23 Stat. 434, giving appeals in habeas corpus proceedings, the mode of review, whether by the circuit court of the judgment of an inferior court or justice or judge, or by this court of the judgment of a circuit court, the word "appeal," and not "writ of error," is used, and as congress has always used these words with a clear understanding of what is meant by them, namely, that by a writ of error only questions of law are brought up for review, as in actions at common law, while on appeal, except when specially provided otherwise, the entire case on both law and facts is to be reconsidered,[73] this court may review the law and facts in habeas corpus proceedings.

c. *Review of Judgment of District Courts.*—Prior to the passage of the act of March 3, 1891, establishing the circuit court of appeals, an appeal from the final judgment of a district court on an application for a writ of habeas corpus by or on behalf of one alleged to be restrained of his liberty in violation of the constitution or any law of the United States, went first to the circuit court.[74]

4. In Mandamus Proceedings.—**In General.**[75]—The judicial act, § 13, enacted that the supreme court shall have the power to issue writs of prohibition to the district courts when proceeding as courts of admiralty and maritime jurisdiction, and writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed, or persons holding offices under the authority of the United States. A mandamus to an officer is said to be the exercise of original jurisdiction, but a mandamus to an inferior court of the United States is in the nature of appellate jurisdiction.[76] Repeated decisions of this court have established the rule that this court has power to issue a mandamus, in the exercise of

70. Carper *v.* Fitzgerald, 121 U. S. 87, 89, 30 L. Ed. 882, cited in McKnight *v.* James, 155 U. S. 685, 687, 39 L. Ed. 310; Lambert *v.* Barrett, 157 U. S. 697, 39 L. Ed. 865; In re Lennon, 150 U. S. 393, 37 L. Ed. 1120; Whitten *v.* Tomlinson, 160 U. S. 231, 244, 40 L. Ed. 406.

71. Harkrader *v.* Wadley, 172 U. S. 148, 43 L. Ed. 399, citing In re Palliser, 136 U. S. 257, 34 L. Ed. 514, and distinguishing Carper *v.* Fitzgerald, 121 U. S. 87, 30 L. Ed. 882.

1. Storti *v.* Massachusetts, 183 U. S. 138, 46 L. Ed. 120; Bissert *v.* Hagan, 183 U. S. 694, 46 L. Ed. 393; Hall *v.* Johnson, 186 U. S. 480, 46 L. Ed. 1259.

Section 761, Rev. Stat., provides as to habeas corpus cases that "the court, or justice, or judge shall proceed in a summary way to determine the facts of the case by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require." That mandate is applicable to this court, whether it is exercising its original or appellate jurisdiction. Storti *v.* Massachusetts, 183 U. S. 138, 143, 46 L. Ed. 120, reaffirmed in Bissert *v.* Hagan, 183 U. S. 694, 46 L. Ed. 393; Hall *v.* Johnson, 186 U. S. 480, 46 L. Ed. 1259.

72. Ex parte McCardle, 6 Wall. 318, 327, 18 L. Ed. 816.

73. In re Neagle, 135 U. S. 1, 42, 34 L. Ed. 55; Johnson *v.* Sayre, 158 U. S. 109, 39 L. Ed. 914.

There seems to be little doubt that, so far as it is essential to a proper decision of this case, the appeal requires us to examine into the evidence brought to sustain or defeat the right of the petitioner to his discharge. In re Neagle, 135 U. S. 1, 42, 34 L. Ed. 55.

74. Rev. Stat., § 763; Boske *v.* Comingore, 177 U. S. 459, 465, 44 L. Ed. 846.

75. See the title MANDAMUS.

76. Ex parte Crane, 5 Pet. 190, 8 L. Ed. 92.

its appellate jurisdiction, and that the writ will lie in a proper case to direct a subordinate federal court to decide a pending cause. The mandamus does not direct the inferior court how to proceed, but only that it must proceed according to its own judgment to a final determination, otherwise it cannot be reviewed in the appellate court.[77]

In What Cases Allowable.—But this court cannot grant mandamus in cases over which they do not possess appellate jurisdiction.[78] This court is empowered to issue writs of mandamus, "in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States."[79] Likewise a writ of mandamus may be used to compel an inferior tribunal to act on a matter within its jurisdiction, but not to control its discretion while acting, nor reverse its decisions when made.[80] Power to issue the writ of mandamus to the circuit courts is exercised by this court to compel the circuit court to proceed to a final judgment or decree in a cause, in order that this court may exercise the jurisdiction of review given by law.[81]

Adequacy of Other Remedies.—But after a case has proceeded to the filing of a declaration and a plea to the jurisdiction, or its equivalent, and a judgment is rendered in favor of the plea and a consequent dismissal of the action, this court has held, that the plaintiff is confined to his remedy by writ of error, and cannot have a mandamus, which only lies, as a general rule, where there is no other adequate remedy.[82]

5. Proceedings to Condemn Property of Insurrectionists.—Where a proceeding, under the act, "to confiscate property used for insurrectionary purposes" to enforce the forfeiture of real estate, was carried on in a circuit court by libel,

77. Marbury *v.* Madison, 1 Cranch 137, 175, 2 L. Ed. 60; Kendall *v.* United States, 12 Pet. 524, 622, 9 L. Ed. 1181; Insurance Co. *v.* Comstock, 16 Wall. 258, 270, 21 L. Ed. 493.

To enable this court then, to issue a mandamus, it must be shown to be an exercise of appellate jurisdiction, or to be necessary to enable them to exercise appellate jurisdiction. It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original. It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, yet to issue such a writ to an officer for the delivery of a paper is, in effect, the same as to sustain an original action for that paper, and, therefore, seems not to belong to appellate, but to original jurisdiction. Neither is it necessary in such a case as this to enable the court to exercise its appellate jurisdiction. The authority, therefore, given to the supreme court by the act establishing the judicial courts of the United States, to issue writs of mandamus to public officers, appears not to be warranted by the constitution; and it becomes necessary to inquire whether a jurisdiction so conferred can be exercised. Marbury *v.* Madison, 1 Cranch 137, 175, 2 L. Ed. 60, 73.

78. Ex parte Glaser, 198 U. S. 171, 49 L. Ed. 1000.

79. Act of September 24, 1789, c. 20, § 13, 1 Stat. 81; Rev. Stat., § 688; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 378, 37 L. Ed. 486.

80. Ex parte Burtis, 103 U. S. 238, 26 L. Ed. 392, citing Ex parte Denver, etc., R. Co., 101 U. S. 711, 25 L. Ed. 872; Ex parte Flippin, 94 U. S. 348, 24 L. Ed. 194.

The general power of the court to issue a writ of mandamus to an inferior court, to take jurisdiction of a cause when it refuses to do so, is settled by a long train of decisions. Ex parte Bradstreet, 7 Pet. 634, 8 L. Ed. 810; Life and Fire Ins. Co. *v.* Wilson, 8 Pet. 291, 8 L. Ed. 949; United States *v.* Gomez, 3 Wall. 752, 18 L. Ed. 212; Ex parte Roberts, 15 Wall. 384, 21 L. Ed. 131; Ex parte United States, 16 Wall. 699, 702, 21 L. Ed. 504; Insurance Co. *v.* Comstock, 16 Wall. 258, 271, 21 L. Ed. 493; Railroad Co. *v.* Wiswall, 23 Wall. 507, 22 L. Ed. 103; Ex parte Schollenberger, 96 U. S. 369, 24 L. Ed. 853; Harrington *v.* Holler, 111 U. S. 796, 28 L. Ed. 602; Ex parte Brown, 116 U. S. 401, 29 L. Ed. 676; Ex parte Parker, 120 U. S. 737, 30 L. Ed. 818; Ex parte Parker, 131 U. S. 221, 33 L. Ed. 123; In re Pennsylvania Co., 137 U. S. 451, 452, 453, 34 L. Ed. 738.

81. Insurance, etc., R. Co. *v.* Comstock, 16 Wall. 258, 270, 21 L. Ed. 493.

82. Ex parte Balt. & Ohio Railroad, 108 U. S. 566, 27 L. Ed. 812; Ex parte Railway Co., 101 U. S. 711, 25 L. Ed. 872; In re Pennsylvania Co., 137 U. S. 451, 453, 34 L. Ed. 738.

monition, claim interposed, and testimony taken in conformity with the practice of courts of admiralty, and without a jury anywhere, jurisdiction of the decree was taken by this court on appeal, but only for the purpose of reversing the decree as irregular, and directing a new trial.[83] The owner of property, for the forfeiture of which a libel is filed under the act of congress of July 17th, 1862, entitled "An act to suppress insurrection, to punish treason and rebellion, to seize and confiscate the property of rebels, and for other purposes," is entitled to appear and to contest the charges upon which the forfeiture is claimed, although he was at the time of filing the libel a resident within the confederate lines, and a rebel; and he can sue out a writ of error from this court to review any final decree of the court below condemning his property.[84]

6. Injunctions against Judgments of State Courts.[85]—This court has no jurisdiction on appeal to annul, revise, or change the decree of a state court of general jurisdiction, having complete control of the parties and of the subject matter of controversy. Where there is error in the proceedings of such a court, a review can be had in the appellate tribunals of the state.[86]

7. Review of Judgments on a Caveat.—Under the act of congress passed in pursuance of the constitution vesting in this court an appellate jurisdiction, a writ of error upon a caveat lies from the district court of the Kentucky district, to the supreme court of the United States.[87]

D. Appellate Jurisdiction over Particular Courts and Tribunals—1. Over District Courts—*a. Under Early Statutes.*—**District Court for Territory of Orleans.**—Under an early statute it was held, that an appeal lies from the district court of the United States, for the territory of Orleans, to this court.[88]

District Court for Maine.—But a writ of error did not lie directly from the supreme court of the United States to the district court of the district of Maine, although the latter has all the original jurisdiction of a circuit court.[89] In all cases where the district of Maine acts as a district court, the appeal was to the circuit court for the District of Massachusetts.[90]

When Sitting as Circuit Courts.—An act of congress, May, 1826, enacted "that appeals and writs of error shall lie from decisions in the district court for the northern district of New York, when exercising the powers of a circuit court; and which may be made by the circuit court for the southern district of said state, in causes heretofore removed to said circuit from the said district court, sitting as a circuit court, to the supreme court of the United States, in the same manner as from circuit courts." Under this statute it was held, that a district court of the United States, performing the appropriate duty of a district court, is not sitting as a circuit court, within the meaning of this statute, because it possesses the powers of a circuit court also.[91]

Where District Judge Exercises a Special Jurisdiction.—The general law allowing appeals did not authorize this court, by appeal or writ of error, to

83. Union Ins. Co. *v.* United States, 6 Wall. 759, 18 L. Ed. 879.

"The constitution gives to this court appellate jurisdiction in all cases of which the inferior courts of the United States have original jurisdiction, subject to such exceptions and regulations as congress shall make; and the act of 1803, 2 Stat. at Large, 244, provides, generally, for appeals from decisions in admiralty." Union Ins. Co. *v.* United States, 6 Wall. 759, 765, 18 L. Ed. 879.

84. McVeigh *v.* United States, 11 Wall. 259, 20 L. Ed. 80.

85. See the title JUDGMENTS AND DECREES.

86. Randall *v.* Howard, 2 Black 585, 17 L. Ed. 269.

87. Wilson *v.* Mason, 1 Cranch 45, 2 L. Ed. 29.

88. Morgan *v.* Callender, 4 Cranch 370, 2 L. Ed. 650.

89. United States *v.* Weeks, 5 Cranch 1, 3 L. Ed. 19.

An appeal from the district court of the district of Maine, in a case of admiralty jurisdiction, does not lie directly to the supreme court of the United States, but to the circuit court of the district of Massachusetts. Sloop Sally *v.* United States, 5 Cranch 372, 3 L. Ed. 129.

90. Sloop Sally *v.* United States, 5 Cranch 372, 3 L. Ed. 129.

91. Southwick *v.* Postmaster-General, 2 Pet. 442, 7 L. Ed. 479.

reverse the proceedings of the district judge, under a statute, passed May 5th, 1820, entitled "an act for the better organization of the treasury department." The act of congress gives to the district judge a special jurisdiction, which he may exercise at his discretion while holding the district court or at any other time. Ordinarily, as district judge, he has no chancery powers; but in proceeding under this statute he is governed by the rules of chancery, which apply to injunctions, except as to the answer of the government.[92]

Appeals by the Government.—The special jurisdiction created by the act of congress must be strictly exercised within its provisions. A particular mode is pointed out by which an appeal from the decision of the district judge may be taken by the person against whom proceedings have issued; consequently, it can be taken in no other way. No provision is made for an appeal by the government; of course none was intended to be given to it.[93] No appeal lies from the decree of a district judge of the United States on a petition presented by the defendant under the second section of the "Act providing for the better organization of the treasury department," where an order had issued by the solicitor of the treasury to the marshal of the United States, and the property of an alleged debtor, the petitioner, had been seized and was about to be sold to satisfy the alleged debt. No appeal by the government is authorized by the act, and the general law giving appeals does not embrace the case. The law is the same where an appeal was taken from the district judge to the circuit court, and an appeal taken thence to the supreme court, and where an appeal was taken to the supreme court, from the district judge of Louisiana, having the powers of a circuit court.[94]

b. *Under Circuit Court of Appeals Act*[95]—(1) *In Cases in Which the Jurisdiction of the Court Is in Issue.*—Section 5 of the act of March 3, 1891, provides

92. United States *v.* Cox, 11 Pet. 162, 9 L. Ed. 671.

93. United States *v.* Nourse, 6 Pet. 470, 8 L. Ed. 467, cited and confirmed in 9 L. Ed. 671, citing United States *v.* Goodwin, 7 Cranch 108, 3 L. Ed. 284.

The agent of the treasury of the United States, under the provisions of the act of congress passed on the 15th of May, 1820, entitled "An act for the better organization of the treasury department," issued a warrant to the marshal of the District of Columbia, under which the goods and chattels, lands and tenements of Joseph Nourse, late register of the treasury of the United States, were attached for the sum of eleven thousand, seven hundred and sixty-nine dollars and thirteen cents, alleged to be due to the United States upon a settlement of his accounts at the treasury of the United States. Mr. Nourse, under the authority of the fourth section of that act, applied to the district judge of the District of Columbia for an injunction to stay proceedings under the warrant, and alleging that a balance was due to him by the United States, as commissions for the expenditure of large sums of money for the United States, and as a compensation for other duties than those of register of the treasury, in the disbursement of the said sums of money, to which commissions and compensation he claimed to be entitled, according, as he alleged, to the established practice, and by the application to his claims of the same rules which had been applied to other and similar cases in the adjustment of accounts at the treasury department. The district judge granted an injunction to stay proceedings under the warrant; and the United States having filed an answer to the bill of Mr. Nourse, auditors were appointed to the district judge to audit and settle the accounts of Mr. Nourse with the United States. The auditors reported the sum of twenty-three thousand, five hundred and eighty-two dollars and seventy-two cents due to Mr. Nourse by the United States, for extra services rendered to the United States in receiving and disbursing public money. Allowing credit in the audit of the accounts of the sum of eleven thousand, seven hundred and sixty-nine dollars and thirteen cents, claimed by the United States, a balance of eleven thousand and eight hundred and thirteen dollars and fifty-nine cents would be due to Mr. Nourse. The district judge made a decree that the injunction should be perpetual. The United States appealed to the circuit court, and the decree for a perpetual injunction was affirmed in that court. The United States appealed to the supreme court; and on a motion by the appellee to dismiss the appeal for want of jurisdiction, it was held, that no appeal is given by the act of congress from a decree of the district judge to the circuit court. United States *v.* Nourse, 6 Pet. 470, 8 L. Ed. 467, cited and confirmed in 9 L. Ed. 671. See, also, United States *v.* Cox, 11 Pet. 162, 9 L. Ed. 671.

94. United States *v.* Cox, 11 Pet. 162, 9 L. Ed. 671, following United States *v.* Nourse, 6 Pet. 470, 8 L. Ed. 467.

95. For the cases construing these sections, see the next division treating of the

that appeals or writs of error may be taken from the district courts direct to the supreme court in any case in which the jurisdiction of the court is in issue; in such case, the question of jurisdiction alone shall be certified to the supreme court from the court below for decision.[96] The question of whether or not the district court acquired jurisdiction by a proper service of process involves the jurisdiction of the court within the meaning of § 5 of the act of March 3, 1891, and hence may be reviewed on a writ of error directly sued out to this court.[97]

(2) *In Prize Causes.*—Section 5 of the act of March 3, 1891, provides that appeals or writs of error may be taken from the district courts direct to the supreme court from the final sentences and decrees in prize causes.

(3) *In Cases of Conviction of Infamous Crimes.*—Appeals or writs of error may be taken from a district court direct to the supreme court in cases of conviction of a capital or otherwise infamous crime.

(4) *In Cases Involving the Construction or Application of the Federal Constitution.*—Section 5 of the act of March 3, 1891, provides that appeals or writs of error may be taken from the district courts direct to the supreme court in any case that involves the construction or application of the constitution of the United States.

Privilege of Senators and Representatives from Arrest.—Thus, the supreme court of the United States may issue a writ of error direct to the district court, in a case involving the construction and application of § 6, art. 1, of the constitution of the United States, providing that senators and representatives shall, in all cases except treason, felony, and breach of peace, be privileged from arrest during their attendance at the sessions of their respective houses, and in going to and returning from the same, provided these questions were raised in the court below.[98]

(5) *In Cases Involving the Constitutionality of Any Law of the United States, or the Validity or Construction of Treaties.*—Section 5 of the act of March 3, 1891, provides that appeals or writs of error may be taken from the district court direct to the supreme court in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority, is drawn in question.

(6) *In Cases Involving the Constitutionality of State Laws and Constitutions.*—Section 5 of the act of March 3, 1891, provides that appeals or writs of error may be taken from the district court direct to the supreme court in any case in which the constitution or law of any state is claimed to be in contravention of the constitution of the United States.

(7) *Appeals by United States from District Court for Florida.*—There is no doubt that this enactment was intended to supersede previous general provisions, and to establish in what cases and to what courts appeals might be taken from the district courts.[1] While the words "unless otherwise provided by law" as used in § 6 of the act of March 3, 1891, providing that the circuit court of appeals shall exercise appellate jurisdiction to review final decisions in the district courts, etc., in all cases other than those provided for in the preceding section "unless otherwise provided by law," do not save every existing provision, or the act would fail of its purpose, yet they save some. And there is no case to which they can apply more clearly than one in which, by reason of its interest, the United States has manifested its will to submit to no judgment not sanctioned by its highest court. Accordingly an appeal will lie to this court on behalf of the

jurisdiction of this court over the circuit court.

96. In re Morrison, 147 U. S. 14, 37 L. Ed. 60.

97. Shepard *v.* Adams, 168 U. S. 618, 42 L. Ed. 602, distinguishing Smith *v.* McKay, 161 U. S. 355, 40 L. Ed. 731.

98. Burton *v.* United States, 196 U. S. 283, 49 L. Ed. 482, 25 Sup. Ct. Rep. 243, citing Horner *v.* United States, 143 U. S. 570, 36 L. Ed. 266.

1. The Paquete Habana, 175 U. S. 677, 686, 44 L. Ed. 320; United States *v.* Dalcour, 203 U. S. 408, 420, 51 L. Ed. 248.

United States under § 11 of the act of June 11, 1860, from an adverse decision of the United States district court in cases to establish land titles in Florida.[2]

c. *Review of Judgments of the District Court for Porto Rico.*—See post, "Over Supreme Court of Porto Rico and the United States District Court," III, D, 11.

d. *Judgments and Decrees of District Courts in Cases Transferred from Territorial Courts.*—The judgments or decrees of any district court, in cases transferred to it from the superior court of any territory, upon the admission of such territory as a state, under sections five hundred and sixty-seven and five hundred and sixty-eight, may be reviewed and reversed or affirmed upon writs of error sued out of, or appeals taken to, the supreme court, in the superior court of such territory. And the mandates and all writs necessary to the exercise of the appellate jurisdiction of the supreme court in such cases shall be directed to such district court, which shall cause the same to be duly executed and obeyed. Rev. Stat., § 704.

e. *Judgments and Decrees of District Court of Alaska.*—**In General.**—This court has jurisdiction to review the final judgments and decrees of the district court of Alaska.[3]

2. United States *v.* Dalcour, 203 U. S. 408, 51 L. Ed. 248.

3. "Under §§ 690, 691, 692, 695 and 699, of the Revised Statutes, this court has appellate jurisdiction to re-examine the final judgments of any circuit court, or of any district court acting as a circuit court, in civil actions, where the matter in dispute, exclusive of costs, exceeds the sum or value of $5,000; all final decrees of any circuit court, or of any district court acting as a circuit court, in cases of equity and of admiralty and maritime jurisdiction, within the same limit of amount involved; all final decrees of any district court in prize causes; all final judgments at law and final decrees in equity of any circuit court or of any district court acting as a circuit court, in any case touching patent rights or copyrights; in any civil action brought by the United States for the enforcement of any revenue law thereof; in actions against revenue officers; in cases brought on account of deprivation of rights of citizens or of rights under the constitution; and in suits for injuries by conspirators against civil rights. Under § 701 this court may affirm, modify or reverse any judgment, decree or order of a circuit court, or district court acting as a circuit court, or of a district court in prize causes, lawfully brought before it for review, or may direct such judgment, decree or order to be rendered, or such further proceedings to be had by the inferior court as the justice of the case may require. And it is argued that the words "as in other cases," in § 7 of the act of 1884 can mean nothing else than other cases of appeals from district courts and district courts acting as circuit courts; and that the right of appeal from the decrees of district courts is confined to prize causes under § 695. It is said that if there could be such a thing as an appeal from the district court of Alaska in an ordinary admiralty case direct to this court, this court would be obliged to try the case de novo; that the district court of Alaska, sitting as an admiralty court, would supply and take the place of a circuit court in admiralty sitting in appeal, although all the statutes authorizing district courts to exercise the functions of circuit courts expressly exclude the power of appeal; that the only foundation of a right of appeal from the Alaska court, based upon this right to exercise the jurisdiction of a circuit court, in § 692 of the Revised Statutes, and that only extends to the final decrees of such district court when exercising the jurisdiction of a circuit court, while the exercise of admiralty and maritime jurisdiction by the district court for Alaska was, by the act creating it and the Revised Statutes, the exercise of purely district court jurisdiction as such; nor could the Alaska court be supposed to have acted in the exercise of both jurisdictions, as the only admiralty and maritime jurisdiction which belongs to the circuit courts is appellate. But the district court of Alaska is not alone a district court of the United States, and a district court exercising circuit court powers; it is also a court of general law and equity jurisdiction. If the contention of petitioner were correct, any power of review in this court over judgments and decrees of the Alaska court in law and equity, except when entered as a circuit court, would be excluded. We do not think it was the intention of congress to give such finality to its judgments and decrees. It seems to us that the words "as in other cases" mean, as in similar cases from other courts; and we concur in the construction contended for on the part of the respondent, that the meaning of the provision is, that this court may review the final judgments or decrees of the district court of Alaska as in cases of the same kind from other courts." In re Cooper, 143 U. S. 472, 510, 36 L. Ed. 232. See Steamer Coquitlam *v.* United States, 163 U. S. 346, 41 L. Ed. 184.

The latter part of § 7 of the act of May

The act of February 16, 1875 (c. 77, § 1, 18 Stat. 315), applies to appeals taken from decrees of the district court of the United States for the district of Alaska sitting in admiralty, and we are therefore limited upon this appeal to a determination of the questions of law arising upon the record, and to such rulings of the court, excepted to at the time, as may be presented by a bill of exceptions prepared as in actions at law.[4] The act of congress (30 St., p. 728), providing for the transfer of all cases, civil and criminal, filed on appeal from the district court of the United States for the district of Alaska, in the United States circuit court of appeals for the ninth judicial district, and pending on appeal therein, on and prior to the 30th day of December, 1897, etc., is by its terms to operate only upon those cases of which the supreme court would have had jurisdiction under the law existing at the time the case was taken to the circuit court of appeals, if a proper appeal had been taken to the supreme court of the United States at the time the case was filed in the circuit court of appeals.[5]

2. OVER CIRCUIT COURTS—a. *Under Early Statutes*—(1) *In General.*—This court formerly had appellate jurisdiction over all final judgments and decrees of any circuit court, or of any district court acting as a circuit court, in civil actions where the matter in dispute exceeded the sum or value of five thousand dollars.[6] Express jurisdiction was conferred upon this court by the twenty-second section of the judiciary act to re-examine, upon writ of error, and reverse or affirm final judgments in civil actions rendered in a circuit court, where the matter in dispute exclusive of costs, exceeded the sum or value of two thousand dollars, whether the same was brought there by original process or was removed there from courts of the several states, or from a district court.[7] Where the circuit court of the United States proceeded to exercise jurisdiction under the twenty-third section of the act of May 31st, 1870, entitled "An act to enforce the rights of citizens of the United States to vote in the several states of this Union, and for other purposes," an appeal would lie to this court from its final decree.[8]

(2) *Cases Removed from District to Circuit Courts.*—According to the former decisions of this court, a writ of error does not lie to carry to this court a civil cause, which has been carried from the district to the circuit court, by writ of error.[9]

b. *By Direct Appeal*—(1) *Under Circuit Court of Appeals Act*—aa. *In General.*—By § 4 of the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, it was

17, 1884, 23 Stat. 24, 26, is as follows: "Writs of error in criminal cases shall issue to the said district court from the United States circuit court for the district of Oregon in the cases provided in chapter one hundred and seventy-six of the laws of eighteen hundred and seventy-nine; and the jurisdiction thereby conferred upon circuit courts is hereby given to the circuit court of Oregon. And the final judgments or decrees of said circuit and district court may be reviewed by the supreme court of the United States as in other cases." We are of opinion that the word circuit as here used refers to the circuit court of Oregon, and, for the purposes of the matter in hand, the clause may be read: "And the final judgments or decrees of said district court of Alaska may be reviewed by the supreme court of the United States as in other cases." In re Cooper, 143 U. S. 472, 509, 36 L. Ed. 232.

4. The Sylvia Handy, 143 U. S. 513, 515, 36 L. Ed. 246, citing In re Cooper, 143 U. S. 472, 36 L. Ed. 232.

5. Thorp *v.* Bonnifield, 177 U. S. 15, 44 L. Ed. 652, reaffirmed in Pacific Coast Steamship Co. *v.* Pande, 180 U. S. 636, 45 L. Ed. 709.

6. Rev. Stat., §§ 690, 691, 692, 18 Stat. 315; United States *v.* American Bell Telephone Co., 159 U. S. 548, 550, 551, 40 L. Ed. 255.

7. 1 Stat. at Large 84; New Orleans Railroad *v.* Morgan, 10 Wall. 256, 260, 19 L. Ed. 892.

8. Ex parte Warmouth, 17 Wall. 64, 21 L. Ed. 543.

9. United States *v.* Goodwin, 7 Cranch 108, 3 L. Ed. 284; United States *v.* Gordon, 7 Cranch 287, 3 L. Ed. 347; United States *v.* Tenbroek, 2 Wheat. 247, 4 L. Ed. 231; United States *v.* Barker, 2 Wheat. 395, 4 L. Ed. 271. (In this case the court said: "It appears not to have been the policy of the legislature at that time to subject the decisions of the district court, in civil cases at common law, to more than one re-examination in an appellate court.")

A writ of error does not lie to carry to the supreme court of the United States a civil cause which has been carried from

provided that "the review, by appeal, by writ of error or otherwise, from the existing circuit courts shall be had only in the supreme court of the United States, or in the circuit courts of appeals hereby established, according to the provisions of this act regulating the same."[10]

bb. *In What Cases Allowable*—aaa. *In Cases in Which the Jurisdiction of the Court Is in Issue*—aaaa. *In General.*—Section 5 of the act of March 3, 1891, provides that appeals or writs of error may be taken from the existing circuit courts direct to the supreme court in any case in which the jurisdiction of the court is in issue; in such case, the question of jurisdiction alone shall be certified to the supreme court from the court below for decision.[11] According to that provision the question involving the jurisdiction of the circuit court must have been in issue and decided against the party seeking to bring it before this court for determination, and must be certified for decision.[12]

bbbb. *Jurisdiction of Court as a Federal Court Must Be Involved.*—**In General.**—It is also settled that the question of jurisdiction thus to be certified is the jurisdiction of the circuit court as a court of the United States, and not in respect of its general authority as a judicial tribunal.[13] The act of March 3,

the district court to the circuit court by writ of error. United States *v.* Gordon, 7 Cranch 287, 3 L. Ed. 347, following United States *v.* Goodwin, 7 Cranch 108, 3 L. Ed. 284.

"It appears that no provision is made in the general act organizing the courts of the United States to authorize an appeal from the judgment or decree of the district court to the circuit court except in cases of admiralty and maritime jurisdiction. On the principle of the case of the United States *v.* Goodwin, 7 Cranch 108, 3 L. Ed. 284, the appeal in this case cannot be maintained. If it be a case in chancery, no provision is made in the general law to appeal such a case from the district to the circuit court." United States *v.* Nourse, 6 Pet. 470, 8 L. Ed. 467, cited and confirmed in 9 L. Ed. 671.

In cases at law removed from the district court to the circuit court, the judgment of the circuit court is final between the parties. It is otherwise in cases in equity, and of admiralty and maritime jurisdiction, and although the reason for this distinction may not be entirely obvious, yet it is our duty to conform to the provisions of the law; and this court have repeatedly decided that, in civil cases at law, the judgment of the circuit court is final where the case is removed by writ of error from the district court to the circuit court. The point was fully considered and decided in the case of The United States *v.* Goodwin (7 Cranch 108), and the opinion there given has been since reaffirmed in several cases. (7 Cranch 287; 2 Wheat. 248, 395.) The question must be regarded as too well settled to be now open for argument. Sarchet *v.* United States, 12 Pet. 143, 9 L. Ed. 1033.

10. United States *v.* Rider, 163 U. S. 132, 138, 41 L. Ed. 101.

11. Carey *v.* Houston etc., R. Co., 161 U. S. 115, 126, 40 L. Ed. 638, reaffirmed in Murphy *v.* Colorado Paving Co., 166 U. S. 719, 41 L. Ed. 1118; Darragh *v.* Manufacturing Co., 169 U. S. 735, 42 L. Ed. 1216; Blythe Co. *v.* Blythe, 172 U. S. 644, 43 L. Ed. 1183; Transportation Co. *v.* Mobile, 199 U. S. 604, 50 L. Ed. 330; In re Morrison, 147 U. S. 14, 37 L. Ed. 60; McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893; Schunk *v.* Moline, etc., Co., 147 U. S. 500, 503, 37 L. Ed. 255; In re Lennon, 150 U. S. 393, 37 L. Ed. 1120.

12. Maynard *v.* Hecht, 151 U. S. 324, 325, 38 L. Ed. 179, followed in Moran *v.* Hagerman, 151 U. S. 329, 38 L. Ed. 181.

In order to bring an appeal or writ of error directly to this court in a case in which the jurisdiction of the court is in issue, the jurisdiction of the circuit court must have been in issue in the case, and, as appeals or writs of error lie here only from final judgments or decrees, must have been decided against appellants; and the question of jurisdiction must have been certified. Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 179, 37 L. Ed. 1041.

13. Courtney *v.* Pradt, 196 U. S. 89, 49 L. Ed. 398, citing Blythe *v.* Hinckley, 173 U. S. 501, 43 L. Ed. 783; Mexican Central R. Co. *v.* Eckman, 187 U. S. 429, 47 L. Ed. 245; Louisville Trust Co. *v.* Knott, 191 U. S. 225, 48 L. Ed. 159; O'Neal *v.* United States, 190 U. S. 36, 47 L. Ed. 945; Bache *v.* Hunt, 193 U. S. 523, 525, 48 L. Ed. 774, reaffirmed in Fowler *v.* Osgood, 205 U. S. 535, 51 L. Ed. 919.

The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the circuit court as a federal court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other. This question was substantially so determined in Smith *v.* McKay, 161 U. S. 355, 357, 40 L. Ed. 731; Louisville Trust Co. *v.* Knott, 191 U. S. 225, 233, 48 L. Ed. 159, reaf-

1891, providing that a case may be brought to the supreme court in any case in which the jurisdiction of the court is in issue, means in any case where the ju-

firmed in Shoesmith *v.* Boot & Shoe Mfg. Co., 198 U. S. 582, 49 L. Ed. 1172.

In Blythe *v.* Hinckley, 173 U. S. 501, 506, 43 L. Ed. 783, this court said: "Appeals or writs of error may be taken directly from the circuit courts to this court in cases in which the jurisdiction of those courts is in issue, that is, their jurisdiction as federal courts, the question alone of jurisdiction being certified to this court. The circuit court held, that the remedy was at law and not in equity. That conclusion was not a decision that the circuit court had no jurisdiction as a court of the United States. Smith *v.* McKay, 161 U. S. 355, 40 L. Ed. 731; Blythe Co. *v.* Blythe, 172 U. S. 644, 43 L. Ed. 1183. The circuit court dismissed the bills on another ground, namely, that the judgments of the state courts could not be reviewed by that court on the reasons put forward. This, also, was not in itself a decision of want of jurisdiction because the circuit court was a federal court, but a decision that the circuit court was unable to grant relief because of the judgments rendered by those other courts. If we were to take jurisdiction on this certificate, we could only determine whether the circuit court had jurisdiction as a court of the United States, and as the decree rested on no denial of its jurisdiction as such, but was rendered in the exercise of that jurisdiction, it is obvious that this appeal cannot be maintained in that aspect." Louisville Trust Co. *v.* Knott, 191 U. S. 225, 235, 48 L. Ed. 159, reaffirmed in Shoesmith *v.* Boot & Shoe Mfg. Co., 198 U. S. 582, 49 L. Ed. 1172.

Parties to ancillary proceeding.—The jurisdiction of a circuit court of the United States was only questioned in respect of its authority under the established rules of practice as to bringing in parties to ancillary or pro interesse suo proceedings, and those governing courts of concurrent jurisdiction as between themselves. It was held, that this is not a question of jurisdiction which the act of March 3, 1891, provides may be certified to the supreme court of the United States directly. Bache *v.* Hunt, 193 U. S. 523, 48 L. Ed. 774, reaffirmed in Fowler *v.* Osgood, 205 U. S. 535, 51 L. Ed. 919.

"In Bache *v.* Hunt, 193 U. S. 523, 48 L. Ed. 774, Hunt, as receiver, filed an intervening petition for the reimbursement of certain amounts paid by him as receiver in the extinguishment of prior claims, which certain railroad bonds and stocks had been deposited to secure. A decree was made in his favor, and an appeal was taken to this court. It was said that 'the jurisdiction of the circuit court was only questioned in respect to its general authority as a judicial tribunal, and not in respect of its power as a court of the United States. The established rules of practice as to bringing in parties to ancillary or pro interesse suo proceedings, and those governing courts of concurrent jurisdiction as between themselves, were alone involved.' The appeal was dismissed." Board of Trade *v.* Hammond Elevator Co., 198 U. S. 424, 433, 49 L. Ed. 1111.

Equity jurisdiction of the court.—"The earliest reported case on this subject is that of the World's Columbian Exposition, 18 U. S. Appeals 42, in which the circuit court, sitting in equity, granted an injunction to prevent the opening of the exposition grounds on Sunday. On appeal to the circuit court of appeals the chief justice held, that as the power of the circuit court to hear the cause was not denied, the appellant contending only that the United States had not made a case cognizable in a court of equity, the jurisdiction of the circuit court was not in issue within the intent and meaning of the act. In Smith *v.* McKay, 161 U. S. 355, 40 L. Ed. 731, it was held, following the prior case, that the question whether the remedy was at law or in equity did not involve the jurisdiction of the Federal court as such, and the case was dismissed. A similar ruling was made in Blythe *v.* Hinckley, 173 U. S. 501, 43 L. Ed. 783." Board of Trade *v.* Hammond Elevator Co., 198 U. S. 424, 432, 49 L. Ed. 1111.

This court has no jurisdiction to review by direct appeal a decree of the circuit court of the United States dismissing a suit to quiet title for want of jurisdiction, the question being whether the proceedings in any or all of the suits, at law or in equity, in the state court afforded a defense (either by way of res adjudicata, or because of any control acquired by the state court over the subject matter), "to this bill in the circuit court of the United States, because this is not a question affecting the jurisdiction of that court, but is a question affecting the merits of the cause, and as such to be tried and determined by that court in the exercise of its jurisdiction. The circuit court of the United States cannot, by treating a question of merits as a question of jurisdiction, enable this court, upon a direct appeal on the question of jurisdiction only, to decide the question of merits, except in so far as it bears upon the question whether the court below had or had not jurisdiction of the case." Huntington *v.* Laidley, 176 U. S. 668, 679, 44 L. Ed. 630, distinguishing Blythe *v.* Hinckley, 173 U. S. 501, 43 L. Ed. 783, Mr. Justice Brewer dissenting.

Smith *v.* McKay, 161 U. S. 355, 357, 40 L. Ed. 731, was a suit in equity for an injunction to restrain the defendants from

risdiction of the circuit or district court of the United States, as such, is

using certain patented machines until they had fully paid the fees they had agreed to pay to the patentee. The defendants moved to dismiss the bill upon the ground that there was a plain, adequate, and complete remedy at law—thus raising only a question of equity jurisdiction. The motion to dismiss was denied. After final decree for the plaintiff, the case was brought directly to this court by appeal, and it was assigned for error that the circuit court erred in not dismissing the suit for want of jurisdiction. The position of the appellee in that case was that only questions of federal jurisdiction could be brought directly here; and that if the circuit court had jurisdiction of the parties and of the matters in dispute, the fact that the remedy of the plaintiff was at law, rather than in equity, raised no question of jurisdiction within the meaning of the fifth section of the judiciary act of March 3d, 1901, under which the appeal was taken. The court observed that the question had never been directly decided by it, but held that: "When the requisite citizenship of the parties appears, and the subject matter is such that the circuit court is competent to deal with it, the jurisdiction of that court attaches, and whether the court should sustain the complainant's prayer for equitable relief, or should dismiss the bill with leave to bring an action at law, either would be a valid exercise of jurisdiction. If any error were committed in the exercise of such jurisdiction, it could only be remedied by an appeal to the circuit court of appeals. 161 U. S. 355, 358." Louisville Trust Co. *v.* Knott, 191 U. S. 225, 233, 234, 48 L. Ed. 159, reaffirmed in Shoesmith *v.* Boot & Shoe Mfg. Co., 198 U. S. 582, 49 L. Ed. 1172.

Respective rights of receivers of state and federal courts.—"The cases were fully reviewed in Louisville Trust Co. *v.* Knott, 191 U. S. 225, 48 L. Ed. 159, in which the question involved was the respective rights of a receiver appointed by the state court and one appointed by the circuit court of the United States. It was held that the question was not one of jurisdiction within the meaning of the act of March 3, 1891, the court observing: 'The question of jurisdiction which the statute permits to be certified to this court directly must be one involving the jurisdiction of the circuit court as a federal court, and not simply its general authority as a judicial tribunal to proceed in harmony with established rules of practice governing courts of concurrent jurisdiction as between each other.'" Board of Trade *v.* Hammond Elevator Co., 198 U. S. 424, 433, 49 L. Ed. 1111.

Res adjudicata.—Where the circuit court dismisses a bill in equity on the ground that the judgments of the state courts could not be reviewed by that court, because the questions involved had been decided by their judgments, which could not be reviewed, this is not in itself a decision of want of jurisdiction because the circuit court is a federal court, but a decision that the circuit court was unable to grant relief because of the judgments rendered by those other courts. Blythe *v.* Hinckley, 173 U. S. 501, 43 L. Ed. 783, reaffirmed in Kittaning Coal Co. *v.* Zabriskie, 176 U. S. 681, 44 L. Ed. 637.

Summary jurisdiction of bankrupt courts.—According to the well-settled rule that the first of the classes of cases enumerated in § 5 of the judiciary act of March 3, 1891, only includes cases where the question is as to the jurisdiction of the United States courts as such, and the question has to be certified, a direct appeal cannot be taken to this court where the question is whether a summary proceeding in bankruptcy in a district court is proper to determine whether any adverse claim to the money was asserted at the time the petition was filed. Schweer *v.* Brown, 195 U. S. 171, 49 L. Ed. 144.

Exemption of bankrupt.—While an erroneous decision against a right of exemption asserted by a bankrupt, and a consequently erroneous decision holding that the property forms assets of the estate in bankruptcy, to be administered under the direction of the bankruptcy court, is subject to correction in the appropriate mode for the correction of errors, it does not create a question of jurisdiction proper to be passed upon by this court under the provisions of the act of March 3, 1891. Lucius *v.* Cawthon-Coleman Co., 196 U. S. 149, 49 L. Ed. 425, citing Denver First Nat. Bank *v.* Klug, 186 U. S. 203, 46 L. Ed. 1127.

Authority of state over trust estates.—Where a circuit court of the United States has jurisdiction of a cause on the grounds of diversity in citizenship of the parties to the suit, and appoints a receiver, the question of jurisdiction to administer a trust estate or whether a state court had prior authority over the trust estate involved in the litigation, raised by the intervention of a receiver appointed by the state court, cannot be certified directly to the supreme court of the United States as a case in which the jurisdiction of the court is in issue. Louisville Trust Co. *v.* Knott, 191 U. S. 225, 48 L. Ed. 159, reaffirmed in Shoesmith *v.* Boot & Shoe Mfg. Co., 198 U. S. 582, 49 L. Ed. 1172, explaining the action of this court in taking jurisdiction of Shields *v.* Coleman, 157 U. S. 168, 39 L. Ed. 660.

A case distinguished and explained.—This court in Shields *v.* Coleman, 157 U. S. 168, 177, 39 L. Ed. 660, assumed jurisdiction upon direct appeal from a circuit court in a case involving the question

in issue.[14] Questions of jurisdiction applicable to the state courts, as well as to the federal courts, are not within its scope.[15]

Service of Process.—There is a distinction, however, between these cases which turn upon questions arising after a valid service of process upon the defendant, with respect to the mode of procedure, or the conflicting claims of the state and federal courts, and certain other authorities which turn upon the validity of the service of process itself upon the defendants; in other words, which involve the jurisdiction of the court in any form over the defendant.[16]

cccc. *Jurisdiction over Separate and Distinct Cases.*—**In General.**—But the fifth section of the act of March 3, 1891, does not authorize a direct appeal to this court in a suit upon a question involving the jurisdiction of the circuit court over another suit previously determined in the same court. It is the jurisdiction of the court below over the particular case in which the appeal from the decree therein is prosecuted; that, being in issue and decided against the party raising it and duly certified, justifies such appeal directly to this court.[17] Since a bill

whether that court had authority to appoint a receiver of property which was at the time in the possession of a receiver appointed by a state court. As the federal court had, in that case, taken property out of the physical possession of a receiver of the state court, this court expressed its views upon the question whether the possession of the state court should have been disturbed by the federal court, and it rendered judgment accordingly. But the precise question here presented as to the jurisdiction of this court under the act of 1891, on direct appeal from the circuit court, was not there raised or considered. Louisville Trust Co. *v.* Knott, 191 U. S. 225, 236, 48 L. Ed. 159, reaffirmed in Shoesmith *v.* Boot & Shoe Mfg. Co., 198 U. S. 582, 49 L. Ed. 1172.

Jurisdiction of state court over foreign executor.—No appeal will lie from the decision of the circuit court, holding that a state court has no jurisdiction over a suit against a foreign executor, and the court is not bound to remand the case that the state court might determine that question. Courtney *v.* Pradt, 196 U. S. 89, 49 L. Ed. 398.

14. Mexican Cent. R. Co. *v.* Eckman, 187 U. S. 429, 47 L. Ed. 245, citing Smith *v.* McKay, 161 U. S. 355, 40 L. Ed. 731, Blythe *v.* Hinckley, 173 U. S. 501, 43 L. Ed. 783.

15. Board of Trade *v.* Hammond Elevator Co., 198 U. S. 424, 432, 49 L. Ed. 1111.

16. Board of Trade *v.* Hammond Elevator Co., 198 U. S. 424, 434, 49 L. Ed. 1111.

Where a judgment of a circuit court dismissed an action removed to it from a state court on the ground of absence of service on the defendant, and also on the ground that the plaintiff denied the validity of the attempt to remove, it was held, that it sufficiently appeared that want of jurisdiction of the court below as a federal court was the ground of the judgment. Remington *v.* Central Pacific R. Co., 198 U. S. 95, 49 L. Ed. 959, citing Excelsior Wooden Pipe Co. *v.* Pacific Bridge Co., 185 U. S. 282, 46 L. Ed. 910; Shepard *v.* Adams, 168 U. S. 618, 42 L. Ed. 602; Powers *v.* Chesapeake, etc., R. Co., 169 U. S. 92, 42 L. Ed. 673.

In Remington *v.* Central Pac. R. Co., 198 U. S. 95, 49 L. Ed. 959, validity of a summons from a state court, served upon a director of a railroad company, in a state other than that in which the company was incorporated, was questioned. The court denied a motion to set the service aside, whereupon the case was removed into the circuit court of the United States, and the defendant renewed its motion to set aside the summons. The motion was granted, and the action was dismissed for want of jurisdiction of the defendant. It was held, upon the authority of Shepard *v.* Adams, 168 U. S. 618, 42 L. Ed. 602, that this court had authority to review the judgment on writ of error. Followed in Board of Trade *v.* Hammond Elevator Co., 198 U. S. 424, 435, 49 L. Ed. 1111.

Jurisdiction over foreign corporations.—A judgment of the circuit court dismissing an appeal upon the ground that it had never acquired jurisdiction over a foreign corporation by proper service of process, involves the jurisdiction of the court within the meaning of the act of March 3, 1891. Shepard *v.* Adams, 168 U. S. 618, 42 L. Ed. 602; Remington *v.* Central Pac. R. Co., 198 U. S. 95, 49 L. Ed. 959; Board of Trade *v.* Hammond Elevator Co., 198 U. S. 424, 435, 49 L. Ed. 1111; Kendall *v.* American Automatic Loom Co., 198 U. S. 477, 49 L. Ed. 1133.

17. Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 37 L. Ed. 1041, reaffirmed in Carey *v.* Houston, etc., Ry. Co., 161 U. S. 115, 40 L. Ed. 638.

And we held in respect of the direct appeal to this court taken from the decree of the circuit court in this cause that such an appeal was not authorized simply because the jurisdiction of the circuit court over another suit, previously determined by the same court, might be involved, and we said: "It is the jurisdiction of the court below over the par-

in equity to impeach and set aside a decree of foreclosure of a railroad mortgage, on the ground of fraud, and to prevent the consummation of a scheme for the reorganization, is a separate and distinct case from the foreclosure suit, no question of jurisdiction over that suit, or over the rendition of the decree passed therein, can be availed of to sustain an appeal to this court from a decree of a circuit court under the provisions of the first class of the six cases specified in § 5 of the act of March 3, 1891.[18]

dddd. *Jurisdiction Challenged Must Be That of Court Rendering Decree.*—A case cannot be brought here by direct appeal from the circuit court as a case in which the jurisdiction of the court is in issue, where the jurisdiction challenged is not that of the court rendering the decree from which the appeal is taken, but is that of the court rendering the former decree, which is set up in the complaint as the basis of the title sued upon.[19]

eeee. *What Are Questions of Jurisdiction?*—aaaaa. *In General.*—Where a case is brought to the United States supreme court from a circuit court under the first subdivision of § 5 of the judiciary act of March 3, 1891, providing that that may be done in any case in which the jurisdiction of the court is in issue, the whole case is not open for review but only the question of jurisdiction.[20] In order

ticular case in which the appeal from the decree therein is prosecuted, that, being in issue and decided against the party raising it and duly certified, justifies such an appeal directly to this court. This suit to impeach the decree of May 4, 1888, and to prevent the consummation of the alleged plan of reorganization, was a separate and distinct case, so far as this inquiry is concerned, from a suit to foreclose the mortgages on the railroad property; and no question of jurisdiction over the foreclosure suit or the rendition of the decree passed therein can be availed of to sustain the present appeal from the decree in this proceeding." Carey *v.* Houston, etc., R., 150 U. S. 170, 37 L. Ed. 1041, reaffirmed in Carey *v.* Houston, etc., Ry. Co., 161 U. S. 115, 40 L. Ed. 638, reaffirmed in Murphy *v.* Colorado Paving Co., 166 U. S. 719, 41 L. Ed. 1188; Darragh *v.* Manufacturing Co., 169 U. S. 735, 42 L. Ed. 1216.

Jurisdiction over habeas corpus.—The Toledo and Ann Arbor Railway Company, which connected with Michigan Southern Railway in the carrying on of interstate commerce, filed a bill in the circuit court to restrain the Michigan Southern from refusing to receive its cars used in such commerce, and discriminating against it, on the ground that it employed engineers who were not members of the Brotherhood of Locomotive Engineers. An injunction was issued, and a few days later the Lake Shore applied for an order of attachment against some of its employees who had refused to haul cars and perform service for them, thus hindering them from complying with the order of the court in respect to the Toledo and Ann Arbor Company. A rule to show cause was issued, and such proceedings had thereunder that one of the employees was adjudged guilty of contempt, was fined, and was ordered to be committed until payment of the fine. This employee applied to the circuit court for a writ of habeas corpus. The petition, after setting the facts forth, claimed that the circuit court had no jurisdiction of the cause in which the original order of injunction had been issued, for reasons stated, and further, that it had no jurisdiction of the petitioner's person, because he was no party to that suit, and had not been served with process. The application was denied and the petition dismissed, from which judgment the petitioner appealed to this court. Held: "The jurisdiction of the circuit court over the petition for habeas corpus was not in issue, and a decision in respect thereof was not rendered against appellant, but, on the contrary, jurisdiction was entertained. Granted, as contended, that the jurisdiction to discharge the prisoner in this case depended upon a want of jurisdiction to commit him in the other, yet the jurisdiction invoked by the petitioner was the jurisdiction to remand as well as to discharge, or, in other words, the power to hear and determine whether he was lawfully held in custody or not. This appeal, therefore, as ruled in Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 37 L. Ed. 1041, and for the reasons therein given, does not come within the first of the classes specified in the fifth section." In re Lennon, 150 U. S. 393, 400, 37 L. Ed. 1120.

18. Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 37 L. Ed. 1041.

19. Empire, etc., Min. Co. *v.* Hanley, 205 U. S. 225, 51 L. Ed. 779, citing In re Lennon, 150 U. S. 393, 37 L. Ed. 1120.

20. Mexican Central R. Co. *v.* Eckman, 187 U. S. 429, 47 L. Ed. 245, citing Horner *v.* United States, 143 U. S. 570, 36 L. Ed. 266; United States *v.* Jahn, 155 U. S. 109, 39 L. Ed. 87; In re Lehigh, etc., Mfg. Co., 156 U. S. 322, 39 L. Ed. 438; Huntington *v.* Laidly, 176 U. S. 668, 44 L. Ed. 630; Wecker *v.* National Enamel-

to bring a case within the first class, not only must it appear of record that a question of jurisdiction was involved in the decision below, but that question, and that alone, must be certified to this court. If both a question of jurisdiction and other questions were before the court below, and a writ of error is allowed in the usual and general form to review its judgment, without certifying or specifying the question of jurisdiction, this court cannot take jurisdiction under this clause of the statute.[21] The power to certify to the supreme court of the United States other than jurisdictional question is vested only in the circuit court of appeals.[22]

bbbbb. *Specific Applications of General Rule.*—**Diverse Citizenship.**—The question whether a circuit court has jurisdiction of an action by a citizen of one state against a citizen of another state brought under a state statute authorizing a creditor in certain cases to bring an action on a claim before it is due, and to have an attachment against the property of the debtor, gives this court jurisdiction under § 5 of the circuit court of appeals act of March 3, 1891.[23]

Action of Court in Allowing Attorney's Fees.—Of course an assignment of error to the action of the circuit court in allowing an attorney's fee, presents no question of jurisdiction, and therefore the action of the circuit court in this regard cannot be reviewed.[24]

Jurisdiction Regardless of Amount.—The question whether the circuit courts of the United States have jurisdiction of actions in which the United States is plaintiff, without regard to the sum or value in dispute, may be certified up under the fifth section of the Act of March 3, 1891, c. 517, 2 Stat. 826.[25]

Jurisdiction of Cause Removed from State Court.—Where the plaintiff contends that the circuit court of the United States has no jurisdiction to entertain the case and to render final judgment complained of, because the case has not been duly removed into the court from the state court in which it has been commenced, the question whether the circuit court of the United States has any jurisdiction whatever of the case is thus in issue, and if the question of its jurisdiction has been duly certified, the case is rightly brought from the circuit court of the United States directly to this court under the act of March 3, 1891, c. 517, § 5, upon the question of jurisdiction only.[26]

ing Co., 204 U. S. 176, 51 L. Ed. 430; Excelsior Wooden Pipe Co. *v.* Pacific Bridge Co., 185 U. S. 282, 46 L. Ed. 910, citing and approving Shields *v.* Coleman, 157 U. S. 168, 39 L. Ed. 660.

It is essential that the question of jurisdiction alone should be certified to this court from the trial court. Shields *v.* Coleman, 157 U. S. 168, 176, 39 L. Ed. 660; Maynard *v.* Hecht, 151 U. S. 324, 38 L. Ed. 179.

Where a case is brought from the circuit to the supreme court under the first subdivision of § 5 of the judiciary act of March 3, 1891, providing that this may be done in any case in which the jurisdiction of the court is in issue, the question of jurisdiction alone is certified to that court from the court below for decision. Mexican Central R. Co. *v.* Eckman, 187 U. S. 429, 47 L. Ed. 245, citing Smith *v.* McKay, 161 U. S. 355, 40 L. Ed. 731; Pirie *v.* Hinckley, 173 U. S. 501, 43 L. Ed. 783.

After the dismissal of a bill by the circuit court, on the ground of lack of jurisdiction, since no diversity of citizenship appears, and the question of jurisdiction is certified to this court, on an appeal under the first of the class of cases enumerated in § 5 of the judiciary act of March 3, 1891, we are confined to a consideration of the question of jurisdiction alone. Hennessy *v.* Richardson Drug Co., 189 U. S. 25, 47 L. Ed. 697.

21. Maynard *v.* Hecht, 151 U. S. 324, 38 L. Ed. 179; Moran *v.* Hagerman, 151 U. S. 329, 38 L. Ed. 181; Colvin *v.* Jacksonville, 157 U. S. 368, 39 L. Ed. 736; Davis Mfg. Co. *v.* Barber, 157 U. S. 673, 39 L. Ed. 853; The Bayonne, 159 U. S. 687, 40 L. Ed. 306; Van Wagenen *v.* Sewall, 160 U. S. 369, 40 L. Ed. 460; Chappell *v.* United States, 160 U. S. 499, 507, 40 L. Ed. 510, reaffirmed in Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209.

22. Arkansas *v.* Schlierholz, 179 U. S. 598, 45 L. Ed. 335, reaffirmed in Richards *v.* Michigan, etc., R. Co., 186 U. S. 479, 46 L. Ed. 1259, citing and approving Bardes *v.* Hawarden First Nat. Bank, 175 U. S. 526, 528, 44 L. Ed. 261.

23. Schunk *v.* Moline, etc., Co., 147 U. S. 500, 37 L. Ed. 255.

24. Schunk *v.* Moline, etc., Co., 147 U. S. 500, 37 L. Ed. 255.

25. United States *v.* Sayward, 160 U. S. 493, 40 L. Ed. 508.

26. Powers *v.* Chesapeake, etc., R. Co.,

Sufficiency of Service of Process.—The question of whether or not the district court acquired jurisdiction by a proper service of process involves the jurisdiction of the court within the meaning of § 5 of the act of March 3, 1891, and hence may be reviewed on a writ of error directly sued out to this court.[27]

Equity Jurisdiction of Circuit Court.—Appeals or writs of error may be taken directly from the circuit courts to this court only in cases in which the jurisdiction of those courts is in issue, that is, their jurisdiction as federal courts, the question alone of jurisdiction being certified to this court. Where the circuit court holds that the remedy is at law and not in equity, that construction is not a decision that the circuit court had no jurisdiction as a court of the United States.[28] Whether the bill shows facts sufficient to invoke the consideration of a court of equity is not such a question of jurisdiction as is referred to in the judiciary act of March 3, 1891, c. 517, and we have therefore no concern with that question.[29]

Adequate Remedy at Law.—Where the circuit court has jurisdiction of the parties and of the matters in dispute, the fact that it is contended that it has no jurisdiction on its equity side because the complainant has a plain, adequate and complete remedy at law, raises no question of jurisdiction within the meaning of the act of March 3, 1891, providing that "in any case in which the question of the jurisdiction of the court is in issue, in such case the question of jurisdiction alone shall be certified to the supreme court from the court below for decision." Because whether a case has been made out by the plaintiff in equity or at law is not a question that puts in issue the jurisdiction of the court in the sense in which that phrase is used in the judiciary act.[30]

Demurrer to Bill in Equity.—Where the only question of jurisdiction is raised by a demurrer to a petition, which is upon two grounds; first, that a proper and final decree had been made adjudicating all the issues in the cause; and second, that the court had no power or jurisdiction to grant the petitioners relief, this is in substance only a general demurrer to the bill for want of equity, and presents no question of jurisdiction within the meaning of the act of March 3, 1891.[31]

Judgment of Dismissal for Want of Jurisdiction.—The provisions of the

169 U. S. 92, 42 L. Ed. 673, distinguishing Smith *v.* McKay, 161 U. S. 355, 40 L. Ed. 731.

27. Shepard *v.* Adams, 168 U. S. 618, 42 L. Ed. 602, distinguishing Smith *v.* McKay, 161 U. S. 355, 40 L. Ed. 731.

28. Smith *v.* McKay, 161 U. S. 355, 40 L. Ed. 731; Blythe Co. *v.* Blythe, 172 U. S. 644, 43 L. Ed. 1183; Blythe *v.* Hinckley, 173 U. S. 501, 506, 43 L. Ed. 783, reaffirmed in Kittaning Coal Co. *v.* Zabriskie, 176 U. S. 681, 44 L. Ed. 637; Illinois Central R. Co. *v.* Adams, 180 U. S. 28, 45 L. Ed. 410; Giles *v.* Harris, 189 U. S. 475, 47 L. Ed. 909; Louisville Trust Co. *v.* Knott, 191 U. S. 225, 48 L. Ed. 159.

If complainant brings an action at law, and the question of federal jurisdiction is in issue, or if this decree should be hereafter reversed and federal and equity jurisdiction sustained, it will be time enough if final judgment or decree passes against defendant in the circuit court for the question of jurisdiction to be certified. United States *v.* Jahn, 155 U. S. 109, 39 L. Ed. 87; Smith *v.* McKay, 161 U. S. 355, 40 L. Ed. 731; New Orleans *v.* Emsheimer, 181 U. S. 153, 154, 45 L. Ed. 794.

29. 26 Stat. 826, § 5; Smith *v.* McKay, 161 U. S. 355, 40 L. Ed. 731; Building and Loan Association *v.* Price, 169 U. S. 45, 46, 42 L. Ed. 655. Smith *v.* McKay, is reviewed at length and affirmed in Louisville Trust Co. *v.* Knott, 191 U. S. 225, 48 L. Ed. 159.

30. Smith *v.* McKay, 161 U. S. 355, 40 L. Ed. 731, citing Murphy *v.* Colorado Paving Co., 166 U. S. 719, 41 L. Ed. 1188; World's Columbian Exposition Case, 18 U. S. App. 42, reaffirmed in Black *v.* Black, 163 U. S. 678, 41 L. Ed. 318; Tucker *v.* McKay, 164 U. S. 701, 41 L. Ed. 1180, distinguished in Shepard *v.* Adams, 168 U. S. 618, 42 L. Ed. 602. In this case the court said: "When the requisite citizenship of the parties appears, and the subject matter is such that the circuit court is competent to deal with it, the jurisdiction of that court attaches, and whether the court should sustain the complainant's prayer for equitable relief, or should dismiss the bill with leave to bring an action at law, either would be a valid exercise of jurisdiction. If any error were committed in the exercise of such jurisdiction, it could only be remedied by an appeal to the circuit court of appeals."

31. Van Wagenen *v.* Sewall, 160 U. S. 369, 40 L. Ed. 460.

act of February 25, 1889, c. 236, 25 Stat. 693, entitled an act to provide for writs of error or appeals to the supreme court of the United States in all cases involving the jurisdiction of the courts below, and the provisions of the act of March 3, 1891, c. 517, 26 Stat. 826, providing that appeals or writs of error may be taken from the circuit courts direct to the supreme court in any case in which the jurisdiction of the court is in issue, "plainly disclose the intent of congress that a party whose suit has been dismissed by a circuit court for want of jurisdiction shall have the right to have such judgment reviewed by this court. And we have accordingly heretofore held that the action of the circuit courts in such cases is subject to our revision."[32]

And although the question whether the amount in controversy was sufficient to give the circuit court jurisdiction is purely one of fact, and although that question was not submitted to the jury, but was passed on by the court upon affidavit, upon a writ of error, this court may nevertheless consider the facts disclosed by the affidavits, and is not restricted to the errors of law shown by the record in determining whether the judgment of the circuit court, dismissing the suit for want of jurisdiction, was warranted by the facts of the case as they are disclosed in the record.[33]

Vacation of Judgments and Decrees.—Where in a petition for a rehearing it is alleged that a final decree was rendered, fully and finally disposing of the cause, which exhausted all the jurisdiction of the court, and that it was beyond its power and jurisdiction to vacate such former decree by subsequent proceedings, it would seem that the question thus raised of the authority to vacate and set aside a previous decree of the court involved a power to exercise the jurisdiction already vested rather than the question of jurisdiction itself, within the meaning of the act of March 3, 1891.[34]

32. Williams *v.* Nottawa, 104 U. S. 209, 26 L. Ed. 719; Barry *v.* Edmunds, 116 U. S. 550, 29 L. Ed. 729; Hartog *v.* Memory, 116 U. S. 588, 29 L. Ed. 725; Morris *v.* Gilmer, 129 U. S. 315, 32 L. Ed. 690; Deputron *v.* Young, 134 U. S. 241, 33 L. Ed. 923; Lehigh Min., etc., Co. *v.* Kelly, 160 U. S. 327, 40 L. Ed. 444; Wetmore *v.* Rymer, 169 U. S. 115, 118, 42 L. Ed. 682; Merritt *v.* Bowdoin College, 169 U. S. 551, 42 L. Ed. 850.

A final decree of the circuit court dismissing for want of jurisdiction a cause under the act of March 3, 1875, c. 137, § 5 which "provides that if in any suit commenced in a circuit court of the United States, it appear to the satisfaction of that court, at any time after the suit is brought, 'that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court,' that court shall dismiss the suit," is reviewable by this court under the act of March 3, 1891, c. 517, § 5. Huntington *v.* Laidley, 176 U. S. 668, 44 L. Ed. 630, citing Wetmore *v.* Rymer, 169 U. S. 115, 42 L. Ed. 682.

The grounds upon which a judge of a circuit court of the United States bases his decision dismissing the suit upon exceptions to allegations of damage for breach of a contract, that the damages had been claimed and magnified fraudulently for the purpose of giving the United States circuit court jurisdiction, when in truth they were less than $2,000, are re-examinable in the supreme court of the United States on writ of error. Globe Refining Co. *v.* Landa Cotton Oil Co., 190 U. S. 540, 47 L. Ed. 1171, citing Wetmore *v.* Rymer, 169 U. S. 115, 42 L. Ed. 682.

33. Wetmore *v.* Rymer, 169 U. S. 115, 42 L. Ed. 682.

Where an action is dismissed by the circuit court by the authority given by § 5 of the act of March 3, 1875, in which it is provided that "if in any suit commenced in a circuit court * * * it shall appear to the said circuit court, at any time after such suit has been brought * * * that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court, or that the parties to such suit have been improperly or collusively made or joined either as plaintiffs or defendants for the purpose of creating a case cognizable * * * under this act," the court shall dismiss the suit, the propriety of the dismissal may be brought here for review by virtue of § 5 of the act of March 3, 1891. "The order of the court is subject to review in this court in respect of the rulings of law and findings of fact upon the evidence. Wetmore *v.* Rymer, 169 U. S. 115, 42 L. Ed. 682." Smithers *v.* Smith, 204 U. S. 632, 640, 51 L. Ed. 656.

34. Van Wagenen *v.* Sewall, 160 U. S. 369, 40 L. Ed. 460; Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 37 L. Ed. 1041; Water Co. *v.* Babcock, 173 U. S. 702, 43 L. Ed. 1186.

Discretionary Matters.—Upon an appeal to this court from the decision of the circuit court under this section mere matters of procedure, such as the granting or refusing of motions for new trials, and questions respecting amendments to the pleadings, even if such questions were reviewable here generally on a writ of error, are not reviewable in this proceeding, because they do not go to the question of jurisdiction in the court below, which is the only question we can consider upon the writ of error.[35]

ffff. *Necessity for Finality of Judgment.*—It was settled, soon after the passage of the act of 1891, that cases in which the jurisdiction of the district or circuit courts was in issue could be brought to this court only after final judgment. The subject was carefully considered in the opinion of Mr. Justice Lamar, and the conclusion reached was in accordance with the general rule that a case cannot be brought to this court in parcels.[36] There is no provision in the act which can be

35. Mexican Central R. Co. *v.* Pinkney, 149 U. S. 194, 37 L. Ed. 699.

36. McLish *v.* Roff, 141 U. S. 661, 666, 35 L. Ed. 893; Chicago, etc., R. Co. *v.* Roberts, 141 U. S. 690, 35 L. Ed. 905; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 378, 37 L. Ed. 486; Hurlbut Land, etc., Co. *v.* Truscott, 165 U. S. 719, 41 L. Ed. 1185; Illinois Central R. Co. *v.* Brown, 156 U. S. 386, 39 L. Ed. 461; Wecker *v.* National Enameling Co., 204 U. S. 176, 51 L. Ed. 430; Reaves *v.* Oliver, 168 U. S. 704, 42 L. Ed. 1212; Lubin *v.* Edison, 195 U. S. 624, 625, 49 L. Ed. 349; Wirgman *v.* Persons, 196 U. S. 636, 49 L. Ed. 629; Farmers' Bank *v.* Roselle, 172 U. S. 641, 43 L. Ed. 1180; Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179; Perea *v.* Perea de Harrison, 195 U. S. 623, 49 L. Ed. 349; International Trust Co. *v.* Weeks, 193 U. S. 667, 48 L. Ed. 839; Johnson *v.* Thomas, 197 U. S. 619, 49 L. Ed. 909; Shoesmith *v.* Boot & Shoe Mfg. Co., 198 U. S. 582, 49 L. Ed. 1172; Wishkah Boom Co. *v.* United States, 202 U. S. 613, 50 L. Ed. 1171; Smith *v.* Iverson, 203 U. S. 586, 51 L. Ed. 329; Ex parte National Enameling Co., 201 U. S. 156, 161, 50 L. Ed. 707; Bowker *v.* United States, 186 U. S. 135, 138, 46 L. Ed. 1090, reaffirmed in Smith *v.* Iverson, 203 U. S. 586, 51 L. Ed. 329; German Nat. Bank *v.* Speckert, 181 U. S. 405, 409, 45 L. Ed. 926; United States *v.* Rider, 163 U. S. 132, 41 L. Ed. 101; Blythe *v.* Hinckley, 173 U. S. 501, 506, 43 L. Ed. 783, reaffirmed in Kittaning Coal Co. *v.* Zabriskie, 176 U. S. 681, 44 L. Ed. 637; Railroad Co. *v.* Wiswall, 23 Wall. 507, 22 L. Ed. 103; Richmond, etc., R. Co. *v.* Thouron, 134 U. S. 45, 33 L. Ed. 871; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 40 L. Ed. 536.

"We have heretofore determined that review by certificate is limited by the act of March 3, 1891, to certificates by the circuit courts, made after final judgment, of a question in issue as to their own jurisdiction; and to certificates by the circuit courts of appeal of questions of law in relation to which the advice of this court is sought. United States *v.* Rider, 163 U. S. 132, 41 L. Ed. 101." Blythe *v.* Hinckley, 173 U. S. 501, 506, 43 L. Ed. 783, reaffirmed in Kittaning Coal Co. *v.* Zabriskie, 176 U. S. 681, 44 L. Ed. 637.

Order of remand.—It has been adjudged that a writ of error or appeal to this court under § 5, in a case concerning the jurisdiction of the circuit court, does not lie until after final judgment, and cannot, therefore, be taken from an order of the circuit court remanding a case to a state court, there being, as said by Mr. Justice Lamar, speaking for this court, "no provision in the act, which can be construed into so radical a change in all the existing statutes and settled rules of practice and procedure of federal courts, as to extend the jurisdiction of the supreme court to the review of jurisdictional cases in advance of the final judgments upon them." McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893; Railroad Co. *v.* Wiswall, 23 Wall. 507, 22 L. Ed. 103; Richmond, etc., R. Co. *v.* Thouron, 134 U. S. 45, 33 L. Ed. 871; Chicago, etc., R. Co. *v.* Roberts, 141 U. S. 690, 35 L. Ed. 905; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 40 L. Ed. 536.

Where after removal, plaintiff files his motion to remand the case to the state court, on the ground that there was not in the case a controversy between citizens of different states and no separable controversy between the plaintiff and the defendant within the meaning of the removal act, but the court, upon hearing the motion, refuses to remand the cause, and afterward, plaintiff electing to stand upon his motion to remand, and refusing to recognize the jurisdiction of the United States court or to proceed with the prosecution of his case therein, upon motion of the defendant the court orders the case to be dismissed, and renders judgment that the plaintiff take nothing by the suit, and that the defendants go hence without day and recover their costs against the plaintiff, this is such a final judgment that the question of jurisdiction may be certified to this court under § 5 of the circuit court of appeals act. Wecker *v.* National Enameling Co., 204 U. S. 176, 51 L. Ed. 430, citing McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893.

construed into so radical a change in all the existing statutes and settled rules of practice and procedure of federal courts as to extend the jurisdiction of the supreme court to review of jurisdictional cases in advance of the final judgments upon them.[37] The rule that under the act of March 3rd, 1891, the trial court cannot send up a question by certificate, as to its own jurisdiction until after the rendition of final judgment, is applicable to a question arising under the bankruptcy act of July 1, 1898.[38]

gggg. *What Judge May Certify.*—The district judge, who as a judge of the circuit court lawfully allowed the appeal and signed the citation, is also authorized to certify to this court a question decided by the circuit judge, or allow an appeal from his decree; because the district judge is a judge of the circuit court of the United States, and as such has authority to allow the appeal and to sign the citation, even if the decree was rendered by the circuit judge.[39]

hhhh. *The Certificate*—aaaaa. *In General.*—The rules in relation to certificates of division of opinion in civil cases under §§ 650, 652, 693, of the Revised Statutes will be applied in the certification of cases under this statute.[40] In the language of Mr. Chief Justice Fuller, the intention of congress as to the certification mentioned in that section, and also in section six in relation to the circuit courts of appeals, is to be arrived at in the light of the rules theretofore prevailing in reference to certificates on division of opinion.[41]

bbbbb. *Necessity for.*—The general rule is that the certificate is an absolute prerequisite to the exercise of jurisdiction here under this section,[42] and if it be

37. McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893, reaffirmed in Chicago, etc., R. Co. *v.* Roberts, 141 U. S. 690, 35 L. Ed. 905; Smith *v.* Iverson, 203 U. S. 586, 51 L. Ed. 329; Bowker *v.* United States, 186 U. S. 135, 46 L. Ed. 1090.

38. Bardes *v.* Hawarden First Nat. Bank, 175 U. S. 526, 44 L. Ed. 261, citing McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893.

"It was early held under that act (act of March 3rd, 1891), McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893, that appeals or writs of error in cases in which the jurisdiction of the court was in issue could only be taken directly to this court after final judgment; and subsequently in United States *v.* Rider, 163 U. S. 132, 41 L. Ed. 101, that review by appeal, writ of error, or otherwise, must be as prescribed by that act, and that the use of certificate was limited by it to the certificate by the courts below, after final judgment, of questions made as to their own jurisdiction, and to the certificate by the circuit courts of appeals of questions of law in relation to which the advice of this court was sought as therein provided. We there held that the act of March 3, 1891, covered the whole subject matter, and furnished the exclusive rule in respect of appellate jurisdiction, on appeal, writ of error or certificate." Bardes *v.* Hawarden First Nat. Bank, 175 U. S. 526, 528, 44 L. Ed. 261.

"The bankruptcy act has made no change in this regard, and as this case has not gone to judgment, the certificate must be dismissed." Bardes *v.* Hawarden First Nat. Bank, 175 U. S. 526, 528, 44 L. Ed. 261.

39. Huntington *v.* Laidley, 176 U. S. 668, 44 L. Ed. 630, citing Rodd *v.* Heartt, 17 Wall. 354, 21 L. Ed. 627.

40. Maynard *v.* Hecht, 151 U. S. 324, 38 L. Ed. 179; Moran *v.* Hagerman, 151 U. S. 329, 38 L. Ed. 181.

41. Rev. Stat., §§ 650, 651, 652, 693, 697; In re Lehigh, etc., Mfg. Co., 156 U. S. 322, 327, 39 L. Ed. 438.

42. Maynard *v.* Hecht, 151 U. S. 324, 38 L. Ed. 179; Courtney *v.* Pradt, 196 U. S. 89, 49 L. Ed. 398; Ansbro *v.* United States, 159 U. S. 695, 40 L. Ed. 310; Filhiol *v.* Torney, 194 U. S. 356, 48 L. Ed. 1014; Excelsior Wooden Pipe Co. *v.* Pacific Bridge Co., 185 U. S. 282, 284, 46 L. Ed. 910; Colvin *v.* Jacksonville, 157 U. S. 368, 39 L. Ed. 736; Van Wagenen *v.* Sewall, 160 U. S. 369, 40 L. Ed. 460; Chappell *v.* United States, 160 U. S. 499, 507, 40 L. Ed. 510; Davis *v.* Geissler, 162 U. S. 290, 40 L. Ed. 972; Moran *v.* Hagerman, 151 U. S. 329, 38 L. Ed. 181; Davis, Mfg. Co. *v.* Barber, 157 U. S. 673, 39 L. Ed. 853.

In Maynard *v.* Hecht, 151 U. S. 324, 38 L. Ed. 179, we held that in the instance of an appeal or writ of error from a circuit court upon the question of jurisdiction under the fifth section of the judiciary act of March 3, 1891, a certificate by the circuit court presenting such question for determination was required in order to invoke the exercise by this court of its appellate jurisdiction. In re Lehigh, etc., Mfg. Co., 156 U. S. 322, 326, 39 L. Ed. 438.

In Maynard *v.* Hecht, 151 U. S. 324, 38 L. Ed. 179, we held that a certificate from the court below of the question of jurisdiction to be decided was an absolute prerequisite to the exercise of jurisdiction here, and indicated by reference to the

wanting, the writ of error will be dismissed without discussing whether the question of jurisdiction should properly be held to have been in issue, or whether, if so, the case would fall within the fifth section.[43]

ccccc. *Time of Granting Certificate.*—Where the jurisdiction of the court below is in issue and the case is certified to us for decision, the certificate must be

settled rules in relation to certificates of division of opinion in what manner we thought the certificate should be framed. The Bayonne, 159 U. S. 687, 692, 40 L. Ed. 306, reaffirmed in Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209.

In order to bring an appeal or writ of error directly to this court under that section of the circuit court of appeals act which provides that such an appeal may lie "in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision," it is held, that the question of jurisdiction must have been certified. Mr. Chief Justice Fuller said, however: "We do not now say that the absence of a formal certificate would be fatal, but it is required by the statute, and its absence might have controlling weight where the alleged issue is not distinctly defined. This record contains no such certificate, nor was it applied for, nor does it appear that the jurisdiction of the circuit court was in issue." Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 180, 37 L. Ed. 1041.

"We think the intention of congress as to the certification mentioned in both sections is to be arrived at in the light of the rules theretofore prevailing as to certifying from the court below, and since, in the instance of an appeal upon the question of jurisdiction under the fifth section of the act, a certificate by the circuit court presenting such question for the determination of this court is explicitly and in terms required in order to invoke the exercise by this court of its appellate jurisdiction, we are of opinion that the absence of such certificate is fatal to the maintenance of the writ of error in this cause." Maynard *v.* Hecht, 151 U. S. 324, 327, 38 L. Ed. 179; Moran *v.* Hagerman, 151 U. S. 329, 38 L. Ed. 181.

Under § 5 of the judiciary act of March 3, 1891, allowing an appeal or writ of error directly to the supreme court, "in any case in which the jurisdiction of the court is in issue;" and further provides that "in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision," it has been held, that the certificate is an absolute prerequisite to the exercise of jurisdiction here. Courtney *v.* Pradt, 196 U. S. 89, 49 L. Ed. 398, citing Maynard *v.* Hecht, 151 U. S. 324, 38 L. Ed. 179. The court said: "Although we have recognized exceptions to this rule when the explicit terms of the decree, or even of the order allowing the appeal, might properly be considered as equivalent to the formal certificate. Huntington *v.* Laidley, 176 U. S. 668, 44 L. Ed. 630; Arkansas *v.* Schlierholz, 179 U. S. 598, 45 L. Ed. 335.

Cases distinguished.—It is true that in In re Lehigh, etc., Mfg. Co., 156 U. S. 322, 39 L. Ed. 438, we held that the certificate was not necessary, inasmuch as it appeared in the decree that the question involved was only a question of jurisdiction, and the judgment not only recited that the court considered it had no jurisdiction of the case, and therefore dismissed it for want of jurisdiction, but the district judge certified in the bill of exceptions that it was "held, that the court did not have jurisdiction of the suit, and ordered the same to be dismissed," and, in the order allowing the writ of error, certified in effect, that it was allowed "upon the question of jurisdiction." Van Wagenen *v.* Sewall, 160 U. S. 369, 372, 40 L. Ed. 460.

So, also, in Shields *v.* Coleman, 157 U. S. 168, 39 L. Ed. 660, where the court below, granting the appeal, said, "this appeal is granted solely upon the question of jurisdiction," and made further provisions for determining what part of the record should be certified to this court under the appeal, we held this to be a sufficient certificate of a question of jurisdiction under the act. Van Wagenen *v.* Sewall, 160 U. S. 369, 372, 40 L. Ed. 460.

43. Maynard *v.* Hecht, 151 U. S. 324, 38 L. Ed. 179; Moran *v.* Hagerman, 151 U. S. 329, 38 L. Ed. 181; Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 37 L. Ed. 1041.

The lack of the proper certificate is a defect which cannot be supplied, and the appeal will be dismissed in such case for want of jurisdiction. The Bayonne, 159 U. S. 687, 40 L. Ed. 306, reaffirmed in Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209.

In the instance of an appeal upon the question of jurisdiction under the fifth section of the act, a certificate by the circuit court presenting such question for the determination of this court is explicitly and in terms required in order to invoke the exercise by this court of its appellate jurisdiction, and the absence of such certificate is fatal to the maintenance of the appeal. Colvin *v.* Jacksonville, 157 U. S. 368, 369, 39 L. Ed. 736, following Maynard *v.* Hecht, 151 U. S. 324, 38 L. Ed. 179; Shields *v.* Coleman, 157 U. S. 168, 39 L. Ed. 660.

granted during the term at which the judgment or decree is entered, by analogy to the statutory provisions on that subject which obtained in relation to certificates of division of opinion,[44] and in view of the general rule as to the inability of the court to deal with matters of this sort after the expiration of the term.[45]

dddd. *Form and Requisites.*—**In General.**—In order to maintain the appellate jurisdiction of this court under this clause, the record must distinctly and unequivocally show that the court below sends up for consideration a single and definite question of jurisdiction, that is, of jurisdiction of the court as a court of the United States. This may appear in either of two ways: by the terms of the decree appealed from and of the order allowing the appeal; or by a separate certificate of the court below.[46] This court cannot be required to search the record to ascertain whether the question of the jurisdiction of the court itself was involved, within the meaning of the act. "Indeed, it appears to have been the very object of the fifth section of the act of 1891 to have the question of jurisdiction plainly and distinctly certified to us, or at least to have it appear so clearly in the decree of the court below, that no other question was involved, that no further examination of the record would be necessary."[47] We have, however, recognized

44. Rev. Stat., §§ 650, 651, 652, 693, 397; Maynard *v.* Hecht, 151 U. S. 324, 38 L. Ed. 179; Colvin *v.* Jacksonville, 158 U. S. 456, 457, 39 L. Ed. 1053; Merritt *v.* Bowdoin College, 169 U. S. 551, 556, 42 L. Ed. 850; Excelsior Wooden Pipe Co. *v.* Pacific Bridge Co., 185 U. S. 282, 46 L. Ed. 910.

In Colvin *v.* Jacksonville, 158 U. S. 456, 39 L. Ed. 1053, it was decided that such certificate must be granted during the term at which the judgment or decree is entered. The Bayonne, 159 U. S. 687, 692, 40 L. Ed. 306, reaffirmed in Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209.

45. Hickman *v.* Fort Scott, 141 U. S. 415, 35 L. Ed. 775; Morse *v.* Anderson, 150 U. S. 156, 37 L. Ed. 1037; Colvin *v.* Jacksonville, 158 U. S. 456, 458, 39 L. Ed. 1053, reaffirmed in Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209.

Time of making certification.—It would seem that the certificate of the circuit courts, under the act of March 3, 1891, c. 517, 26 Stat. 826, must be made at the term at which the final judgment or decree is entered; and, moreover, that as, after the close of such term, the parties are out of court and the litigation there at an end, the court has no power to grant such certificate, and cannot certify, nunc pro tunc, if no such certificate was made or intended to be made at the term. In re Lehigh, etc., Mfg. Co., 156 U. S. 322, 327, 39 L. Ed. 438.

The district court of the United States for the southern district of New York has monthly terms. Rev. Stat. 572. The decree here was entered December 21, and the appeal allowed December 31, 1892. On the seventeenth of the following January, during a new term of the court the assignment of errors was directed to be filed nunc pro tunc as of December 31, 1892. Held, if that assignment could be treated as a certificate, it came too late, and, as there is nothing in the record prior to the expiration of the December term, to indicate any attempt or intention to file a certificate during that term, and there was no omission to enter anything which had actually been done at that term, the case did not come within the rule that permits an amendment of the record nunc pro tunc. Hickman *v.* Fort Scott, 141 U. S. 415, 418, 35 L. Ed. 775; Michigan Ins. Bank *v.* Eldred, 143 U. S. 293, 299, 36 L. Ed. 162; The Bayonne, 159 U. S. 687, 692, 693, 40 L. Ed. 306, reaffirmed in Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209; Arkansas *v.* Schlierholz, 179 U. S. 598, 45 L. Ed. 335, reaffirmed in Richards *v.* Michigan, etc., R. Co., 186 U. S. 479, 46 L. Ed. 1259.

46. Maynard *v.* Hecht, 151 U. S. 324, 38 L. Ed. 179; In re Lehigh, etc., Mfg. Co., 156 U. S. 322, 39 L. Ed. 438; Shields *v.* Coleman, 157 U. S. 168, 39 L. Ed. 660; Interior Construction, etc., Co. *v.* Gibney, 160 U. S. 217, 40 L. Ed. 401; Van Wagenen *v.* Sewall, 160 U. S. 369, 40 L. Ed. 460; Chappell *v.* United States, 160 U. S. 499, 40 L. Ed. 510; Davis *v.* Geissler, 162 U. S. 290, 40 L. Ed. 972; Huntington *v.* Laidley, 176 U. S. 668, 676, 44 L. Ed. 630; Courtney *v.* Pradt, 196 U. S. 89, 49 L. Ed. 398.

47. Van Wagenen *v.* Sewall, 160 U. S. 369, 40 L. Ed. 460.

A district court by an order allowed an appeal of the United States from a decision that a special agent of the general land office was entitled to his discharge from the custody of a sheriff and propounded the questions whether the court had jurisdiction to discharge the petitioner or whether it should remand him to the custody of the sheriff to be dealt with by the state court. It was held, that the authority of the supreme court to review the action of the court below must be found in one of three classes of cases in which, by § 5 of the judiciary act of March 3, 1891, an appeal or writ of error

exceptions to this rule when the explicit terms of the decree, or even if the order allowing the appeal, might properly be considered as equivalent to the formal certificate.[48]

What Constitutes a Sufficient Certificate.—It is not necessary that the word "certify" be formally used. It is sufficient if there is a plain declaration that the single matter which is by the record sent up to this court for decision is a question of jurisdiction, and the precise question clearly, fully, and separately stated. No mere suggestion that the jurisdiction of the court was in issue will answer. This court will not of itself search nor follow counsel in their search of the record to ascertain whether the judgment of the trial court did or did not turn on some question of jurisdiction. But the record must affirmatively show that the trial court sends up for consideration a single definite question of jurisdiction.[49]

The assignment of errors, and the action of the court in directing it to be filed, cannot be regarded as a compliance with the statutory provision and equivalent to the certificate required.[50] The record does not show an equivalent of the certificate of jurisdiction, where the assignment of errors is directed both to the jurisdiction and the merits, and the petition for the writ of error, which was allowed generally and without any limitation or specification, prays for a review to the end that the rulings and judgment of the court may be reversed.[51]

Nor can the allowance of the appeal be treated as a certificate.[52] Thus,

may be taken from a district or circuit court direct to this court. It was further held, that the case at bar is not embraced within either of the classes of cases just mentioned. Arkansas *v.* Schlierholz, 179 U. S. 598, 600, 45 L. Ed. 335, reaffirmed in Richards *v.* Michigan, etc., R. Co., 186 U. S. 479, 46 L. Ed. 1259, citing and approving Bardes *v.* Hawarden First Nat. Bank, 175 U. S. 526, 528, 44 L. Ed. 261.

48. Huntington *v.* Laidley, 176 U. S. 668, 44 L. Ed. 630; Arkansas *v.* Schlierholz, 179 U. S. 598, 45 L. Ed. 335; Courtney *v.* Pradt, 196 U. S. 89, 49 L. Ed. 398.

Authentication.—Where it appears from the record that the only matters decided in the circuit court were demurrers to the pleas to the jurisdiction, and the petition to the supreme court upon which the writ of error was allowed asked only for the review of the judgment, which decided that the court had no jurisdiction of the action, no bill of exception, or formal certificate in respect to the matter decided is required, and a writ of error will not be dismissed because the bill of exceptions filed below and the certificate made as to the question of jurisdiction were authenticated by a judge other than the trial judge, and because the certificate was not made at the term at which the judgment complained of was entered. Petri *v.* Creelman Lumber Co., 199 U. S. 487, 50 L. Ed. 281, citing Interior Construction, etc., Co. *v.* Gibney, 160 U. S. 217, 40 L. Ed. 401; Chappell *v.* United States, 160 U. S. 499, 40 L. Ed. 510.

49. Shields *v.* Coleman, 157 U. S. 168, 176, 39 L. Ed. 660; Filhiol *v.* Torney, 194 U. S. 356, 48 L. Ed. 1014; Chappell *v.* United States, 160 U. S. 499, 508, 40 L. Ed. 510, reaffirmed in Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209.

50. The Bayonne, 159 U. S. 687, 693, 40 L. Ed. 306, reaffirmed in Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209.

51. Filhiol *v.* Torney, 194 U. S. 356, 48 L. Ed. 1014, citing Chappell *v.* United States, 160 U. S. 499, 40 L. Ed. 510.

52. The Bayonne, 159 U. S. 687, 695, 40 L. Ed. 306, reaffirmed in Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209, distinguishing In re Lehigh, etc., Mfg. Co., 156 U. S. 322, 39 L. Ed. 438; Shields *v.* Coleman, 157 U. S. 168, 39 L. Ed. 660.

The prayer for appeal did, indeed, state that claimant appealed "upon the ground that this court was without jurisdiction to make the said decree," but it specified no question of jurisdiction, and asked "that a transcript of the record and proceedings and papers upon which said final decree was made should be sent up," as if the appeal were on the whole case. The entry of the district judge thereupon was "appeal allowed." This was wholly insufficient to subserve any other than the ostensible purpose. The Bayonne, 159 U. S. 687, 693, 40 L. Ed. 306, reaffirmed in Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209.

The statements in the order allowing the appeal, setting forth the questions propounded for the decision of this court, whether considered by themselves or in connection with the record, cannot in reason be treated as a plain declaration that the single matter which is by the record sent up to this court for decision is a question of jurisdiction. Shields *v.* Coleman, 157 U. S. 168, 39 L. Ed. 660. As declared in the case just cited, no mere suggestion that the jurisdiction of the court was in issue will answer. In effect, the questions but imply that the court assumed that it had a discretion

where the plaintiff in error prays for a writ of error to this court upon the question of jurisdiction, and in the order allowing the writ, the court certified in effect that it was allowed "upon the question of jurisdiction," he is not entitled to have the question of jurisdiction certified to this court at a subsequent term, because the requisition of the statute has already been sufficiently complied with.[53] But if the writ of error is allowed upon the petition of the original plaintiff, asking for a review of a judgment dismissing the action for want of jurisdiction, and the only question tried and decided in the court below was a question of jurisdiction, that question is sufficiently certified to this court.[54] And, where the

either to dispose of the case on its merits or to remand the accused to the state court and require him to resort to his remedy by writ of error, and that the instruction of this court was desired by the court below as to the proper exercise of its discretion in the premises. Arkansas *v.* Schlierholz, 179 U. S. 598, 45 L. Ed. 335, reaffirmed in Richards *v.* Michigan, etc., R. Co., 186 U. S. 479, 46 L. Ed. 1259.

An order allowing an appeal from a decision that a special agent of the general land office is entitled to his discharge on habeas corpus from the custody of the sheriff and propounding the questions whether the court has jurisdiction to discharge the petitioner, or whether it should remand him to the custody of the sheriff to be dealt with by the state court, where there is not even a suggestion that an issue was made and decided by the district court as to the jurisdiction of that court to hear and determine the controversy, and where there is no intimation that the court in the judgment rendered did more than pass upon the merits, is not a sufficient certification of a question of jurisdiction by the district court. Arkansas *v.* Schlierholz, 179 U. S. 598, 45 L. Ed. 335, citing and approving Bardes *v.* Hawarden First Nat. Bank, 175 U. S. 526, 528, 44 L. Ed. 261, reaffirmed in Richards *v.* Michigan, etc., R. Co., 186 U. S. 479, 46 L. Ed. 1259.

53. In re Lehigh, etc., Mfg. Co., 156 U. S. 322, 39 L. Ed. 438.

In re Lehigh, etc., Mfg. Co., 156 U. S. 322, 39 L. Ed. 438, the defendant in an action of ejectment filed two pleas to the jurisdiction of the court, which pleas were sustained, and judgment thereupon entered as follows: "And for reasons in writing filed herewith, as part of this order, the court doth further consider that it has no jurisdiction of this case, and that the said action of ejectment be and the same is hereby dismissed for want of jurisdiction, but without prejudice to the parties to this suit." A bill of exceptions was taken, in which it was declared that the court "held that the court did not have jurisdiction of this suit, and ordered the same to be dismissed, to which opinion and action of the court, the plaintiff did then and there except." The plaintiff then prayed for a writ of error from this court, which was allowed by an order under the hand of the judge, and entered of record, reciting the final judgment entered, "dismissing the said case because the said court, in its opinion, did not have jurisdiction thereof," and the plaintiff prayed for a writ of error "upon the said question of jurisdiction," and averring "that said writ of error be allowed and awarded as prayed for." Under these circumstances it was thought that the question was sufficiently certified. The Bayonne, 159 U. S. 687, 693, 694, 40 L. Ed. 306, reaffirmed in Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209.

In Chappell *v.* United States, 160 U. S. 499, 508, 40 L. Ed. 510, it is said: "The record in the present case falls far short of satisfying the test prescribed in Shields *v.* Coleman, 157 U. S. 168, 177, 39 L. Ed. 660. The defendant, among many other defenses, and in various forms, objected to the jurisdiction of the district court, because the act of congress under which the proceedings were instituted was unconstitutional, because the proceedings were not according to the laws of the United States, and because they should have been had in a court of the state of Maryland; and the court, overruling or disregarding all the objections, whether to its jurisdiction over the case, or to the merits or the form of the proceedings, entered final judgment for the petitioners. There is no formal certificate of any question of jurisdiction; the allowance of the writ of error is general, and not expressly limited to such a question; and the petition for the writ, after mentioning all the proceedings in detail, asks for a review of all the rulings, judgments and orders" of the court "upon the question of jurisdiction raised in said exceptions, pleas and demurrers, and the other papers on file in this cause," without defining or indicating any specific question of jurisdiction. Here, certainly, is no such clear, full and separate statement of a definite question of jurisdiction, as will supply the want of a formal certificate under the first clause of the statute. Reaffirmed in Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209; Filhiol *v.* Torney, 194 U. S. 356, 48 L. Ed. 1014.

54. In re Lehigh, etc., Mfg. Co., 156 U. S. 322, 39 L. Ed. 438; Interior Construction, etc., Co. *v.* Gibney, 160 U. S. 217, 40 L. Ed. 401; Chappell *v.* United

record shows that the only matter tried and decided in the circuit court was a demurrer to a plea to the jurisdiction; and the petition, upon which the writ of error was allowed, asked only for a review of the judgment that the court had no jurisdiction of the action, the question of jurisdiction alone is thus sufficiently certified to this court.[55] And if an appeal from a decree of the circuit court appointing a receiver is allowed by that court "solely upon the question of jurisdiction," and on a petition praying an appeal from the decree as "taking and exercising jurisdiction," the question of jurisdiction is sufficiently certified.[56]

iiii. *Simultaneous Appeal and Certification, or the Rule in Jahn's Case.*—If the jurisdiction of the circuit court is in issue and decided in favor of the defendant.

States, 160 U. S. 499, 507, 40 L. Ed. 510, reaffirmed in Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209.

55. March 3, 1891, ch. 517, § 5; 26 Stat. 828; In re Lehigh, etc., Mfg. Co., 156 U. S. 322, 39 L. Ed. 438; Shields *v.* Coleman, 157 U. S. 168, 39 L. Ed. 660; Interior Construction, etc., Co. *v.* Gibney, 160 U. S. 217, 219, 40 L. Ed. 401.

The original decree of the circuit court made November 5, 1900, recited "that said suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of this court, and that this court should not further exercise jurisdiction, it is therefore ordered and decreed that said suit be and the same is hereby dismissed for want of jurisdiction." An appeal was taken from this decree, and the order allowing the appeal states that the appeal was allowed "from the final order and decree dismissing said suit for want of jurisdiction." It was held, that this is clearly a sufficient certificate of the circuit court that the jurisdiction of that court was in issue. Excelsior Wooden Pipe Co. *v.* Pacific Bridge Co., 185 U. S. 282, 285, 46 L. Ed. 910, citing Shields *v.* Coleman, 157 U. S. 168, 39 L. Ed. 660; In re Lehigh, etc., Mfg. Co., 156 U. S. 322, 39 L. Ed. 438; Huntington *v.* Laidley, 176 U. S. 668, 44 L. Ed. 630.

56. Shields *v.* Coleman, 157 U. S. 168, 39 L. Ed. 660; Chappell *v.* United States, 160 U. S. 499, 507, 40 L. Ed. 510, reaffirmed in Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209.

Thus, where the petition for an appeal is upon the single ground that the circuit court of the United States wrongfully took jurisdiction of the property when it was in the possession of the receiver appointed by the state court, that the circuit court of the United States had no power to appoint another receiver and take the property out of the former's hands, because it was then in possession of the state court, and in the order allowing the appeal it is explicitly stated that "this appeal is granted solely upon the question of jurisdiction," and the court at the same time reserved to itself the right, which it subsequently exercised, of determining what portions of the proceedings should be incorporated into the record sent here for the purpose of presenting this question, this, taken in connection with the petition upon which it was founded, is a sufficient certificate. Shields *v.* Coleman, 157 U. S. 168, 39 L. Ed. 660, citing United States *v.* Jahn, 155 U. S. 109, 39 L. Ed. 87; In re Lehigh, etc., Mfg. Co., 156 U. S. 322, 39 L. Ed. 438.

"In Shields *v.* Coleman, 157 U. S. 168, 39 L. Ed. 660, a receiver appointed by a state court intervened in a suit in the circuit court of the United States for the recovery of possession of railroad property from the receiver of the circuit court, and, his application having been denied, he prayed an appeal to this court from the decree and interlocutory orders by which the circuit court assumed and asserted jurisdiction over the property. The circuit court allowed the appeal by an order stating "this appeal is granted solely upon the question of jurisdiction," and reserving to the court the right, which it subsequently exercised, of determining what portion of the proceedings should be incorporated into the record for the purpose of presenting that question. We entertained jurisdiction in that case also. But we are of opinion that this case cannot be brought within either of those last cited." The Bayonne, 159 U. S. 687, 694, 40 L. Ed. 306, reaffirmed in Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209.

Where the record discloses that the defendants below appealed upon the express ground that the court erred in taking jurisdiction of the bill and in not dismissing the bill for want of jurisdiction, and prayed that their appeal should be allowed, and the question of jurisdiction be certified to the supreme court, and that said appeal was allowed, and the certificate further states that there is sent a true copy of so much of the record as is necessary for the determination of the question of jurisdiction, and as part of the record so certified is the opinion of the court below, in accordance with which defendants' motion to dismiss the cause for want of jurisdiction was denied, it therefore appears that the appeal was granted solely upon the question of jurisdiction, and this brings the case within the rulings in Shields *v.* Coleman, 157 U. S. 168, 39 L. Ed. 660, and In re Lehigh, etc., Mfg. Co., 156 U. S. 322, 39 L. Ed. 438; Smith *v.* McKay, 161 U. S. 355,

as that disposes of the case, the plaintiff should have the question certified and take his appeal or writ of error directly to this court.[57] If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the circuit court of appeals, where, if the question of jurisdiction arises, the circuit court of appeals may certify it.[58] If the question of jurisdiction is in issue, and the jurisdiction sustained, and judgment on the merits is rendered in favor of the plaintiff, then the defendant can elect either to have the question certified and come directly to this court, or to carry the whole case to the circuit court of appeals, and the question of jurisdiction can be certified by that court.[59] If, in the case last supposed, the plaintiff has ground of complaint in respect of the judgment he has recovered, he may also carry the case to the circuit court of appeals on the merits, and this he may do by way of cross appeal or writ of error if the defendant has taken the case there, or independently, if the defendant has carried the case to this court on the question of jurisdiction alone, and in this instance the circuit court of appeals will suspend a decision upon

357, 40 L. Ed. 731, reaffirmed in Murphy *v.* Colorado Paving Co., 166 U. S. 719, 41 L. Ed. 1188; Black *v.* Black, 163 U. S. 678, 41 L. Ed. 318; Tucker *v.* McKay, 164 U. S. 701, 41 L. Ed. 1180.

57. United States *v.* Jahn, 155 U. S. 109, 114, 39 L. Ed. 87; Robinson *v.* Caldwell, 165 U. S. 359, 41 L. Ed. 745; In re Morrison, 147 U. S. 14, 36, 37 L. Ed. 60; In re New York, etc., Steamship Co., 155 U. S. 523, 531, 39 L. Ed. 246.

58. United States *v.* Jahn, 155 U. S. 109, 114, 39 L. Ed. 87, following United States *v.* Klingenberg, 153 U. S. 93, 38 L. Ed. 647; Robinson *v.* Caldwell, 165 U. S. 359, 41 L. Ed. 745.

Under the act of March 3, 1891, the plaintiff cannot maintain a direct appeal from a circuit court of the United States to the supreme court of the United States in a case in which the jurisdiction of the circuit court is in issue, where the jurisdiction is sustained and judgment or decree rendered in favor of the defendant on the merits. Anglo-American Provision Co. *v.* Davis Provision Co., 191 U. S. 373, 48 L. Ed. 225, citing and approving United States *v.* Jahn, 155 U. S. 109, 114, 39 L. Ed. 87.

59. United States *v.* Jahn, 155 U. S. 109, 115, 39 L. Ed. 87; Robinson *v.* Caldwell, 165 U. S. 359, 41 L. Ed. 745.

Where, in a suit against the defendants in a circuit court, they file a plea to the jurisdiction of the court, if the jurisdiction is sustained, and the defendants preserve the question by certificate in the form of a bill of exceptions and the cause has subsequently proceeded to a final decree against them, they can bring the case at the proper time, on the question of jurisdiction solely, directly to this court, although not compelled to do so. In re Lehigh, etc., Mfg. Co., 156 U. S. 322, 39 L. Ed. 438.

If, in a revenue case, a final judgment were rendered because of want of jurisdiction, that judgment could be reviewed by this court upon a certificate of the circuit court, while if jurisdiction were sustained and the merits adjudicated, although the question of jurisdiction might be brought up directly, the circuit court of appeals would undoubtedly have jurisdiction to review the case upon the merits. The provision that any case in which the question of jurisdiction is in issue may be taken directly to this court, necessarily extends to other cases than those in which the final judgment rests on the ground of want of jurisdiction, for in them that would be the sole question, and the certificate, though requisite to our jurisdiction under the statute, would not be in itself essential, however valuable in the interest of brevity of record. But in such other cases, the requirement that the question of jurisdiction alone should be certified for decision was intended to operate as a limitation upon the jurisdiction of this court of the entire case and of all questions involved in it, a jurisdiction which can be exercised in any other class of cases taken directly to this court under section five. Horner *v.* United States, 143 U. S. 570, 577, 36 L. Ed. 266; United States *v.* Jahn, 155 U. S. 109, 112, 39 L. Ed. 87; Robinson *v.* Caldwell, 165 U. S. 359, 41 L. Ed. 745.

"The act certainly did not contemplate two appeals or writs of error at the same time by the same party to two different courts, nor does it seem to us that it was intended to compel a waiver of the objection to the jurisdiction altogether or of the consideration of the merits. By taking a case directly to this court on the question of jurisdiction, the contention on the merits would be waived, but it does not follow that the jurisdictional question could not be considered, if the case were taken to the circuit court of appeals. The act was passed to facilitate the prompt disposition of cases in this court and to relieve it from the oppressive burden of general litigation, but the rights of review by appeal or writ of error, and of invoking the supervisory jurisdiction of

the merits until the question of jurisdiction has been determined.[60] The same observations are applicable where a plaintiff objects to the jurisdiction and is, or both parties are, dissatisfied with the judgment on the merits.[61] The circuit court of appeals will, however, suspend any consideration of the case upon the merits until the question of jurisdiction is determined by this court.[62]

jjjj. *Double Appeals.*—The act of 1891 does not contemplate several separate appeals in the same case and at the same time to two appellate courts. "The true purpose of the act, as gathered from its context, is that the writ of error, or the appeal, may be taken only after final judgment, except in the cases specified in § 7 of the act. When that judgment is rendered, the party against whom it is rendered must elect whether he will take his writ of error or appeal to the supreme court upon the question of jurisdiction alone, or to the circuit court of appeals upon the whole case; if the latter, then the circuit court of appeals may, if it deem proper, certify the question of jurisdiction to this court."[63] Where no question of jurisdiction is certified by the circuit court, and the defendant chooses not to await the action of this court upon the appeal to it from the circuit court, but invokes the jurisdiction of the circuit court of appeals upon the whole case, he will be held to have waived his right to any decision here upon his direct appeal from the circuit court.[64]

kkkk. *Hearing and Determination.*—**In General.**—This court, moreover, may review the judgment of the circuit court dismissing a suit for want of jurisdiction, under the act of March 3, 1875, c. 137, although that judgment is either based on the verdict of a jury or upon facts found in an agreed statement. "The statute does not prescribe any particular mode in which the question of the jurisdiction is to be brought to the attention of the court, nor how such question, when raised, shall be determined. When such a question arises in an action at law, its decision would usually depend upon matters of fact, and also usually involves a denial of formal, but necessary, allegations contained in the plaintiff's declaration of complaint. Such a case would be presented when the plaintiff's allegation that the controversy was between citizens of different states, or when the allegation that the matter in dispute was of sufficient value to give the court jurisdiction, was denied. In such cases, whether the question was raised by the defendant or by the court on its own motion, the court might doubtless order the issue to be tried by the jury. The action of the court, in the admission or rejection of evidence, or in instructing the jury, would thus be subjected to the review by this court which was intended by congress."[65]

Determination of Question of Jurisdiction.—In General.—Where it no-

this tribunal, were sought to be amply secured and should not be circumscribed by too narrow a construction." United States *v.* Jahn, 155 U. S. 109, 113, 39 L. Ed. 87; Robinson *v.* Caldwell, 165 U. S. 359, 41 L. Ed. 745.

60. United States *v.* Jahn, 155 U. S. 109, 115, 39 L. Ed. 87; Robinson *v.* Caldwell, 165 U. S. 359, 41 L. Ed. 745.

61. United States *v.* Jahn, 155 U. S. 109, 115, 39 L. Ed. 87; Robinson *v.* Caldwell, 165 U. S. 359, 41 L. Ed. 745.

62. United States *v.* Jahn, 155 U. S. 109, 39 L. Ed. 87, citing McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893; New Orleans *v.* Benjamin, 153 U. S. 411, 38 L. Ed. 764, Robinson *v.* Caldwell, 165 U. S. 359, 41 L. Ed. 745.

63. McLish *v.* Roff, 141 U. S. 661, 668, 35 L. Ed. 893.

64. Robinson *v.* Caldwell, 165 U. S. 359, 41 L. Ed. 745, reaffirmed in Daugherty *v.* Hood, 179 U. S. 680, 45 L. Ed. 383.

65. Wetmore *v.* Rymer, 169 U. S. 115, 120, 42 L. Ed. 682.

But whether the judge shall elect to submit the issues to the jury, or to himself hear and determine them, it is the manifest meaning of this legislation that, in either event, the parties are not to be concluded by the judgment of the circuit court. As we have already said, if the questions are submitted to the jury, there will be a ready remedy, by proper exceptions and a writ of error to correct any errors into which the trial court may have fallen. And if the court takes to itself the determination of the disputed questions, it is imperative, in order to give effect to the intention of congress, that its action must take a form that will enable this court to review it, so far as to determine whether the conclusion of the court below was warranted by the evidence before that court. Wetmore *v.* Rymer, 169 U. S. 115, 121, 42 L. Ed. 682.

where appears from the record that the issue as to jurisdiction presented by the motion to dismiss, the overruling of which is the sole ground for reversal relied upon in the assignment of error, was made or passed upon by the court, this court will generally dismiss the writ of error, on the ground that the record does not disclose the presence in the case of a question of jurisdiction.[66] But although the certificate does not show whether the jurisdictional question arose from insufficient amount, want of diversity of citizenship, collusion or otherwise, this court may determine that fact from an examination of the record, aided by the opinion of the court contained therein, and made part thereof.[67]

From Statement of Facts.—As the circuit court is without power to make a certificate containing a statement of facts as the basis for legal propositions upon which it desires the guidance of this court,[68] it follows, speaking in a general sense, that our right to review on a direct proceeding concerning the jurisdiction of that court must depend upon the record and not upon the mere statement of facts made in the certificate prepared by the trial court.[69]

From Certificate.—As, however, under the judiciary act of 1891, on a direct review of a question of jurisdiction, the trial judge is authorized to certify as to the existence of such question, this court we may look at his certificate for the purpose of ascertaining when and how the question of jurisdiction was raised, although, for the purpose of deciding the question shown to have been thus raised, we may not resort to the statements in the certificate for the purpose of supplying elements of decision which we could not properly consider in an action at law without a bill of exceptions.[70]

Extraneous Matter.—Whilst we must consider the record for the purpose of determining the question of jurisdiction which the certificate shows adequately to have been raised, we may not consider, in passing upon that question, in the absence of a bill of exceptions, the extraneous matter, such as the testimony of the plaintiff, etc., which forms no part of the record.[71]

Mr. Justice White states the rule as follows: "Whilst in a case of direct review under the judiciary act of 1891, when the record does not otherwise show when and how the question of jurisdiction was raised, the certificate of the circuit may be considered for the purpose of supplying such deficiency when the

66. Nichols Lumber Co. *v.* Frason, 203 U. S. 278, 51 L. Ed. 181.

67. Chicago *v.* Mills, 204 U. S. 321, 51 L. Ed. 504. "We think this brings the case within the ruling in Smith *v.* McKay, 161 U. S. 355, 40 L. Ed. 731, in which the court, looking into the character of the appeal, the certificate of the court and the certified copy of the opinion made part of the record, sustained the court's jurisdiction, citing, with approval, Shields *v.* Coleman, 157 U. S. 168, 39 L. Ed. 660, and In re Lehigh, etc., Mfg. Co., 156 U. S. 322, 39 L. Ed. 438."

68. Mexican Central R. Co. *v.* Eckman, 187 U. S. 429, 47 L. Ed. 245; United States *v.* Rider, 163 U. S. 132, 41 L. Ed. 101; Nichols Lumber Co. *v.* Frason, 203 U. S. 278, 281, 51 L. Ed. 181.

69. Nichols Lumber Co. *v.* Frason, 203 U. S. 278, 281, 51 L. Ed. 181.

70. Nichols Lumber Co. *v.* Frason, 203 U. S. 278, 281, 282, 51 L. Ed. 181.

"We have said that we may resort to the certificate, in the absence of a proper showing on the record as to when and how the question of jurisdiction was raised and decided, for the limited purpose stated, because the power to do so is implied in a previous decision of the court, North American Trans, etc., Co. *v.* Morrison, 178 U. S. 262, 44 L. Ed. 1061, and because of the general rule that it would be our duty, without action of the trial court or of the parties, to look at the record to determine whether or not the court below had jurisdiction of the action." Thomas *v.* Ohio State University, 195 U. S. 207, 49 L. Ed. 160; Nichols Lumber Co. *v.* Frason, 203 U. S. 278, 282, 51 L. Ed. 181.

71. Nichols Lumber Co. *v.* Frason, 203 U. S. 278, 282, 51 L. Ed. 181.

Where the certificate does not show whether the jurisdictional question arose from insufficient amount, want of diversity of citizenship, collusion or otherwise, this court may have recourse to portions of the proceedings, including the testimony on the question of jurisdiction, duly signed and sealed and made part of the record, which are certified to this court by certificate in the form of a bill of exceptions. Chicago *v.* Mills, 204 U. S. 321, 51 L. Ed. 504, citing In re Lehigh, etc., Mfg. Co., 156 U. S. 322, 39 L. Ed. 438; Nichols Lumber Co. *v.* Frason, 203 U. S. 278, 51 L. Ed. 181.

elements necessary to decide the question are in the record, we deem it the better practice in every case of direct review on a question of jurisdiction to make apparent on the record by a bill of exceptions, or other appropriate mode, the fact that the question of jurisdiction was raised and passed upon and the elements upon which the decision of the question was based."[72]

III. *Scope of Review.*—**In General.**—But the judiciary act of March 3, 1891, provides that in cases where the jurisdiction of the court below is in issue, that question, and that alone, shall be certified to this court for decision, the inquiry being limited to the question thus certified.[73]

Dismissal by Circuit Court for Want of Jurisdiction.—On an appeal to this court solely upon the question of the jurisdiction of the circuit court of the United States, we are only concerned with the correctness of the conclusion reached in the circuit court as to the question of jurisdiction.[74]

Where the jurisdiction of the circuit court depends on diverse citizenship, the only question that can be considered by this court on a writ of error to the circuit court, is that of the jurisdiction of the circuit court. If the defendant desires to have any matter of error considered, he must take the case to the circuit court of appeals.[75]

Limitation of General Rule.—But "the provision that any case in which the question of jurisdiction is in issue may be taken directly to this court, necessarily extends to other cases than those in which the final judgment rests on the ground of want of jurisdiction, for in them that would be the sole question, and the certificate, though requisite to our jurisdiction under the statute, would not be in itself essential, however valuable in the interest of brevity of record. But in such other cases, the requirement that the question of jurisdiction alone should be certified for decision was intended to operate as a limitation upon the jurisdiction of this court of the entire case and of all questions involved in it, a jurisdiction which

72. Nichols Lumber Co. *v.* Frason, 203 U. S. 278, 283, 51 L. Ed. 181.

73. United States *v.* Jahn, 155 U. S. 109, 113, 39 L. Ed. 87; The Bayonne, 159 U. S. 687, 692, 40 L. Ed. 306, reaffirmed in Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209.

74. Chicago *v.* Mills, 204 U. S. 321, 51 L. Ed. 504, citing Wetmore *v.* Rymer, 169 U. S. 115, 42 L. Ed. 682.

By the act of February 25, 1889, c. 236, 25 Stat. 693, it was provided: "That in all cases where a final judgment or decree shall be rendered in the circuit court of the United States in which there shall have been a question involving the jurisdiction of the court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the supreme court of the United States to review such judgment or decree without reference to the amount of the same; but in cases where the judgment or decree does not exceed the sum of five thousand dollars, the supreme court shall not review any question raised upon the record except such question of jurisdiction." The act of 1891 was framed in this regard in view of the former act, and section five restricts the power of this court, in all suits in which its appellate jurisdiction is invoked by reason of the existence of a question involving the jurisdiction of the circuit court over the case to the review of that question only. The act did not contemplate several appeals in the same suit at the same time, but gave to a party to a suit in the circuit court where the question of the jurisdiction of the court over the parties or subject matter was raised and put in issue upon the record at the proper time and in the proper way, the right to a review by this court, after final judgment or decree against him, of the decision upon that question only, or by the circuit courts of appeals on the whole case. McLish *v.* Roff, 141 U. S. 661, 668, 35 L. Ed. 893; Maynard *v.* Hecht, 151 U. S. 324, 38 L. Ed. 179; Moran *v.* Hagerman, 151 U. S. 329, 38 L. Ed. 181.

Where the question raised by a writ of error to this court is whether the circuit court erred in dismissing the plaintiff's suit for the alleged reason that the value of the property in dispute did not amount to the sum of $2,000, exclusive of interest and costs, and therefore such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of circuit courts, and prescribed by the fifth section of the act of March 3, 1891, such question of the jurisdiction of the circuit court alone is presented for our decision. Wetmore *v.* Rymer, 169 U. S. 115, 42 L. Ed. 682, citing Shields *v.* Coleman, 157 U. S. 168, 39 L. Ed. 660.

75. Schunk *v.* Moline, etc., Co., 147 U. S. 500, 37 L. Ed. 255, following McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893.

can be exercised in any other class of cases taken directly to this court under section five."[76]

The Merits of the Case.—The first of six classes of cases enumerated in § 5 of the judiciary act of March 3, 1891, embraces cases "in which the jurisdiction of the court is in issue," that is, where the power of the circuit and district courts of the United States to hear and determine is denied.[77] An erroneous conclusion in regard to the merits of the case can only be reviewed on appeal or error, or in such appropriate way as may be provided.[78]

mmmm. *Waiver.*—Where, on a writ of error to the United States circuit court of appeals, the plaintiff contends, on his motion to dismiss, that, as under § 5 of the act of 1891, the jurisdiction of the circuit court is in issue, the case might have been brought by a writ of error directly from the circuit court to this court, but it does not appear by the record that the defendant on the trial made any objections to the jurisdiction of the circuit court, but, on the contrary, the petition for removal from the state court to the federal court recognizes the jurisdiction of the circuit court, even if a writ of error in this court could have been taken, yet as the defendant did not take such writ of error but took one from the circuit court of appeals to the circuit court, the plaintiff cannot be heard to assert, as the ground of this motion to dismiss, the fact that the defendant might have taken a writ of error from this court to the circuit court. Nor can it be objected as a ground for this motion, that the defendant has waived its right to review by this court, because it failed to take a writ of error from this court to the circuit court, to review the judgment of the latter court.[79] Where in a case pending in the United States circuit court against two defendants, an interlocutory decree appointing a receiver and issuing a preliminary injunction is entered, and one of them appeals to the United States circuit court of appeals, which affirms the decree, the right of the other defendants to appeal from the decree of the circuit court of the United States, an appeal to the supreme court, upon the question of

76. In re Lehigh, etc., Mfg. Co., 156 U. S. 322, 327, 39 L. Ed. 438; United States *v.* Jahn, 155 U. S. 109, 39 L. Ed. 87.

77. Smith *v.* McKay, 161 U. S. 355, 40 L. Ed. 731; Vance *v.* Vandercook Co. (No. 2), 170 U. S. 468, 472, 42 L. Ed. 1111; Mexican Central R. *v.* Eckman, 187 U. S. 429, 432, 47 L. Ed. 245; O'Neal *v.* United States, 190 U. S. 36, 37, 47 L. Ed. 945.

78. O'Neal *v.* United States, 190 U. S. 36, 38, 47 L. Ed. 945; Louisville Trust Co. *v.* Comminger, 184 U. S. 18, 26, 46 L. Ed. 413; Ex parte Gordon, 104 U. S. 515, 26 L. Ed. 814.

The supreme court of the United States cannot review on writ of error a proceeding in a district court imposing imprisonment for contempt, where the contention was that respondent had not committed any act of contempt. The case does not come within the first of the six classes of cases enumerated in § 5 of the judiciary act of March 3, 1891. Such a contention is addressed to the merits of the case and not to the jurisdiction of the court. An erroneous conclusion in that regard can only be reviewed by an appeal or writ of error, or in such appropriate way as may be provided. O'Neal *v.* United States, 190 U. S. 36, 47 L. Ed. 945.

79. Northern Pac. R. Co. *v.* Amato, 144 U. S. 465, 36 L. Ed. 506.

In Northern Pac. R. Co. *v.* Amato, 144 U. S. 465, 36 L. Ed. 506, a suit was brought in the supreme court of New York against a railroad corporation created by an act of congress, to recover damages for personal injuries sustained by the plaintiff from the negligence of the defendant, and was removed by the defendant into the circuit court of the United States, where a trial was had, which resulted in a verdict and judgment for the plaintiff. The defendant took a writ of error from the circuit court of appeals for the second circuit, which affirmed the judgment. On a writ of error taken by the defendant from this court to the circuit court of appeals, a motion was made by the plaintiff to dismiss or affirm; and it was ruled, among other things, that as it did not appear by the record that on the trial in the circuit court the defendant made any objection to the jurisdiction of that court, and the petition for removal recognized the jurisdiction, the plaintiff could not be heard to assert, as a ground for the motion to dismiss, that the defendant might have taken a writ of error from this court to the circuit court under section five of the said act of 1891, and had, by failing to do so, waived this right. United States *v.* Jahn, 155 U. S. 109, 116, 39 L. Ed. 87; Robinson *v.* Caldwell, 165 U. S. 359, 41 L. Ed. 745.

the jurisdiction of the circuit court, is not affected by the affirmance of the interlocutory decree by the circuit court of appeals.[80]

bbb. *In Prize Causes.*—**In General.**—Section 5 of the act of March 3, 1891, provides that appeals or writs of error may be taken from the existing circuit courts direct to the supreme court final sentences and decrees in prize causes. This court has held, in an exhaustive opinion, in which all the statutes were reviewed, that the act of 1891, upon its face, read in the light of settled rules of statutory construction, and of the decisions of this court, clearly manifests the intention of congress to cover the whole subject of the appellate jurisdiction from the district and circuit courts of the United States, so far as regards in what cases, as well as to what courts, appeals may be taken, and to supersede and repeal, to this extent, all the provisions of earlier acts of congress, including those that imposed pecuniary limits upon such jurisdiction; and, as part of the new scheme, to confer upon this court jurisdiction of appeals from all final sentences and decrees in prize causes, without regard to the amount in dispute, and without any certificate of the district judge as to the importance of the particular case.[81]

Section 695 of the Revised Statutes provides that "an appeal shall be allowed to the supreme court from all final decrees of any district court in prize causes where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars; and shall be allowed, without reference to the matter in dispute, on the certificate of the district judge that the adjudication involves a question of general importance."[82]

ccc. *In Cases of Conviction of Capital or Infamous Crimes*—aaaa. *By Act of March 3rd, 1891*—aaaaa. *In General.*—By the act of March 3rd, 1891, appeals or writs of error may be taken from the existing circuit courts direct to the supreme court in cases of conviction of a capital or otherwise infamous crime. "This clause looks to the nature of the crime, and not to the extent of the punishment actually imposed. A crime which might have been punished by imprisonment in a penitentiary is an infamous crime, even if the sentence actually pronounced is of a small fine only. * * * Consequently, such a sentence for such a crime was subject to the appellate jurisdiction of this court, under this clause, until this jurisdiction, so far as regards crimes not capital, was transferred to the circuit court of appeals by the act of January 20, 1897, c. 68, 29 Stat. 492."[83]

A Matter of Right.—A writ of error from this court direct to a circuit court under the act of March 3, 1891, in cases of conviction of a capital or otherwise infamous crime, is a matter of right.[84]

District of Columbia.—But this section, even when taken in connection with § 846 of the Revised Statutes of the District of Columbia, cannot be extended so as to give this court jurisdiction over judgments of the supreme court of the District of Columbia in criminal cases.[85]

Retrospective Operation of Statute.—Under the 5th section of the act of March 3, 1891, providing that a writ of error may be taken from an existing circuit court direct to the supreme court of the United States in cases of conviction of a capital or otherwise infamous crime, a writ of error may issue from this court to a circuit court even before July 1, 1891, to review a conviction under § 5209 of the Revised Statutes, where the accused was convicted May 28, 1890, but before he was sentenced under his conviction, congress passed the act of March 3, 1891, although by a joint resolution "approved March 3, 1891, entitled 'Joint resolution to provide for the organization of the circuit court of appeals,' it was

80. Stillman *v.* Combe, 197 U. S. 436, 49 L. Ed. 822.

81. The Paquete Habana, 175 U. S. 677, 685, 44 L. Ed. 320; Woey Ho *v.* United States, 191 U. S. 558, 48 L. Ed. 301; Holt *v.* Indiana Mfg. Co., 176 U. S. 68, 44 L. Ed. 374.

82. The Paquete Habana, 175 U. S. 677, 680, 44 L. Ed. 320.

83. The Paquete Habana, 175 U. S. 677, 682, 44 L. Ed. 320.

84. In re Claasen, 140 U. S. 200, 35 L. Ed. 409.

85. In re Heath, 144 U. S. 92, 36 L. Ed. 358, distinguishing Wales *v.* Whitney, 114 U. S. 564, 29 L. Ed. 277.

provided that nothing in the above-mentioned act of March 3, 1891, should be held or construed in anywise to impair the jurisdiction of the supreme court or any circuit court of the United States 'in any case now pending before it, or in respect of any case wherein the writ of error' should have been sued out before July 1, 1891."[86] Where the conviction of the defendant was before the passage of the judiciary act of March 3, 1891, ch. 517, no bill of exceptions could be allowed by the circuit court to the rulings and instructions at the trial.[87]

bbbbb. *Infamous Crimes Defined.*—**In General.**—In determining whether the crime is infamous, the question is, whether it is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one.[88] A crime which is punishable by imprisonment in the state prison or penitentiary, whether the accused is or is not sentenced or put to hard labor, is an infamous crime within the meaning of the act of March 3, 1891, allowing a writ of error from an existing circuit court direct to the supreme court of the United States in cases of conviction of capital or otherwise infamous crimes.[89] A crime which might have been punished by imprisonment in a penitentiary is an infamous crime, even if the sentence actually pronounced is of a small fine only.[90]

The test of a capital crime under § 5 of the circuit court of appeals act as amended by the act of January 20, 1897, specifying the cases in which a writ of error may be issued directly to a district court, is not the punishment which is imposed, but that which may be imposed under the statute.[91]

A conviction for murder, punishable with death, is not the less a conviction for a capital crime by reason of the fact that the jury, in a particular case, qualified the punishment, and in such circumstances, the supreme court has jurisdiction under § 5 of the judiciary act of March 3, 1891, providing therefor "in cases of conviction of a capital crime."[92]

Specific Offenses Considered.—The offenses of making false entries in violation of the provision of § 5209 of the Revised Statutes of the United States, is punishable by imprisonment not less than five nor more than ten years, and is therefore an infamous crime.[93]

Bank officers issuing false and fraudulent reports contrary to the Revised Statutes of the United States, §§ 5209, 5211, are guilty of an infamous crime within the meaning of this statute.[94]

86. In re Claasen, 140 U. S. 200, 35 L. Ed. 409.

87. Claasen *v.* United States, 142 U. S. 140, 35 L. Ed. 966.

88. In re Claasen, 140 U. S. 200, 35 L. Ed. 409.

"As was observed in In re Claasen, 140 U. S. 200, 205, 35 L. Ed. 409, with respect to infamous crimes under the court of appeals act prior to its amendment: 'A crime which is punishable by imprisonment in the state prison or penitentiary, as the crime of which the defendant was convicted, is an infamous crime whether the accused is or is not sentenced or put to hard labor; and that, in determining whether the crime is infamous, the question is, whether it is one for which the statute authorizes the court to award an infamous punishment, and not whether the punishment ultimately awarded is an infamous one.'" Fitzpatrick *v.* United States, 178 U. S. 304, 307, 44 L. Ed. 1078. See, also, Ex parte Wilson, 114 U. S. 417, 426, 29 L. Ed. 89; Logan *v.* United States, 144 U. S. 263, 308, 36 L. Ed. 429; The Paquete Habana, 175 U. S. 677, 682, 44 L. Ed. 320; Motes *v.* United States, 178 U. S. 458, 44 L. Ed. 1150.

89. In re Claasen, 140 U. S. 200, 35 L. Ed. 409; Ex parte Wilson, 114 U. S. 417, 29 L. Ed. 89; Mackin *v.* United States, 117 U. S. 348, 29 L. Ed. 909; Parkinson *v.* United States, 121 U. S. 281, 30 L. Ed. 959; United States *v.* De Walt, 128 U. S. 393, 32 L. Ed. 485; In re Medley, 134 U. S. 160, 33 L. Ed. 835; In re Mills, 135 U. S. 263, 34 L. Ed. 107; Ansbro *v.* United States, 159 U. S. 695, 40 L. Ed. 310.

90. Ex parte Wilson, 114 U. S. 417, 426, 29 L. Ed. 89; The Paquete Habana, 175 U. S. 677, 682, 44 L. Ed. 320, reaffirmed in Woey Ho *v.* United States, 191 U. S. 558, 48 L. Ed. 301.

91. Fitzpatrick *v.* United States, 178 U. S. 304, 44 L. Ed. 1078.

92. Good Shot *v.* United States, 179 U. S. 87, 45 L. Ed. 101, following Fitzpatrick *v.* United States, 178 U. S. 304, 44 L. Ed. 1078.

93. Folsom *v.* United States, 160 U. S. 121, 40 L. Ed. 363, citing In re Claasen, 140 U. S. 200, 35 L. Ed. 409.

94. Ex parte Bain, 121 U. S. 1, 30 L. Ed. 849.

Passing counterfeit coin is an infamous crime.[95]

Passing counterfeit bonds of the United States is an infamous crime within the meaning of the statute.[96]

Embezzlement and making false entries by a president of a national bank is an infamous crime.[97]

Unlawful and fraudulent voting at an election is an infamous crime within the meaning of the statute.[98]

The crime of dumping injurious deposits within the harbor and adjacent waters of New York city, in violation of the act of congress of June 29, 1888, 25 Stat. 209, c. 496, is not punishable by imprisonment for a term of over one year or at hard labor; and persons convicted thereof cannot be sentenced to imprisonment in a penitentiary; therefore, it is not an infamous crime.[99]

A conviction of murder punishable with death is a "conviction of a capital crime" within the meaning of the court of appeals act of March 3, 1891, § 5, as amended by the act of January 20, 1897, specifying the cases in which a writ of error may be issued directly to a district court. This is so even though the jury is given by the act of January 15, 1897 the power to qualify the verdict of guilty by adding the words "without capital punishment" and by reason thereof the prisoner is only subjected to the imposition of a life imprisonment as a punishment.[1] "A conviction for murder, punishable with death, is not the less a conviction for a capital crime by reason of the fact that the jury, in a particular case, qualifies the punishment."[2]

ccccc. *Remedies for Transfer of Cause.*—By section five of the act of March 3, 1891, c. 517, 26 Stat. 826, "appeals or writs of error may be taken from the district courts or from the existing circuit courts" of the United States directly to this court, in certain enumerated cases, civil and criminal, among others, "in cases of conviction of a capital or otherwise infamous crime." There was no purpose by that act to abolish the general distinction, at common law, between an appeal and a writ of error.[3] The final judgment of a court of the United States in a case of the conviction of a capital or otherwise infamous crime is not reviewable here except upon writ of error.[4]

ddddd. *Scope of Review.*—Our review of the judgment, when brought here by writ of error, is confined to questions of law, properly presented by a bill of exceptions, or arising upon the record.[5]

eeeee. *Reversal.*—This court has power under this section, upon a reversal, to enter a proper judgment, or to remand the cause to the lower court with such directions for further proceedings as will promote substantial justice.[6]

bbbb. *By Act of January 20, 1898.*—As originally passed, the act of March 3, 1891, gave to this court jurisdiction over cases of infamous crimes in addition to that which it theretofore had in capital cases.[7]

But the act of January 20, 1897, c. 68, withdraws from the consideration of this court, upon appeal or writ of error direct from the circuit court, cases of conviction of infamous crimes not capital, and gives jurisdiction in such cases, upon

95. United States *v.* Petit, 114 U. S. 429, 29 L. Ed. 93.

96. Ex parte Wilson, 114 U. S. 417, 29 L. Ed. 89.

97. United States *v.* De Walt, 128 U. S. 393, 32 L. Ed. 485.

98. Parkinson *v.* United States, 121 U. S. 281, 30 L. Ed. 959.

99. Ansbro *v.* United States, 159 U. S. 695, 40 L. Ed. 310.

1. Fitzpatrick *v.* United States, 178 U. S. 304, 44 L. Ed. 1078.

2. Fitzpatrick *v.* United States, 178 U. S. 304, 307, 44 L. Ed. 1078; Goodshot *v.* United States, 179 U. S. 87, 45 L. Ed. 101.

3. Bucklin *v.* United States, 159 U. S. 680, 681, 40 L. Ed. 304.

4. Bucklin *v.* United States, 159 U. S. 680, 681, 40 L. Ed. 304, distinguished in Rice *v.* Ames, 180 U. S. 371, 375, 45 L. Ed. 577; Fisher *v.* Baker, 203 U. S. 174, 182, 51 L. Ed. 142.

5. Bucklin *v.* United States, 159 U. S. 680, 681, 40 L. Ed. 304.

6. Ballew *v.* United States, 160 U. S. 187, 40 L. Ed. 388.

7. Bessette *v.* Conkey Co., 194 U. S. 324, 336, 48 L. Ed. 997, reaffirmed in In the Matter of Lewis, 202 U. S. 614, 50 L. Ed. 1172.

appeal or writ of error, only to the proper circuit court of appeals.[8]

Contempt.—This court has no jurisdiction on error to review an order of a district court punishing for contempt.[9]

While proceedings in contempt may be said to be sui generis, a judgment in such proceedings in a district court imposing imprisonment is in effect a judgment in a criminal case, over which this court has no jurisdiction on error.[10]

But this court may still take jurisdiction of criminal cases not capital under other clauses of § 5. This court, under the act of March 3, 1891, 26 Stat. 826, c. 517, establishing circuit courts of appeals, can take cognizance of a criminal case, upon writ of error to review the judgment of a circuit court in a criminal case, when the case really "involves the construction or application of the constitution of the United States."[11] That act does not make a distinction between civil and criminal causes.[12]

Right of Confrontation.—Where it is necessary for the circuit court to determine whether the admission of certain testimony in a criminal case was not an infringement of rights secured to the accused by the 6th amendment to the constitution, declaring that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witness against him, such case involves the construction and application of the constitution of the United States, and may be taken directly to this court under the act of January 20, 1897, c. 68.[13]

ddd. *In Cases Involving the Construction or Application of the Federal Constitution*—aaaa. *In General.*—Section 5 of the act of March 3, 1891, provides that appeals or writs of error may be taken from the existing circuit court direct to the supreme court in any case that involves the construction or application of the constitution of the United States.[14]

8. Motes *v.* United States, 178 U. S. 458, 466, 44 L. Ed. 1150.

A circuit court of appeals has no jurisdiction to review, upon writ of error, the trial, judgment and sentence of an Indian to imprisonment for life, founded upon a verdict rendered on a trial of an indictment of the Indian for murder, by which verdict the jury found the defendant "guilty as charged in the indictment, without capital punishment." The remedy is by writ of error from the supreme court of the United States to the circuit court. Good Shot *v.* United States, 179 U. S. 87, 45 L. Ed. 101.

9. Section 5, act of March 3, 1891, 26 Stat. 826, c. 517, as amended by the act of January 20, 1897, 29 Stat. 492, c. 68; In re Chetwood, 165 U. S. 443, 462, 41 L. Ed. 782; Tinsley *v.* Anderson, 171 U. S. 101, 105, 43 L. Ed. 91; Cary Mfg. Co. *v.* Acme Flexible Clasp Co., 187 U. S. 427, 428, 47 L. Ed. 244; O'Neal *v.* United States, 190 U. S. 36, 47 L. Ed. 945; Bessette *v.* Conkey Co., 194 U. S. 324, 334, 48 L. Ed. 997, reaffirmed in In the Matter of Lewis, 202 U. S. 614, 50 L. Ed. 1172.

10. Section 5, act of March 3, 1891, 26 Stat. 826, ch. 517, as amended by the act of January 20, 1897, 29 Stat. 492, ch. 68. In re Chetwood, 165 U. S. 443, 462, 41 L. Ed. 782; Tinsley *v.* Anderson, 171 U. S. 101, 105, 43 L. Ed. 91; Cary Mfg. Co. *v.* Acme Flexible Clasp Co., 187 U. S. 427, 428, 47 L. Ed. 244; O'Neal *v.* United States, 190 U. S. 36, 38, 47 L. Ed. 945.

11. Motes *v.* United States, 178 U. S. 458, 466, 44 L. Ed. 1150.

"At the present term of this court, we have taken cognizance of a criminal case involving a misdemeanor, brought here directly from a circuit court of the United States. Rider *v.* United States, 178 U. S. 251, 44 L. Ed. 1057. And we had previously in United States *v.* Rider, 163 U. S. 132, 138, 41 L. Ed. 101, said: 'By section six (of the circuit court of appeals act) the judgments or decrees of the circuit courts of appeals were made final "in all cases arising under the criminal laws," and in certain other classes of cases, unless questions were certified to this court or the whole case ordered up by writ of certiorari as therein provided. American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 37 L. Ed. 486. Thus, appellate jurisdiction was given in all criminal cases by writ of error either from this court or from the circuit court of appeals, and in all civil cases by appeal or writ of error without regard to the amount in controversy, except as to appeals or writs of error to or from the circuit courts of appeals in cases not made final as specified in § 6.'" Motes *v.* United States, 178 U. S. 458, 466, 44 L. Ed. 1150.

12. Motes *v.* United States, 178 U. S. 458, 466, 44 L. Ed. 1150.

13. Motes *v.* United States, 178 U. S. 458, 44 L. Ed. 1150.

14. United States *v.* Sanges, 144 U. S. 310, 311, 36 L. Ed. 445; In re Lennon, 150 U. S. 393, 37 L. Ed. 1120; Muse *v.* Arlington Hotel Co., 168 U. S. 430, 42 L. Ed. 531; Nelson *v.* United States, 201 U.

Construction of Fourteenth Amendment.—Where it is claimed that a judgment of the supreme court of the United States gives such unwarranted effect

S. 92, 50 L. Ed. 673; Filhiol *v.* Maurice, 185 U. S. 108, 46 L. Ed. 827; Turner *v.* Williams, 194 U. S. 279, 48 L. Ed. 979; Defiance Water Co. *v.* Defiance, 191 U. S. 184, 194, 48 L. Ed. 140; Cummings *v.* Chicago, 188 U. S. 410, 426, 47 L. Ed. 525, reaffirmed in Jessup *v.* Trustees, etc., of Southhampton, 195 U. S. 624, 49 L. Ed. 349.

Regulations of treasury department.—A court of limited jurisdiction in Kentucky adjudged a United States collector of internal revenue to be in contempt because he refused, in making a deposition, to furnish copies of reports, made by distillers, and which were in his custody. The refusal was based upon a regulation of the treasury department which had been made by the secretary of the treasury under authority conferred by § 161, Rev. Stat., authorizing him to prescribe regulations for the custody, uses and preservation of the records, papers, etc., appertaining to his department. Upon the arrest of the collector under order of the state court, he sued out a writ of habeas corpus before the district court of the United States for Kentucky. It was held, that a direct appeal from a final order of the district court of the United States for the district of Kentucky, discharging the appellee, was properly brought, the case belonging to that class of cases in which it is provided by the act of March 3, 1891, that appeals or writs of error may be taken from the district courts or from the circuit courts direct to the supreme court "in any case that involves the construction or application of the constitution of the United States." The appellee, who was discharged upon habeas corpus, invoked the protection of the constitution against his being restrained of his liberty by the appellant acting under an order of commitment issued by an inferior state court; and the judgment of the district court proceeded upon the ground that the proceedings against him were inconsistent with the laws of the United States and with the regulations of the treasury department legally prescribed under those laws. Throughout, the contention of the appellant has been that the constitution forbade the giving of the force of law to those regulations adopted by merely executive officers. The case is properly before the supreme court of the United States on appeal as one involving the construction and application of the constitution of the United States. Boske *v.* Comingore, 177 U. S. 459, 44 L. Ed. 846.

Denial of right to vote for members of congress.—An action brought in the circuit court of the United States against election officers of a state to recover damages for refusing the plaintiff's vote for a member of congress, is a case which involves the construction and application of the constitution of the United States, and is, therefore, rightly brought directly from the circuit court to the supreme court of the United States under the act of March 3, 1891, ch. 517, § 5, cl. 4, 26 Stat. 828. Wiley *v.* Sinkler, 179 U. S. 58, 45 L. Ed. 84; Swafford *v.* Templeton, 185 U. S. 487, 491, 46 L. Ed. 1005.

Power of congress over navigable waters.—A case involving the consideration of questions relating to the power of congress, under the constitution, over navigable waters of the United States, belongs to that class of cases which may be appealed from the circuit court direct to the supreme court by virtue of the act of March 3, 1891, c. 517. Cummings *v.* Chicago, 188 U. S. 410, 426, 47 L. Ed. 525, reaffirmed in Jessup *v.* Trustees, etc., of Southhampton, 195 U. S. 624, 49 L. Ed. 349.

Denial of constitutional right to vote.—The supreme court of the United States, on direct writ of error to a circuit court of the United States, has jurisdiction to review a judgment of that court dismissing an action to recover damages for an asserted wrongful refusal by state election officials to permit the plaintiff to vote at a national election for members of the house of representatives. It is a case involving the construction or application of the constitution of the United States. Swafford *v.* Templeton, 185 U. S. 487, 491, 46 L. Ed. 1005, citing and approving Wiley *v.* Sinkler, 179 U. S. 58, 45 L. Ed. 84, and reaffirmed in Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328.

Privileges of representatives from arrest.—A case which involves the construction or application of § 6, art. 1, of the constitution of the United States, providing that senators and representatives shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses and in going to and returning from the same, may be taken to this court directly from a district court. And in such case the statute grants this court jurisdiction to issue the writ of error directly to the district court, and then to decide the case without being restricted to the constitutional question. Burton *v.* United States, 196 U. S. 283, 49 L. Ed. 482, citing Horner *v.* United States, 143 U. S. 570, 36 L. Ed. 266.

Privilege of refusing to testify.—Where a witness claims an immunity from testifying in answer to a subpœna duces tecum to produce certain books and papers, basing his immunity on the fifth amendment to the federal constitution, this involves

to a judgment of the state court as to deprive a party of his property without due process of law, it may be reviewed by the supreme court of the United States on direct appeal from the circuit court on the ground that the case involves the application of the constitution of the United States.[16]

Necessity for Request for Ruling.—In order to bring a case within this clause of the act, the circuit court must have construed the constitution, or applied it to the case, or must, at least, have been requested and have declined or omitted to construe or apply it. No construction or application of the constitution can be said to have been involved in the judgment below, when no construction or application thereof was either expressed or asked for.[17]

bbbb. *Determination of Question.*—**In General.**—Whether a suit is one that arises under the constitution or laws of the United States is determined by the questions involved. If from them it appears that some title, right, privilege or immunity on which the recovery depends will be defeated by one construction of the constitution or a law of the United States, or sustained by the opposite construction, then the case is one arising under the constitution or laws of the United States.[18]

Decision Must Necessarily and Directly Involve the Construction or Application of the Federal Constitution.— It is only when a construction or application of the constitution of the United States is directly drawn in question, and not merely incidentally involved, that we can take jurisdiction,[19] and the

questions under the federal constitution, giving this court jurisdiction by direct appeal from the circuit court. Nelson *v.* United States, 201 U. S. 92, 50 L. Ed. 673.

16. Fayerweather *v.* Ritch, 195 U. S. 276, 49 L. Ed. 193.

"In Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 41 L. Ed. 979, we held that a judgment of a state court might be here reviewed if it operated to deprive a party of his property without due process of law, and that the fact that the parties were properly brought into court and admitted to make defense was not absolutely conclusive upon the question of due process." Fayerweather *v.* Ritch, 195 U. S. 276, 297, 49 L. Ed. 193.

"If a judgment of a state court can be reviewed by this court on error upon the ground that, although the forms of law were observed, it necessarily operated to wrongfully deprive a party of his property (as indicated by the decision just referred to) a judgment of the circuit court of the United States, claimed to give such unwarranted effect to a decision of a state court as to accomplish the same result, may also be considered as presenting the question how far it can be sustained in the view of the prohibitory language of the fifth amendment, and thus involve the application of the constitution." Fayerweather *v.* Ritch, 195 U. S. 276, 298, 49 L. Ed. 193.

Impairment of obligation of contract.—A suit in equity in the circuit court of the United states brought by the waterworks company against a city claiming the exclusive right under a contract with the city for the construction and maintenance of the waterworks and for supplying the city with water for a period of thirty years, and in which it is alleged that such contract would be destroyed if subjected to the competition of a system of waterworks to be erected by the city itself, which was in contemplation under authority of an act authorizing the city to issue bonds for that purpose, and in which suit it is alleged that a resolution has been passed authorizing and providing for notice to the complainant that liability is denied under the contract for the use of their waterworks hydrants, presents a federal question under § 5 of the act of March 3, 1891, and appeal will lie directly from the decree of the circuit court of the United States to the supreme court of the United States. Vicksburg *v.* Waterworks Co., 202 U. S. 453, 50 L. Ed. 1102.

17. Cornell *v.* Green, 163 U. S. 75, 78, 41 L. Ed. 76, reaffirmed in Consolidated Water Co. *v.* Babcock, 173 U. S. 702, 43 L. Ed. 1186. Richards *v.* Michigan, etc., R. Co., 186 U. S. 479, 46 L. Ed. 1259.

18. Osborn *v.* Bank of the United States, 9 Wheat. 738, 6 L. Ed. 204; Starin *v.* New York, 115 U. S. 248, 257, 29 L. Ed. 388; Cooke *v.* Avery, 147 U. S. 375, 384, 385, 37 L. Ed. 209.

In Carson *v.* Dunham, 121 U. S. 421, 30 L. Ed. 992, it was ruled that it was necessary that the construction either of the constitution or some law or treaty should be directly involved in order to give jurisdiction, although for the purpose of the review of the judgments of state courts under § 709 of the Revised Statutes, it would be enough if the right in question came from a commission held or authority exercised under the United States. Cooke *v.* Avery, 147 U. S. 375, 385, 37 L. Ed. 209.

19. Blythe *v.* Hinckley, 173 U. S. 501, 43 L. Ed. 783, reaffirmed in Kittaning

case must be one in which the construction or application of the constitution of the United States is involved as controlling.[20] A direct appeal from a circuit court under § 5 of the act of March 3, 1891, will not be sustained where the construction or application of the constitution of the United States was not distinctly pre-

Coal Co. *v.* Zabriskie, 176 U. S. 681, 44 L. Ed. 637.

Where on appeal to the supreme court of the United States from a district court of the United States, the only suggestion of a contention based upon the constitution of the United States is that contained in the assignment of errors made for the purpose of the appeal, the record presents no constitutional question for review by that court, since it fails to disclose that a controversy on such subject was called to the attention of the court below prior to the hearing, and when it also does not appear that the court below considered or necessarily passed upon an issue of that character. Arkansas *v.* Schlierholz, 179 U. S. 598, 45 L. Ed. 335, reaffirmed in Richards *v.* Michigan, etc., R. Co., 186 U. S. 479, 46 L. Ed. 1259, citing and approving Chapin *v.* Fye, 179 U. S. 127, 45 L. Ed. 119, and Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 45 L. Ed. 280.

20. Empire, etc., Min. Co. *v.* Hanley, 205 U. S. 225, 232, 51 L. Ed. 779.

Habeas corpus proceedings.—In re Lennon, 150 U. S. 393, 37 L. Ed. 1120, was a proceeding in habeas corpus to discharge a party held upon an order for imprisonment for failing to pay a fine imposed for contempt. The petitioner alleged that the circuit court had no jurisdiction of the case in which the order of injunction had been issued, for violation of which the petitioner was alleged to be guilty of contempt; and that it had no jurisdiction either of the subject matter or of the person of the petitioner. The application being denied and direct appeal being taken to this court, it was held, that it would not lie under § 5, act of March 3, 1891, because the jurisdiction of the circuit court of the petition for habeas corpus was not in issue, nor was the construction or application of the constitution involved. Of the latter phase of the case, Mr. Chief Justice Fuller, speaking for the court, said: "Nor can the attempt be successfully made to bring the case within the class of cases in which the construction or application of the constitution is involved in the sense of the statute, on the contention that the petitioner was deprived of his liberty without due process of law. The petition does not proceed on any such theory, but entirely on the ground of want of jurisdiction in the prior case over the subject matter and over the person of petitioner, in respect of inquiry into which the jurisdiction of the circuit court was sought. If, in the opinion of that court, the restraining order had been absolutely void, or the petitioner were not bound by it, he would have been discharged, not because he would otherwise be deprived of due process, but because of the invalidity of the proceedings for want of jurisdiction. The opinion of the circuit court was that jurisdiction in the prior suit and proceedings existed, and the discharge was refused, but an appeal from that judgment directly to this court would not, therefore, lie on the ground that the application of the constitution was involved as a consequence of an alleged erroneous determination of the questions actually put in issue by the petitioner." Approved in Empire, etc., Min. Co. *v.* Hanley, 205 U. S. 225, 233, 51 L. Ed. 779.

Validity of foreclosure proceedings.—In Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 37 L. Ed. 1041, in which a bill in equity had been filed in order to impeach and set aside a decree of foreclosure on the ground of fraud and want of jurisdiction in the foreclosure suit, it was held, that no case for appeal directly to this court was made as one that involved the construction or application of the constitution of the United States. In that case Mr. Chief Justice Fuller, delivering the opinion of the court, said: "It is argued that the record shows that complainants had been deprived of their property without due process of law, by means of the decree attacked, but because the bill alleged irregularities, errors and jurisdictional defects in the foreclosure proceedings and fraud in respect thereof and in the subsequent transactions, which might have enabled the railroad company upon a direct appeal to have avoided the decree of sale, or which, if sustained on this bill, might have justified the circuit court in setting aside that decree, it does not follow that the construction or application of the constitution of the United States was involved in the case in the sense of the statute. In passing upon the validity of that decree, the circuit court decided no question of the construction or application of the constitution, and, as we have said, no such question was raised for its consideration. Our conclusion is that the motion to dismiss the appeal must be sustained." Approved in Empire, etc., Min. Co. *v.* Hanley, 205 U. S. 225, 234, 51 L. Ed. 779.

Service of process on foreign corporations.—In Cosmopolitan Min. Co. *v.* Walsh, 193 U. S. 460, 48 L. Ed. 749, it was contended, in a replication to an answer setting up certain former judgments rendered against the complainant as a bar to the suit brought by it to recover possession of the real property sold under

sented for decision in the court below.[21] In the language of Mr. Chief Justice Fuller: "Cases in which the construction or application of the constitution is involved, or the constitutionality of any law of the United States is drawn in question, are cases which present an issue upon such construction or application or constitutionality, the decision of which is controlling; otherwise, every case arising under the laws of the United States might be said to involve the construction or application of the constitution, or the validity of such laws."[22]

Where the suit does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution or laws of the United States, upon the determination of which the result depends, it is not a suit under the constitution or laws, and jurisdiction cannot under such circumstances be maintained of a direct appeal to this court from the circuit court.[23]

A case may be said to involve the construction or application of the constitution of the United States when a title, right, privilege, or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally but necessarily and directly, that our jurisdiction can be invoked for that reason.[24]

the judgments, that they were awarded without due process of law, in violation of the fourteenth amendment. And this was upon the theory that the service of process in the state courts upon the corporation's agent in the suits where the judgments were rendered was unauthorized by the laws of the state or the general principles of law. It was held, that the case was not one directly involving the construction or application of the federal constitution within the meaning of § 5 of the act of March 3, 1891, and the writ of error was dismissed. Approved in Empire, etc., Min. Co. *v.* Hanley, 205 U. S. 225, 235, 51 L. Ed. 779.

Controlling effect of res adjudicata.— Where the real issue in the circuit court is whether a former judgment between the parties in another suit is res judicata, or, as contended by the plaintiff in error, rendered without jurisdiction, and the court, in deciding against the plaintiff in error, decided that the court had jurisdiction and that the former decree was conclusive, this does not necessarily and directly involve the construction or application of the constitution of the United States. "The thing relied upon in this case was the controlling effect as res judicata of a decree rendered between the parties in another suit. And the real issue was as to the jurisdiction of the court to render the decree. The determination of that question did not involve the construction or application of the constitution of the United States. * * * The court thus really decided a question of res judicata between the parties upon general principles of law. And it does not convert the decision into one involving the construction and application of the constitution of the United States to aver, argumentatively, that to give such effect to a former adjudication under the circumstances amounts to depriving a party of due process of law." Empire, etc., Min. Co. *v.* Hanley, 205 U. S. 225, 235, 51 L. Ed. 779.

21. Empire, State—Idaho, etc., Co. *v.* Hanley, 198 U. S. 292, 298, 49 L. Ed. 1056.

22. Empire, etc., Min. Co. *v.* Hanley, 205 U. S. 225, 233, 51 L. Ed. 779.

23. Sloan *v.* United States, 193 U. S. 614, 620, 48 L. Ed. 814, citing Muse *v.* Arlington Hotel Co., 168 U. S. 430, 42 L. Ed. 531; Western Union Telegraph Co. *v.* Ann Arbor R. Co., 178 U. S. 239, 44 L. Ed. 1052; Lampasas *v.* Bell, 180 U. S. 276, 45 L. Ed. 527.

If the case does not really involve the construction or application of the constitution of the United States, in the sense in which that phrase is employed in the judiciary act of 1891, the supreme court of the United States is precluded from examining the merits upon a direct writ of error. Cosmopolitan Min. Co. *v.* Walsh, 193 U. S. 460, 48 L. Ed. 749.

24. Borgmeyer *v.* Idler, 159 U. S. 408, 40 L. Ed. 199; Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 37 L. Ed. 1041; In re Lennon, 150 U. S. 393, 395, 37 L. Ed. 1120; Northern Pac. R. Co. *v.* Amato, 144 U. S. 465, 472, 36 L. Ed. 506; Sayward *v.* Denny, 158 U. S. 180, 39 L. Ed. 941; Ansbro *v.* United States, 159 U. S. 695, 698, 40 L. Ed. 310; Cornell *v.* Green, 163 U. S. 75, 41 L. Ed. 76; Water Co. *v.* Babcock, 173 U. S. 702, 43 L. Ed. 1186; Richards *v.* Michigan, etc., R. Co., 186 U. S. 479, 46 L. Ed. 1259.

As ruled in Ansbro *v.* United States, 159 U. S. 695, 697, 40 L. Ed. 310, "a case may be said to involve the construction or application of the constitution of the United States when a title, right, privilege or immunity is claimed under that instrument, but a definite issue in respect to the possession of the right must

Mere allegations that the construction or application of the constitution was involved, not based upon the facts of the case, do not create a case which we are authorized to review,[25] averments of conclusions as to constitutional rights do not change the real character of the controversy and make it a case in which the controlling rule of decision involves the construction or application of the constitution of the United States.[26]

Must be Controlling Question.—The cases which can go only to the supreme court are those in which the construction or application of the constitution is the controlling question; that is to say, in which no proper conclusion can be reached without deciding it.[27] Although on appeal or error all other questions would be

be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision." Cornell *v.* Green, 163 U. S. 75, 78, 41 L. Ed. 76; Muse *v.* Arlington Hotel Co., 168 U. S. 430, 435, 42 L. Ed. 531.

Where an amended complaint stated that plaintiffs would "rely upon the following written evidences of their title for the maintenance of this action," and enumerated, among them, "the 3d article of the treaty between the United States of America and the French Republic of April 30, 1803, which was ratified on the 21st of October, 1803," 8 Stat. 200; and "the fifth amendment to the constitution of the United States;" but nowhere was any right, title, privilege or immunity asserted to be derived from either constitution or treaty, and there was nothing to indicate in what way, if any, the cause of action was claimed to arise from either, this is not sufficient to give this court jurisdiction of a writ of error direct from this court to the circuit court either on the ground that the construction or application of the constitution of the United States is involved, or on the ground that the validity or construction of any treaty made under the authority of the United States is drawn in question. Muse *v.* Arlington Hotel Co., 168 U. S. 430, 435, 42 L. Ed. 531.

25. Budzisz *v.* Illinois Steel Co., 170 U. S. 41, 42 L. Ed. 941.

Where the object of a plea in abatement to the jurisdiction of the court was to bring about a dismissal of the suit under the fifth section of the act of March 3, 1875, ch. 137, 18 Stat. 470, which provides for the dismissal of a suit in a circuit court of the United States if it shall appear to the satisfaction of the court at any time that the parties to it have been improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this act, this court has no jurisdiction to review by direct appeal an order of the circuit court overruling the plea upon the ground that it involves the construction or application of the constitution of the United States, where the plea raises no question as to the constitutionality of the act of 1875, and calls for no order or judgment that would require a construction or application of the constitution, although an allowance of the plea may have involved the application of an act of congress. "The plea set out certain facts which, if found to be true, required the dismissal of the suit as one of which the court could not take cognizance under the statute regulating the jurisdiction of the circuit courts of the United States. While the issue involved the jurisdiction of the circuit court, it did not involve or require, within the meaning of the act of March 3, 1891, either the construction or application of the constitution." Merritt *v.* Bowdoin College, 169 U. S. 551, 556, 42 L. Ed. 850.

26. Empire, etc., Min. Co. *v.* Hanley, 205 U. S. 225, 235, 51 L. Ed. 779.

27. Question must be controlling.—In Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 37 L. Ed. 1041, this court, in dismissing an appeal from a decree of the circuit court on a bill in equity to impeach and set aside a decree of foreclosure of a railroad mortgage, uses the following language: "It is argued that the record shows that complainants had been deprived of their property without due process of law, by means of the decree attacked, but because the bill alleged irregularities, errors, and jurisdictional defects in the foreclosure proceedings, and fraud in respect thereof and in the subsequent transactions, which might have enabled the railroad company upon a direct appeal to have avoided the decree of sale, or which, if sustained on this bill, might have justified the circuit court in setting aside that decree, it does not follow that the construction or application of the constitution of the United States was involved in the case in the sense of the statute. In passing upon the validity of that decree, the circuit court decided no question of the construction or the application of the constitution, and, as we have said, no such question was raised for its consideration." Approved in Cosmopolitan Min. Co. *v.* Walsh, 193 U. S. 460, 48 L. Ed. 749.

Habeas corpus.—The Toledo and Ann Arbor Railway Company, which connected with the Michigan Southern Railway in the carrying on of interstate commerce, filed a bill in the circuit court to restrain the Michigan Southern from re-

open to determination, if inquiry were not rendered unnecessary by the ruling on that arising under the constitution.[28]

Effect of Direction of Verdict.—Because the trial judge directs the jury to find a verdict for the defendant, will not justify the writ of error from this court to the circuit court of the United States on the ground that the case "involves the construction or application of the constitution of the United States," because the plaintiff in error was deprived of the right to a trial by jury. If the court errs as matter of law in so doing, the remedy lies in a review in the appropriate court.[29]

cccc. *Proceedings Reviewable.*—**Criminal Prosecutions.**—That act does not make a distinction between civil and criminal causes.[30]

dddd. *Time of Raising Constitutional Question.*—Under this section the constitutional question must be raised at the trial, and it comes too late for the first time in the assignment of errors.[31]

fusing to receive its cars used in such commerce, and discriminating against it, on the ground that it employed engineers who were not members of the Brotherhood of Locomotive Engineers. An injunction was issued, and a few days later the Lake Shore applied for an order of attachment against some of its employees who had refused to haul cars and perform service for them, thus hindering them from complying with the order of the court in respect to the Toledo and Ann Arbor Company. A rule to show cause was issued, and such proceedings had thereunder that one of the employees was adjudged guilty of contempt, was fined, and was ordered to be committed until payment of the fine. This employee applied to the circuit court for a writ of habeas corpus. The petition, after setting the facts forth, claimed that the circuit court had no jurisdiction of the cause in which the original order of injunction had been issued, for reasons stated, and further, that it had no jurisdiction of the petitioner's person, because he was no party to that suit, and had not been served with process. The application was denied and the petition dismissed, from which judgment the petitioner appealed to this court. Held: "The opinion of the circuit court was that jurisdiction in the prior suit and proceedings existed, and the discharge was refused, but an appeal from that judgment directly to this court would not, therefore, lie on the ground that the application of the constitution was involved as a consequence of an alleged erroneous determination of the questions actually put in issue by the petitioner." In re Lennon, 150 U. S. 393, 401, 37 L. Ed. 1120, approved in Cosmopolitan Min. Co. *v.* Walsh, 193 U. S. 460, 48 L. Ed. 749.

28. Horner *v.* United States, 143 U. S. 570, 36 L. Ed. 266; Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 181, 37 L. Ed. 1041.

There can be no doubt that when the only question in the case, or when the controlling question in the case, involves the construction or the application of the constitution of the United States, then the supreme court has exclusive appellate jurisdiction, and an appeal will not lie to the circuit court of appeals. And if, besides these, there are other questions (not controlling questions, however), the supreme court, by virtue of its jurisdiction over the controlling question, will take jurisdiction of, and will decide, the whole case. Horner *v.* United States, 143 U. S. 570, 576, 36 L. Ed. 266.

29. Treat Mfg. Co. *v.* Standard Steel, etc., Co., 157 U. S. 674, 39 L. Ed. 853; Cincinnati, etc., R. Co. *v.* Thiebaud, 177 U. S. 615, 44 L. Ed. 911.

30. Motes *v.* United States, 178 U. S. 458, 466, 44 L. Ed. 1150.

Right of confrontation.—Where it is necessary for the circuit court to determine whether the admission of certain testimony in a criminal case was not an infringement of rights secured to the accused by the 6th amendment to the constitution declaring that in all criminal prosecutions the accused shall enjoy the right to be confronted with the witness against him, such case involves the construction and application of the constitution of the United States, and may be taken directly to this court under the act of January 20, 1897, ch. 68. Motes *v.* United States, 178 U. S. 458, 44 L. Ed. 1150.

31. Ansbro *v.* United States, 159 U. S. 695, 40 L. Ed. 310.

Time of raising constitutional question.—"A case may be said to involve the construction or application of the constitution of the United States, when a title, right, privilege, or immunity is claimed under that instrument; but a definite issue in respect of the possession of the right must be distinctly deducible from the record, before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally, but necessarily and directly, that our jurisdiction can be invoked for that reason. An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction

eeee. *Double Appeals.*—Where appellants appeal to this court, alleging diversity of citizenship in their bill, but jurisdiction is also invoked on constitutional grounds, the case is appealable directly to this court under § 5 of the act of March 3, 1891, as one which "involves the construction or application of the constitution of the United States."[32] If cases which are controlled by the construction or application of the constitution of the United States are carried to the circuit courts of appeals, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance.[33] But when the circuit court of appeals has acted on the whole case, its judgment stands unless revised by certiorari to, or appeal from, that court in accordance with the act of March 3, 1891.[34]

eee. *In Cases Involving the Constitutionality of Any Law of the United States or the Validity or Construction of Treaties*—aaaa. *In General.*—Section 5 of the act of March 3, 1891, provides that appeals or writs of error may be taken from the existing circuit courts direct to the supreme court in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority, is drawn in question.[35] Where the jurisdiction of the circuit court is not invoked on the ground of diverse citizenship, but on the ground that the case arose "under the constitution or laws of the United

to this court under the fifth section of the act of March 3, 1891. Ansbro *v.* United States, 159 U. S. 695, 697, 698, 40 L. Ed. 310. In support of that judgment, several cases were cited, two of them very like the case at bar. Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 181, 37 L. Ed. 1041; In re Lennon, 150 U. S. 393, 401, 37 L. Ed. 1120." Cornell *v.* Green, 163 U. S. 75, 79, 41 L. Ed. 76, reaffirmed in Water Co. *v.* Babcock, 173 U. S. 702, 43 L. Ed. 1186; Richards *v.* Michigan, etc., R. Co., 186 U. S. 479, 46 L. Ed. 1259.

Assignment of errors.—Where this court cannot find that any constitutional question was raised at the trial, as for example, where motions to quash, to instruct the jury to find for the defendant, "for new trial, and in arrest of judgment were made, but in neither of them, so far as appears, nor by any exception to rulings on the admission or exclusion of evidence, nor to instructions given or the refusal of instructions asked, was any suggestion made that defendant was being denied any constitutional right or that the law under which he was indicted was unconstitutional," but the first time that anything appears upon that subject is in the assignment of errors, the writ of error will be dismissed, because an assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and the rulings asked thereon, so as to give to this court jurisdiction under the 5th section of the act of March 3, 1891. Ansbro *v.* United States, 159 U. S. 695, 40 L. Ed. 310.

A decree of the circuit court dismissing upon general demurrer for want of equity a bill filed by a grantee of land to redeem the land from a mortgage, and to set aside the proceedings for foreclosure, on the ground that he was not sufficiently made a party to bind him by the decree in his individual, as well as in his representative capacity, cannot be reviewed by this court by direct appeal on the ground that the case "involved the construction or application of the constitution of the United States" within the meaning of the judiciary act of March 3, 1891, ch. 517, § 5, especially where the first indication of anything like an intention on the part of the plaintiff to invoke the protection of the constitution of the United States, is in the suggestion, in the assignment of errors "that said findings deprived said complainant of his property without due process of law." Cornell *v.* Green, 163 U. S. 75, 41 L. Ed. 76, Mr. Justice Brown dissenting, reaffirmed in Water Co. *v.* Babcock, 173 U. S. 702, 43 L. Ed. 1186; Richards *v.* Michigan, etc., R. Co., 186 U. S. 479, 46 L. Ed. 1259.

32. Field *v.* Barber Asphalt Co., 194 U. S. 618, 48 L. Ed. 1142, reaffirmed in Field *v.* Barber Asphalt Co., 203 U. S. 585, 51 L. Ed. 328.

33. Holt *v.* Indiana Mfg. Co., 176 U. S. 68, 44 L. Ed. 374; United States *v.* Jahn, 155 U. S. 109, 39 L. Ed. 87; New Orleans *v.* Benjamin, 153 U. S. 411, 38 L. Ed. 764; Benjamin *v.* New Orleans, 169 U. S. 161, 42 L. Ed. 700.

34. Carter *v.* Roberts, 177 U. S. 496, 500, 44 L. Ed. 861; Cincinnati, etc., R. Co. *v.* Thiebaud, 177 U. S. 615, 44 L. Ed. 911.

35. Chappell *v.* United States, 160 U. S. 499, 40 L. Ed. 510; Muse *v.* Arlington Hotel Co., 168 U. S. 430, 42 L. Ed. 531; Chin Bak Kan *v.* United States, 186 U. S. 193, 201, 46 L. Ed. 1121; Turner *v.* Williams, 194 U. S. 279, 289, 48 L. Ed. 979; Filhiol *v.* Maurice, 185 U. S. 108, 110, 46 L. Ed. 827, reaffirmed in Cueli *v.* Rodriguez, 198 U. S. 581, 582, 49 L. Ed. 1172.

States, or treaties made, or which shall be made, under their authority;" and the circuit court takes jurisdiction on the latter ground, and decides the case upon the merits, the writ of error is properly taken directly to this court, the jurisdiction of which is exclusive in such cases.[36]

Prospective Operation of Statute.—Where a case involves the constitutionality of a law of the United States, it is within the appellate jurisdiction of this court by direct appeal from the circuit court, notwithstanding the appeal was taken since the act establishing the circuit court of appeals took effect.[37]

bbbb. *Determination of Question.*—Where the case depends entirely on the construction of an act of congress, its constitutionality not being drawn in question, it is not one of those described in the fifth section of the act of 1891, and consequently cannot come here directly from the circuit court.[38]

Mere allegations that the construction or the validity of a treaty of the United States or made under its authority is involved, or arises, or is drawn in question in the case, not based upon the facts of the case, do not create a case which we are authorized to review.[39]

Must Be Directly in Issue.—A case may be said to involve the validity or construction of a treaty made under the authority of the United States when a title, right, privilege or immunity is claimed under that instrument, but a definite issue in respect to the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. Some right, title, privilege or immunity dependent on the treaty must be so set up or claimed as to require the circuit court to pass on the question of validity or construction in disposing of the right asserted.[40] And it is only when the constitutionality of a

36. Filhiol *v.* Maurice, 185 U. S. 108, 110, 46 L. Ed. 827, reaffirmed in Cueli *v.* Rodriguez, 198 U. S. 581, 49 L. Ed. 1172, citing Huguley Mfg. Co. *v.* Galeton Cotton Mills, 184 U. S. 290, 46 L. Ed. 546; American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 45 L. Ed. 859.

Offenses against postal laws.—An appeal will lie direct to this court from the circuit court under § 5 of the act of March 3, 1891, ch. 517 (26 Stat. 826 to 828, 1115), where there is drawn in question in the circuit court the constitutionality of § 3894 of the Revised Statutes, as amended by the act of September 19, 1890, ch. 908 (26 Stat. 465), prohibiting the sending by mail of circulars concerning lotteries. Horner *v.* United States, 143 U. S. 570, 36 L. Ed. 266.

37. Ekiu *v.* United States, 142 U. S. 651, 35 L. Ed. 1146.

It is contended on the part of the United States that, as the appeal in this case was taken on November 17, 1891, after the act entitled "An act to establish circuit courts of appeals, and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," c. 517, passed March 3, 1891 (26 Stat. 826), went into effect, this court has no jurisdiction of this appeal, and that it ought to have been taken to the circuit court of appeals for the second circuit. But, as the constitutionality of § 3894, as amended, is drawn in question, an appeal in this case lies directly to this court from the circuit court, under § 5 of the act of March 3, 1891, which gives such appeal "in any case in which the constitutionality of any law of the United States * * * is drawn in question." This is in accordance with our decision in Ekiu *v.* United States, 142 U. S. 651, 658, 659, 35 L. Ed. 1146, where it was said: "As this case involves the constitutionality of a law of the United States, it is within the appellate jurisdiction of this court, notwithstanding the appeal was taken since the act establishing circuit courts of appeals took effect. Act of March 3, 1891, ch. 517, § 5; 26 Stat. 827, 828, 1115." Horner *v.* United States, 143 U. S. 570, 576, 36 L. Ed. 266.

38. Spreckels Sugar Refining Co. *v.* McClain, 192 U. S. 397, 407, 48 L. Ed. 496; Pettit *v.* Walshe, 194 U. S. 205, 216, 48 L. Ed. 938.

39. Budzisz *v.* Illinois Steel Co., 170 U. S. 41, 42 L. Ed. 941.

40. Muse *v.* Arlington Hotel Co., 168 U. S. 430, 42 L. Ed. 531, citing Borgmeyer *v.* Idler, 159 U. S. 408, 40 L. Ed. 199; Blythe *v.* Hinckley, 173 U. S. 501, 43 L. Ed. 783.

"A case may be said to involve the construction or application of the constitution of the United States when a title, right, privilege or immunity is claimed under that instrument, but a definite issue in respect to the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. The same rule is applicable in respect of the validity or con-

law of the United States is drawn in question, not incidentally but necessarily and directly, that our jurisdiction can be invoked for that reason.[41]

Validity or Construction of Treaties.—In General.—A case may be brought directly from a circuit court to this court if the construction of a treaty is therein drawn in question.[42] This court cannot take jurisdiction on the ground that the validity or construction of a treaty was drawn in question where it was not so drawn in question directly, but was merely indirectly involved.[43] Some right, title,

struction of a treaty. Some right, title, privilege or immunity dependent on the treaty must be so set up or claimed as to require the circuit court to pass on the question of the validity or construction in disposing of the right asserted." Filhiol *v.* Maurice, 185 U. S. 108, 110, 46 L. Ed. 827, reaffirmed in Cueli *v.* Rodriguez, 198 U. S. 581, 582, 49 L. Ed. 1172, citing Muse *v.* Arlington Hotel Co., 168 U. S. 430, 42 L. Ed. 531.

Where an amended complaint stated that plaintiffs would "rely upon the following written evidences of their title for the maintenance of this action," and enumerated, among them, "the 3d article of the treaty between the United States of America and the French Republic of April 30, 1803, which was ratified on the 21st of October, 1803," 8 Stat. 200; and "the fifth amendment to the constitution of the United States;" but nowhere was any right, title, privilege or immunity asserted to be derived from either constitution or treaty, and there was nothing to indicate in what way, if any, the cause of action was claimed to arise from either, this is not sufficient to give this court jurisdiction of a writ of error direct from this court to the circuit court either on the ground that the construction or application of the constitution of the United States is involved, or on the ground that the validity or construction of any treaty made under the authority of the United States is drawn in question. Muse *v.* Arlington Hotel Co., 168 U. S. 430, 435, 42 L. Ed. 531.

The circuit court of appeals ordered that the following question be certified to the supreme court of the United States for its instruction: "Does a record showing an instruction by the circuit court directing a jury that the plaintiff is entitled to recover in his action under a state law, upon which the plaintiff relies for recovery, to which instruction a general exception is reserved by the defendant, disclose a case in which it is claimed that the law of a state is in contravention of the constitution of the United States, within the meaning of § 5 of the act of March 3, 1891, where the record of the circuit court does not affirmatively show that any issue as to the statute was raised by the pleadings, and where the record does not affirmatively show that said exception to said instruction was upon the ground that said statute was in contravention of the constitution of the United States, or that the constitutionality of said statute was otherwise presented or considered or passed upon by the circuit court?" It was held, such record does not disclose such a case. Cincinnati, etc., R. Co. *v.* Thiebaud, 177 U. S. 615, 617, 618, 44 L. Ed. 911.

41. Borgmeyer *v.* Idler, 159 U. S. 408, 40 L. Ed. 199; Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 37 L. Ed. 1041; In re Lennon, 150 U. S. 393, 395, 37 L. Ed. 1120; Northern Pac. R. Co. *v.* Amato, 144 U. S. 465, 472, 36 L. Ed. 506; Sayward *v.* Denny, 158 U. S. 180, 39 L. Ed. 941; Ansbro *v.* United States, 159 U. S. 695, 698, 40 L. Ed. 310; Blythe *v.* Hinckley, 173 U. S. 501, 43 L. Ed. 783.

42. 26 Stat. 826, ch. 517, § 5; Pettit *v.* Walshe, 194 U. S. 205, 216, 48 L. Ed. 938; Filhiol *v.* Torney, 194 U. S. 356, 48 L. Ed. 1014.

Where a petition for a writ of habeas corpus and the warrant under which the accused was arrested both refer to a treaty, and the court below properly proceeded on the ground that the determination of the question involved in the case depended in part, at least, on the meaning of certain provisions of the treaty, the construction of a treaty is involved, giving the court jurisdiction of a direct appeal from the circuit court, and the construction of the treaty is none the less drawn in question, because it became necessary or appropriate for the court below also to construe the acts of congress passed to carry the provisions of the treaty into effect. Pettit *v.* Walshe, 194 U. S. 205, 48 L. Ed. 938.

43. Blythe *v.* Hinckley, 173 U. S. 501, 43 L. Ed. 783, reaffirmed in Kittaning Coal Co. *v.* Zabriskie, 176 U. S. 681, 44 L. Ed. 637.

Where the question of the capacity of an alien to inherit, was not directly passed on by the circuit court, this court has no jurisdiction although that question might have been indirectly involved in the judgment. Blythe *v.* Hinckley, 173 U. S. 501, 43 L. Ed. 783, reaffirmed in Kittaning Coal Co. *v.* Zabriskie, 176 U. S. 681, 44 L. Ed. 637.

The bill alleged that the cause arises under a treaty between the United States and Spain which ratified and confirmed the grant in question. And the controversy involved in this cause necessarily involves the construction of said treaty. It was held, that a motion to dismiss a direct appeal from the circuit court of the

privilege or immunity dependent upon a treaty must be so set up or claimed as to require the circuit court to pass upon the question of the validity or construction of the treaty in disposing of the right asserted. In order to come within the act of 1891 the treaty must be directly involved, and upon its construction the rights of the parties must rest.[44] The mere fact that the matter in controversy in an action is a sum of money received by one of the parties as an award under a treaty of the United States with a foreign power, providing for the submission of claims against that power to arbitration, does not, in any way, draw in question the validity or construction of that treaty, so as to confer jurisdiction on this court to review the judgment of a circuit court of the United States.[45] It cannot be said that the construction of any treaty is drawn in question when the rights of neither party are necessarily dependent upon such construction, but are dependent upon that which may be given an act of congress and when the construction of that statute is independent of that which may be given any of the treaties mentioned, although weight may be given to the treaties in determining the question

United States for lack of jurisdiction, must be dismissed. Mitchell *v.* Furman, 180 U. S. 402, 45 L. Ed. 596.

Considering the pleadings, the evidence and the master's report and opinion, the supreme court of the United States, upon a direct appeal from a circuit court of the United States in a cause involving the construction of a treaty, held that rights under the treaty were so far set up and relied on as to give jurisdiction to the circuit court, and to justify an appeal from its decree directly to that court. The court said: "The record differs from that in Muse *v.* Arlington Hotel Co., 168 U. S. 430, 42 L. Ed. 531, which fell short of affording adequate grounds for the maintenance of our jurisdiction." Mitchell *v.* Furman, 180 U. S. 402, 45 L. Ed. 596.

Averments in a complaint in ejectment, that the defendant's possession rests upon an infraction by the United States of its obligations under its treaty, or an unlawful act in taking possession without compensation in defiance of the constitution, does not bring the case within the jurisdiction of this court by direct appeal, either on the ground that there is involved in the case the application of the constitution of the United States, or the meaning and force of a treaty. Filhiol *v.* Torney, 194 U. S. 356, 48 L. Ed. 1014.

44. Sloan *v.* United States, 193 U. S. 614, 620, 48 L. Ed. 814, citing Muse *v.* Arlington Hotel Co., 168 U. S. 430, 42 L. Ed. 531.

45. Borgmeyer *v.* Idler, 159 U. S. 408, 40 L. Ed. 199; Blackburn *v.* Portland Gold Min. Co., 175 U. S. 571, 586, 44 L. Ed. 276.

Where an award has been obtained under a treaty, and both parties claim under the award, the introduction of the treaty and the award, merely as part of the history of the case, does not involve the validity or construction of any treaty. Borgmeyer *v.* Idler, 159 U. S. 408, 40 L. Ed. 199, citing the following cases, which were decided under that section of the judiciary act allowing writs of error to the state courts under similar circumstances. Gill *v.* Oliver, 11 How. 529, 13 L. Ed. 799; Williams *v.* Oliver, 12 How. 111, 13 L. Ed. 921, and Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 32 L. Ed. 908, which was decided under that section of the Revised Statutes allowing a writ of error or appeal to the supreme court of the District of Columbia under similar circumstances, without regard to the sum or value of the matter in controversy.

In Gill *v.* Oliver, 11 How. 529, 543, 13 L. Ed. 799, on error to the court of appeals of Maryland, it was held, where an award had been obtained under a treaty with Mexico and both parties claimed under the award, that the introduction of the treaty and the award merely as part of the history of the case did not in any way involve the validity of the treaty or its construction and that the writ of error could not be maintained. See Williams *v.* Oliver, 12 How. 111, 13 L. Ed. 921; Baltimore & Potomac Railroad *v.* Hopkins, 130 U. S. 210, 225, 32 L. Ed. 908; Borgmeyer *v.* Idler, 159 U. S. 408, 415, 40 L. Ed. 199.

"By the fifth section of the act of March 3, 1891, appeals or writs of error from the district and circuit courts of the United States to this court were allowed, among other cases, "in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question," but it was not suggested in the summons and statement of claim that the validity or construction of any treaty made under the authority of the United States was drawn in question, and no such question was decided either by the circuit court or the circuit court of appeals. It is unreasonable to contend that any question was raised directly touching the validity or construction of either of the treaties of Venezuela by plaintiff's statement of claim or by clear and necessary intendment therefrom, and, this writ of error must be dismissed." Borgmeyer *v.* Idler, 159 U. S. 408, 414, 40 L. Ed. 199.

of the construction of the statute.[46]

Where the construction of an extradition treaty is involved in a habeas corpus case in the circuit court, an appeal will lie to this court under the circuit court of appeals act which permits an appeal to this court in any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question.[47]

Indian Treaties.—A decision by a circuit court in an action of ejectment that the patents under which the plaintiff claims are invalid because the Indian title to the land had not been extinguished at the time of the inception of the plaintiff's title, and that any patent or purported patent granted by the United States while the Indian title was still existing, was null and void, cannot be reviewed by this court on direct appeal under the fifth section of the act of March 3rd, 1891, on the ground that it is a case in which the validity or construction of a treaty made under the authority of the United States is drawn in question by a party having a rightful interest in such question, because the alleged invalidity of the entries and of the patents did not arise out of any alleged misconstruction or breach of any treaty, but out of the alleged misconduct of the officers of the land office in permitting the entries and in issuing the patents. Moreover, the defendants did not connect themselves in any way with the Indian treaties, or with any of the parties to them; nor did they claim any rights under those treaties, or under any of the parties to them.[48]

cccc. *Scope of Review.*—Where an appeal or writ of error is taken direct to this court under § 5 of the act of March 3, 1891, in a case in which the constitutionality of a law of the United States is drawn in question, this court acquires jurisdiction of the entire case, and of all questions involved in it, and not merely of the question of the constitutionality of the law of the United States. This is shown by the fact that, under § 5, where an appeal or writ of error is taken direct to this court, in a case in which the jurisdiction of the district court or of the

46. Sloan *v.* United States, 193 U. S. 614, 621, 48 L. Ed. 814.

Where an action is brought under authority of the acts of congress approved, respectively, August 15, 1894, and February 6, 1901, permitting persons, in whole or in part of Indian blood and claiming to be entitled to an allotment of land under any act of congress, to commence an action in the proper circuit court of the United States for the purpose of maintaining their right to such allotment, and the complainants' attempt to bring an appeal direct to this court from the circuit court on the ground that the construction of a treaty or treaties of the United States with the Omaha Indians was drawn in question, a motion to dismiss the appeal on the ground that the case does not fall within the provisions of § 5 of the act of March 3, 1891, because the respective complainants neither assert nor claim any right to an allotment under or by virtue of any treaty, and because the validity or construction of a treaty is not drawn in question, will be granted. "The complainants in their several bills have based their claims to an allotment upon the act of 1882 and upon the proper construction to be given to its language, which construction, they aver, would recognize their rights to an allotment under the treaties referred to. The United States, in defending against the claims made by the complainants, also relies entirely upon the proper construction of the act of 1882. The construction of a treaty is used only as an argument upon the issue directly in question, viz, the construction of the statute. The alleged right to an allotment being based upon the act of 1882, and the defense being also based upon the proper construction of that act, we cannot but regard the case as one simply resting on such act. The construction of these various treaties was not substantially or in any other than a merely incidental or remote manner drawn in question, and therefore a direct appeal to this court cannot be sustained." Sloan *v.* United States, 193 U. S. 614, 48 L. Ed. 814.

47. Rice *v.* Ames, 180 U. S. 371, 45 L. Ed. 577; Pettit *v.* Walshe, 194 U. S. 205, 48 L. Ed. 938.

The supreme court of the United States has held that a direct review by it is allowed where the construction of an extradition treaty is drawn in question on a habeas corpus in the United States circuit court. Pettit *v.* Walshe, 194 U. S. 205, 48 L. Ed. 938, citing Spreckels Sugar Refining Co. *v.* McLain, 192 U. S. 397, 48 L. Ed. 496, 26 Stat. 826, ch. 517, § 5; Ornelas *v.* Rinz, 161 U. S. 502, 507, 40 L. Ed. 787.

48. Budisz *v.* Illinois Steel Co., 170 U. S. 41, 42 L. Ed. 941.

circuit court is in issue, it is specifically directed that "the question of jurisdiction alone shall be certified to the supreme court from the court below for decision," but there is no kindred limitation prescribed in regard to any of the other cases in which jurisdiction in this court of appeals or writs of error is given by § 5.[49] Although no question of jurisdiction has been separately certified or specified, yet if the writ of error was allowed without restriction or qualification, and this court has acquired appellate jurisdiction under that clause of the statute giving it jurisdiction by direct appeal in cases in which the constitutionality of a law of the United States was drawn in question, we have power to dispose, not merely of the constitutional question, but of the entire case, including all questions, whether of jurisdiction or of merits.[50]

III. *In Cases Involving the Constitutionality of State Laws and Constitutions*—aaaa. *In General.*—By the fifth section of the act of March 3, 1891, c. 517, 26 Stat. 826, creating the circuit courts of appeals, jurisdiction is conferred upon this court to review by direct appeal any final judgment rendered by the circuit court "in any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States."[51] This court cannot take jurisdiction on the ground that the constitution or law of a state was claimed to be in contravention of the constitution of the United States, unless such question was directly in issue, and not merely indirectly involved in the judgment.[52]

Claim Must Be Real and Substantial.—The questions which can be raised under any of the subdivisions of § 5 of the act (of March 3, 1891), must be real; the controversies they present must be substantial, not only from the nature of the principles invoked, but from the relation of the party to them by whom they are invoked.[53]

49. Horner *v.* United States, 143 U. S. 570, 576, 36 L. Ed. 266; Press Publishing Co. *v.* Monroe, 164 U. S. 105, 41 L. Ed. 367; German Savings Society *v.* Dormitzer, 192 U. S. 125, 48 L. Ed. 373.

50. Chappell *v.* United States, 160 U. S. 499, 40 L. Ed. 510, citing Ekiu *v.* United States, 142 U. S. 651, 35 L. Ed. 1146; Horner *v.* United States, 143 U. S. 570, 577, 36 L. Ed. 266; United States *v.* Jahn, 155 U. S. 109, 112, 113, 39 L. Ed. 87, reaffirmed in Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209; Filhiol *v.* Torney, 194 U. S. 356, 48 L. Ed. 1014.

51. Penn., etc., Ins. Co. *v.* Austin, 168 U. S. 685, 694, 42 L. Ed. 626; Fidelity, etc., Ass'n *v.* Mettler, 185 U. S. 308, 315, 46 L. Ed. 922, citing and approving Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 45 L. Ed. 280; American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 45 L. Ed. 859; Giozza *v.* Tiernan, 148 U. S. 657, 661, 37 L. Ed. 599.

Laws relating to foreign corporations.—Where an action is brought in a federal court by a foreign corporation, against one of its commission agents, to recover the price of certain goods sold by the defendant in the state under a contract in writing, and the defendant sets up the defense that the foreign corporation has failed to comply with the laws of the state and thereby the contract is void, if the circuit court, in giving judgment for the plaintiff, holds that the statute, so far as it applies to the business carried on by the plaintiff in that state under the contract, is in conflict with the constitution of the United States, authorizing congress to regulate interstate commerce, it is "a case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States," and is rightly brought directly to this court under the act of March 3, 1891, ch. 517, § 5; 26 Stat. 828. Holder *v.* Aultman, 169 U. S. 81, 42 L. Ed. 669.

Insurance laws.—A writ of error will lie from this court to a United States circuit court where the validity of the statutes of a state authorizing the recovery of damages and attorney's fees for failure by life and health insurance companies to pay losses, is seasonably drawn in question by the defendant below as being in contravention of the constitution of the United States. Fidelity, etc., Ass'n *v.* Mettler, 185 U. S. 308, 46 L. Ed. 922, following Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 45 L. Ed. 280; American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 45 L. Ed. 859.

52. Blythe *v.* Hinckley, 173 U. S. 501, 43 L. Ed. 783, reaffirmed in Kittaning Coal Co. *v.* Zabriskie, 176 U. S. 681, 44 L. Ed. 637.

53. Lampasas *v.* Bell, 180 U. S. 276, 284, 45 L. Ed. 527.

"This court has only jurisdiction by appeal or writ of error directly from the circuit court in certain cases, one of which is when 'the constitution or law of a state is claimed to be in contravention of the constitution of the United States.' Section 5 of the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, 828. But the

bbbb. *What Is a "Law of a State."*—Where the state has delegated certain powers to a city, the ordinances of the municipal authorities in this particular are the acts of the state, through one of its properly constituted instrumentalities, and their unconstitutionality is the unconstitutionality of a state law within the meaning of § 5 of the circuit court of appeals act.[54]

cccc. *Who May Raise the Question.*—**In General.**—A court will not listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has therefore no interest in defeating it. Therefore, a plaintiff in error, who has no legal interest in the constitutional question raised, cannot come directly to this court from the circuit court under this section.[55]

Where Federal Question Is Raised by Defendant.—But it was the purpose of congress to give opportunity to an unsuccessful litigant to come to this court directly from the circuit court in every case in which a claim is made that a state law is in contravention of the constitution of the United States.[56] When the jurisdiction of the circuit court is invoked by the plaintiff only on the ground of diverse citizenship, a claim by the defendant of the repugnancy of a state law to the constitution of the United States is sufficient to give the supreme court of the United States jurisdiction, upon writ of error, to review the final judgment of the circuit court sustaining such ground.[57] In other words, if a claim is made

claim must be real and substantial. A mere claim in words is not enough. We said by the chief justice, in Western Union Telegraph Co. *v.* Ann Arbor R. Co., 178 U. S. 239, 44 L. Ed. 1052: 'When a suit does not really and substantially involve a dispute or controversy as to the effect or construction of the constitution or laws of the United States, upon the determination of which the result depends, it is not a suit arising under the constitution or laws. And it must appear on the record, by a statement in legal and logical form, such as is required in good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction of the constitution or some law or treaty of the United States, before jurisdiction can be maintained on this ground.' Gold Washing & Water Co. *v.* Keyes, 96 U. S. 199, 24 L. Ed. 656; Blackburn *v.* Portland Gold Min. Co., 175 U. S. 571, 44 L. Ed. 276;" Lampasas *v.* Bell, 180 U. S. 276, 282, 283, 45 L. Ed. 527; Newburyport Water Co. *v.* Newburyport, 193 U. S. 561, 48 L. Ed. 795."

54. Law of a state defined.—City R. Co. *v.* Citizens' Street R. Co., 166 U. S. 557, 41 L. Ed. 1114; Penn., etc., Ins. Co. *v.* Austin, 168 U. S. 685, 694, 42 L. Ed. 626; St. Paul Gaslight Co. *v.* St. Paul, 181 U. S. 142, 148, 45 L. Ed. 788; Davis & Farnum Mfg. Co. *v.* Los Angeles, 189 U. S. 207, 216, 47 L. Ed. 778.

55. Who may raise the question.—The objection that, by a new incorporation extending the boundaries of a city and bringing in people who were not formerly in the city, the residents of the territory thus brought in were not given an opportunity to be heard, "whether they should or should not be included in or made subject to taxation in the proposed corporations;" and that a levy and collection of taxes from them was in violation of § 1, of the 14th amendment to the constitution of the United States, cannot be made by the city, the plaintiff in error, on behalf of the people who have not objected to the incorporation, in order to obtain a direct appeal to the supreme court of the United States from a circuit court under § 5, of the judiciary act of 1891. The objection must be made by one having a legal interest in the question and not by a stranger to its grievance. The plaintiff in error has no legal interest in the constitutional question which it raised, and upon which it claims the right to come directly to this court from the circuit court under § 5 of the act of 1891. Lampasas *v.* Bell, 180 U. S. 276, 45 L. Ed. 527.

56. Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 478, 45 L. Ed. 280.

57. Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 45 L. Ed. 280.

"Our right of review, by the express words of the statute, extends to 'any case of the kind specified in the fifth section.' And the statute does not in terms exclude a case in which the federal question therein was raised by the defendant. That section differs from § 709 of the Revised Statutes relating to the review by this court of the final judgment of the highest court of a state in this, that under the latter section we can review the final judgment of the state court upon writ of error sued out by the party who is denied a right, privilege or immunity specially set up or claimed by him under the constitution or laws of the United States; whereas the circuit court of appeals act does not declare that the final judgment of a circuit court in a case in which there was a claim of the repugnancy of a state statute to the constitution of the United States may be reviewed here only upon writ of error sued out by the party mak-

by one of the parties in the circuit court that a state law is repugnant to the constitution of the United States, the supreme court may direct a writ of error to the court to review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant.[58]

dddd. *Showing as to Jurisdiction.*—**In General.**—The words of the statute which empower this court to review directly the action of the circuit court are that such power shall exist wherever it is claimed on the record that a law of a state is in contravention of the federal constitution. Of course, the claim must be real and colorable, not fictitious and fraudulent.[59] Moreover, the power of this court to review, on a writ of error, the action of a state court, must not be confounded "with the power exercised by this court, under the act of 1891, to review by direct appeal the final action of the circuit court where, on the face of the record, it appears that the claim was made that the statute of a state contravened the constitution of the United States. These classes of jurisdiction are distinct in their nature, and are embraced in different statutory provisions. Having jurisdiction of the cause, there exists the power to consider every question arising on the record."[60]

Test of Jurisdiction.—When the question is whether a judgment of the circuit court of appeals is final in a particular case, it may well be that the jurisdiction of the circuit court is, within the meaning of that section, to be regarded as dependent entirely upon the diverse citizenship of the parties if the plaintiff invoked the authority of that court only upon that ground; because in such case

ing the claim. In other words, if a claim is made in the circuit court, no matter by which party, that a state enactment is invalid under the constitution of the United States, and that claim is sustained or rejected, then it is consistent with the words of the act, and, we think, in harmony with its object, that this court review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant." Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 477, 478, 45 L. Ed. 280.

58. Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 45 L. Ed. 280.

This court has jurisdiction on writ of error to a circuit court, under the circuit court of appeals act, where the invalidity of a state statute is claimed, under the constitution of the United States, to review such question, when decided against either party; hence, includes a case where defendant brings up the writ of error, who has previously set up, in defense of the action, a state statute, which the court held unconstitutional. Connolly *v.* Union Sewer Pipe Co., 184 U. S. 540, 46 L. Ed. 679.

In Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 477, 45 L. Ed. 280, this court said: "The circuit court of appeals act does not declare that the final judgment of a circuit court in a case in which there was a claim of the repugnancy of a state statute to the constitution of the United States may be reviewed here only upon writ of error sued out by the party making the claim. In other words, if a claim is made in the circuit court, no matter by which party, that a state enactment is invalid under the constitution of the United States, and that claim is sustained or rejected, then it is consistent with the words of the act, and, we think in harmony with its object, that this court review the judgment at the instance of the unsuccessful party, whether plaintiff or defendant. It was the purpose of congress to give opportunity to an unsuccessful litigant to come to this court directly from the circuit court in every case in which a claim is made that a state statute is in contravention of the constitution of the United States." Approved in Connolly *v.* Union Sewer Pipe Co., 184, U. S. 540, 544, 46 L. Ed. 679.

59. Penn., etc., Ins. Co. *v.* Austin, 168 U. S. 685, 695, 42 L. Ed. 626; Newburyport Water Co. *v.* Newburyport, 193 U. S. 561, 48 L. Ed. 795.

60. Horner *v.* United States, 143 U. S. 570, 36 L. Ed. 266; Penn., etc., Ins. Co. *v.* Austin, 168 U. S. 685, 695, 42 L. Ed. 626.

Where "the complainants in their bill in express terms predicated their right to the relief sought upon the averment that certain ordinances adopted by the municipal authorities of the city of Austin, and an act of the legislature of the state of Texas referred to in the bill, impaired the obligations of the contract which the bill alleged had been entered into with the complainants by the city of Austin, and that both the law of the state of Texas and the city ordinances were in contravention of the constitution of the United States," it was held, that no language could more plainly bring the case within the letter of a statute than do these allegations of the bill bring this case within the act of March 3, 1891, c. 517, 26 Stat. 826, giving this court jurisdiction to re-

the jurisdiction of the court needed no support from the averments of the answer, but attached and became complete upon the allegations of the petition. But no such test of the jurisdiction of this court to review the final judgment of the circuit court is prescribed by the fifth section. Our jurisdiction depends only on the inquiry whether that judgment was in a case in which it was claimed that a state law was repugnant to the Constitution of the United States.[61]

Necessity for Adverse Decision.—Upon a writ of error from this court to a circuit court under the act of March 3, 1891, c. 517, § 5, in a case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States, the jurisdiction of this court does not depend upon the question whether the right claimed under the constitution of the United States has been upheld or denied in the court below, and therefore it differs in this respect from a writ of error to the highest court of a state.[62] On the other hand, under the act of March 3, 1891, the fact that the defeated party, in a suit in a circuit court of the United States, alleged that a state law is in contravention of the constitution of the United States, does not authorize him to appeal directly to the supreme court of the United States, where the decision of the circuit court on that point was in his favor and a judgment or decree was rendered against him on the merits.[63] The words "in any case in which the constitution or law of a

view by direct appeal any final judgment rendered by the circuit court in any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States. Not only were the averments of the bill, as to the invalidity of the state law adequate, but so also were the allegations as to the nullity of the city ordinances. These ordinances were but the exercise by the city of a legislative power which it assumed had been delegated to it by the state, and were, therefore, in legal intendment the equivalent of laws enacted by the state. Penn., etc., Ins. Co. *v.* Austin, 168 U. S. 685, 42 L. Ed. 626, citing City R. Co. *v.* Citizens' Street R. Co., 166 U. S. 557, 41 L. Ed. 1114.

61. Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 479, 45 L. Ed. 280.

62. Holder *v.* Aultman, 169 U. S. 81, 42 L. Ed. 669.

Holder *v.* Aultman, 169 U. S. 81, 88, 42 L. Ed. 669, was an action in the circuit court of the United States for the eastern district of Michigan upon a written contract relating to agricultural machines, the plaintiff being a corporation of Ohio, and the defendant a corporation of Michigan. No question of a federal nature appeared in the plaintiff's petition. The defendant, however, claimed that a certain statute of Michigan stood in the way of the plaintiff maintaining its action. This court said: 'The circuit court, in giving judgment for the plaintiff, held that the contract was made in the state of Ohio, and that the statute of Michigan, so far as it applied to the business carried on by the plaintiff in that state under the contract, was in conflict with the constitution of the United States authorizing congress to regulate interstate commerce. 68 Fed. Rep. 467. This was therefore a "case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States," and was rightly brought directly to this court by writ of error under the act of March 3, 1891, ch. 517, § 5, 26 Stat. 828. Upon such writ of error, differing in those respects from a writ of error to the highest court of a state, the jurisdiction of this court does not depend upon the question whether the right claimed under the constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not limited to the constitutional question, but includes the whole case. Whitten *v.* Tomlinson, 160 U. S. 231, 238, 40 L. Ed. 406; Penn., etc., Ins. Co. *v.* Austin, 168 U. S. 685, 42 L. Ed. 626; Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 480, 481, 45 L. Ed. 280.

63. Anglo-American Provision Co. *v.* Davis Provision Co., 191 U. S. 373, 48 L. Ed. 225, citing Lampasas *v.* Bell, 180 U. S. 276, 45 L. Ed. 527.

In United States *v.* Jahn, 155 U. S. 109, 114, 115, 39 L. Ed. 87, it is said: "If the question of jurisdiction is in issue, and the jurisdiction sustained, and then judgment or decree is rendered in favor of the defendant on the merits, the plaintiff, who has maintained the jurisdiction, must appeal to the circuit court of appeals, where, if the question of jurisdiction arises, the circuit court of appeals may certify it." Anglo-American Provision Co. *v.* Davis Provision Co., 191 U. S. 373, 377, 48 L. Ed. 228.

"As a general rule, the court will not allow a party to rely on anything as cause for reversing a judgment, which was for his advantage." Cited from Mr. Justice Curtis' dissent in Scott *v.* Sanford, 19 How. 393, 566, 15 L. Ed. 691, in Mansfield, etc., R. Co. *v.* Swan, 111 U. S. 379, 383, 28 L. Ed. 462. This remark, to be sure, is not strictly in point, as the plaintiff

state is claimed to be in contravention of the constitution of the United States;" are general in form, but they do not mean that, whenever a party makes a case of that sort, he may appeal directly to this court whenever the decision is against him, no matter on what grounds, although his contention about the state law is sustained. If a party comes into the circuit court alleging that a state law is unconstitutional, and the circuit court decides for him on that point, the mere fact that there was such a question in the case does not authorize him to appeal to this court on grounds that otherwise would not support an appeal.[64]

eeee. *Hearing and Determination.*—Where a cause is brought directly to the supreme court from the circuit court of the United States on the ground that the case arose under the constitution of the United States, it at once becomes the duty of that court to inquire whether the circuit court should have retained the case.[65] Where a cause is brought directly to the supreme court of the United States from a circuit court of the United States, on the ground that the case arose under the federal constitution, that court, having reached the conclusion that the circuit court erred in retaining the cause, is vested with the power to direct that conclusion to be carried into effect, and, in its exercise, it discharges one of its essential functions, the determination of the jurisdiction of the courts below.[66]

Scope of Review.—The jurisdiction of this court upon a writ of error from this court directly to a circuit court under the act of March 3, 1891, c. 517, § 5, in a case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States, is not limited to the constitutional question, but includes the whole case.[67] Where a bill is based not only upon diversity of citizenship, but upon the alleged unconstitutionality of a municipal ordinance as impairing the obligation of a contract with the city under prior ordinances, an appeal lies directly to this court, and upon such appeal the whole case is opened for consideration.[68]

cc. *When Jurisdiction Is Exclusive and When Concurrent.*—**When Exclusive.**—Where diversity of citizenship does not exist, and the jurisdiction of the circuit court rests solely on the ground that the cause of action arose under the constitution of the United States, an appeal lies directly to this court under section five of the judiciary act of March 3, 1891, and not to the circuit court of appeals.[69] But if an appeal is nevertheless prosecuted to the latter court and has

would not ask to have the judgment reversed on the ground that this New York law was constitutional. But it, with the quotation from United States *v.* Jahn, 155 U. S. 109, 117, 39 L. Ed. 87, helps to indicate a principle to be applied to the construction of the words "in any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States." Anglo-American Provision Co. *v.* Davis Provision Co., 191 U. S. 373, 378, 48 L. Ed. 225.

64. See Lampasas *v.* Bell, 180 U. S. 276, 45 L. Ed. 527; Anglo-American Provision Co. *v.* Davis Provision Co., 191 U. S. 373, 378, 48 L. Ed. 225.

65. Defiance Water Co. *v.* Defiance, 191 U. S. 184, 195, 48 L. Ed. 140.

66. Defiance Water Co. *v.* Defiance, 191 U. S. 184, 195, 48 L. Ed. 140, citing and approving Morris *v.* Gilmer, 129 U. S. 315, 32 L. Ed. 690; Wetmore *v.* Rymer, 169 U. S. 115, 42 L. Ed. 682; Aztec Min. Co. *v.* Ripley, 151 U. S. 79, 38 L. Ed. 80.

67. Holder *v.* Aultman, 169 U. S. 81, 42 L. Ed. 669, citing Whitten *v.* Tomlinson, 160 U. S. 231, 40 L. Ed. 406; Penn., etc., Ins. Co. *v.* Austin, 168 U. S. 685, 42 L. Ed. 626; Home Life Ins. Co. *v.* Fisher, 188 U. S. 726, 47 L. Ed. 667; The Roanoke, 189 U. S. 185, 192, 47 L. Ed. 770.

Under the act of 1891, ch. 517, § 5, this court has jurisdiction to consider the whole case in a case where it is claimed that a state constitution violates the United States constitution; this jurisdiction cannot be narrowed to a review of the jurisdiction of the circuit court as a court of the United States, by a certificate of the circuit court judge which raises that sole question. Giles *v.* Harris, 189 U. S. 475, 486, 47 L. Ed. 909.

68. Horner *v.* United States, 143 U. S. 570, 36 L. Ed. 266; Chappell *v.* United States, 160 U. S. 499, 40 L. Ed. 510; Davis & Farnum Mfg. Co. *v.* Los Angeles, 189 U. S. 207, 47 L. Ed. 778.

69. American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 45 L. Ed. 859; Union, etc., Bank *v.* Memphis, 189 U. S. 71, 73, 47 L. Ed. 712, reaffirmed in Berlin Iron Bridge Co. *v.* Brennan, 194 U. S. 630, 48 L. Ed. 1158.

If the case, as made by the plaintiff's statement, involves no other question

there gone to decree, and an appeal is allowed to this court because the judgment was not made final in that court by section six of the act, the case being here, and the jurisdiction of the circuit court having depended on the sole ground that it arose under the constitution, we will reverse the decree of the circuit court of appeals, not on the merits, but by reason of the want of jurisdiction in that court.[70] If this were not so, the right to two appeals would exist in every similar case notwithstanding, as we have repeatedly held, that such was not the intention of the act.[71] Likewise, where the jurisdiction of the circuit court rests solely on the ground that the controversy arises under the constitution, laws or treaties of the United States, the jurisdiction of this court is exclusive, otherwise there would be a right to two appeals in every case in which the litigated matter had the requisite value.[72]

When Concurrent.—On the other hand, when the case, made by the plaintiff, involves a question other than those relating to the constitutionality of an act

than the constitutional validity of an act of congress, or the construction or application of the constitution of the United States, the supreme court alone will have jurisdiction to review the judgment of the circuit court. Huguley Mfg. Co. *v.* Galeton Cotton Mills, 184 U. S. 290, 295, 46 L. Ed. 546; Spreckels Sugar Refining Co. *v.* McClain, 192 U. S. 397, 407, 48 L. Ed. 496.

If the case depended entirely on the construction of the act of congress—its constitutionality not being drawn in question—it would not be one of those described in the fifth section of the act of 1891, and, consequently, could not come here directly from the circuit court. Spreckels Sugar Refining Co. *v.* McClain, 192 U. S. 397, 407, 48 L. Ed. 496.

"In Huguley Mfg. Co. *v.* Galeton Cotton Mills, 184 U. S. 290, 295, 46 L. Ed. 546, it was said: 'If after the jurisdiction of the circuit court attaches on the ground of diversity of citizenship, issues are raised, the decision of which brings the case within either of the classes set forth in section five, then the case may be brought directly to this court; although it may be carried to the circuit court of appeals, in which event the final judgment of that court could not be brought here as of right. Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 45 L. Ed. 280. If the jurisdiction of the circuit court rests solely on the ground that the suit arises under the constitution, laws or treaties of the United States, then the jurisdiction of this court is exclusive, but if it is placed on diverse citizenship, and also on grounds independent of that, then if carried to the court of appeals, the decision of that court would not be made final, and appeal or writ of error would lie. American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 45 L. Ed. 859. * * * The ground on which the jurisdiction of the circuit court was invoked was solely diversity of citizenship, and the record does not show anything to the contrary, so that the decree of the circuit court of appeals cannot be regarded otherwise than as made final by the statute.'" Spreckels Sugar Refining Co. *v.* McClain, 192 U. S. 397, 409, 48 L. Ed. 496.

70. Union, etc., Bank *v.* Memphis, 189 U. S. 71, 73, 47 L. Ed. 712, reaffirmed in Berlin Iron Bridge Co. *v.* Brennan, 194 U. S. 630, 48 L. Ed. 1158.

71. Robinson *v.* Caldwell, 165 U. S. 359, 41 L. Ed. 745; Loeb *v.* Columbia Trustees, 179 U. S. 472, 45 L. Ed. 280; American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 45 L. Ed. 859; Union, etc., Bank *v.* Memphis, 189 U. S. 71, 74, 47 L. Ed. 712, reaffirmed in Berlin Iron Bridge Co. *v.* Brennan, 194 U. S. 630, 48 L. Ed. 1158.

Cases distinguished.—In Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138, 43 L. Ed. 108, an appeal was taken to this court and also to the circuit court of appeals, and a motion was made in each court to dismiss the appeal, whereupon by reason of the circumstances, we granted a writ of certiorari and brought up the record from the latter court before it had proceeded to decree. The question as to which was the correct route to reach this court became immaterial and we disposed of the case on its merits. But in the present case the circuit court of appeals went to decree, and we are obliged to deal with the appeal therefrom, in doing which the jurisdiction of that court necessarily comes under review. Union, etc., Bank *v.* Memphis, 189 U. S. 71, 74, 47 L. Ed. 712.

72. "As, however, a case so arises under the constitution, laws or treaties of the United States, where it appears on the record, from plaintiff's own statement, in legal and logical form, such as is required by good pleading, that the suit is one which does really and substantially involve a dispute or controversy as to a right which depends on the construction or application of the constitution, or some law, or treaty of the United States. Gold Washing & Water Co. *v.* Keyes, 96 U. S. 199, 24 L. Ed. 656; Blackburn *v.* Portland Gold Min. Co., 175 U. S. 571, 44 L. Ed. 276; Western Union Telegraph Co. *v.* Ann Arbor R. Co., 178

of congress and to the application and construction of the constitution, the circuit court of appeals has jurisdiction to review the judgment of the circuit court, although if the plaintiff elects to bring it here directly, this court would have had jurisdiction to determine all the questions arising upon the record. The plaintiff is entitled to bring it here directly from the circuit court, or at his election, to go to the circuit court of appeals for a review of the whole case.[73] Where the plaintiff elects to go to the circuit court of appeals for a review of the judgment, he cannot thereafter, if unsuccessful in that court upon the merits, prosecute a writ of error directly from the circuit court to the supreme court.[74]

dd. *Transfer of Cause.*—**In General.**—As to the methods and system of review, through appeals or writs of error, including the citations, supersedeas, and bond or other security, in cases, either civil or criminal, brought to this court from the circuit court or the district court, congress made no provision in this act, evidently considering those matters to be covered and regulated by the provisions of earlier statutes forming parts of one system.[75]

ee. *Cross Appeals.*—Where, from the allegations of the complaint, the whole case can come to this court by direct appeal, and all the questions, federal or otherwise, may come up on such appeal, it must follow that either party aggrieved by the decision may appeal, and the complainant appealing, a cross appeal may be sued out by the defendant as to the matters decided in the same case against him. If he fails to take such appeal, the correctness of the decision as against him will be presumed.[76]

ff. *Limitations.*—The sixth section of the act of March 3, 1891, does not change the two years limit as regards the cases which could be taken from the circuit and district courts of the United States to the supreme court.[77]

gg. *Showing as to Jurisdiction.*—**In General.**—When our jurisdiction is invoked under § 5 of the judiciary act of March 3, 1891, c. 517, on the ground that the case falls within the fourth, fifth or sixth of the classes of cases therein enu-

U. S. 239, 44 L. Ed. 1052, and as those cases fall strictly within the terms of § 5, the appellate jurisdiction of this court in respect of them is exclusive." American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 281, 45 L. Ed. 859.

73. Spreckels Sugar Refining Co. *v.* McClain, 192 U. S. 397, 407, 48 L. Ed. 496.

"In American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 280, 45 L .Ed. 859, 281, it was said: 'It was held, in Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 45 L. Ed. 280, where the jurisdiction of the circuit court rested on diverse citizenship, but the state statute involved was claimed in defense to be in contravention of the constitution of the United States, that a writ of error could be taken directly from this court to revise the judgment of the circuit court, although it was also ruled that the plaintiff might have carried the case to the circuit court of appeals, and that if a final judgment were rendered by that court against him, he could not thereafter have invoked the jurisdiction of this court directly on another writ of error to review the judgment of the circuit court. * * * If plaintiff, by proper pleading, places the jurisdiction of the circuit court on diverse citizenship, and also on grounds independent of that, a question expressly reserved in Colorado, etc., Mining Co. *v.* Turck, 150 U. S. 138, 37 L. Ed. 1030, and the case is taken to the court of appeals, propositions as to the latter grounds may be certified, or, if that course is not pursued and the case goes to judgment (and the power to certify assumes the power to decide), an appeal or writ of error would lie under the last clause of section six, because the jurisdiction would not depend solely on diverse citizenship. Union Pac. R. Co. *v.* Harris, 158 U. S. 326, 39 L. Ed. 1003.'" Spreckels Sugar Refining Co. *v.* McClain, 192 U. S. 397, 409, 48 L. Ed. 496.

74. Robinson *v.* Caldwell, 165 U. S. 359, 41 L. Ed. 745; Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 45 L. Ed. 280; Ayers *v.* Polsdorfer, 187 U. S. 585, 47 L. Ed. 314; Spreckels Sugar Refining Co. *v.* McClain, 192 U. S. 397, 408, 48 L. Ed. 496.

75. Ballew *v.* United States, 160 U. S. 187, 202, 40 L. Ed. 388; Hudson *v.* Parker, 156 U. S. 277, 39 L. Ed. 424.

76. Cross appeals Mail Co. *v.* Flanders, 12 Wall. 130, 20 L. Ed. 249; Chittenden *v.* Brewster, 2 Wall. 191, 196, 17 L. Ed. 839; Field *v.* Barber Asphalt Co., 194 U. S. 618, 621, 48 L. Ed. 1142, reaffirmed in Field *v.* Barber Asphalt Co., 203 U. S. 585, 51 L. Ed. 328.

77. Limitations.—Holt *v.* Indiana Mfg. Co., 176 U. S. 68, 44 L. Ed. 374; Allen *v.* Southern, etc., R. Co., 173 U. S. 479, 43 L. Ed. 775; Excelsior Wooden Pipe Co. *v.* Pacific Bridge Co., 185 U. S. 282, 46 L. Ed. 910.

merated, it must appear that a title, right, privilege or immunity was claimed under the constitution, and a definite issue in respect to the possession of the right must be distinctly deducible from the record; or that the constitutionality of the particular law or the validity or construction of the particular treaty was necessarily and directly drawn in question; or that the constitution or law of a state was distinctly claimed to be in contravention of the constitution of the United States; and it is not sufficient that the point is raised in the assignment of errors.[78]

An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891.[79]

Certificate of Trial Judge.—In order to determine whether the case is one which should have gone to the circuit court of appeals and not have been brought directly to the supreme court of the United States, it is necessary to look into the record without regard to a certificate given by the trial judge. Indeed, there is no authority for the making of such certificate.[80]

hh. *Scope of Review.*—Except in cases under § 5 of the act of March 3, 1891, where the question of jurisdiction alone is certified, the supreme court of the United States has power to dispose of the entire case.[81] Where an appeal or writ of error is taken directly from the circuit court to this court in cases involving the construction or application of the constitution, or the constitutionality of a law, or the validity or construction of a treaty, of the United States, or in which the constitution or a law of a state is claimed to be in contravention of the constitution of the United States; in any of these cases the appellate jurisdiction of this court is not limited to the constitutional question, but extends to the determination of the whole case.[82] Where the construction of a treaty made under the

78. Ansbro *v.* United States, 159 U. S. 695, 40 L. Ed. 310; Cornell *v.* Green, 163 U. S. 75, 41 L. Ed. 76; Muse *v.* Arlington Hotel Company, 168 U. S. 430, 42 L. Ed. 531; Miller *v.* Cornwall R. Co., 168 U. S. 131, 42 L. Ed. 409; Cincinnati, etc., R. Co. *v.* Thiebaud, 177 U. S. 615, 619, 620, 44 L. Ed. 911.

79. Ansbro *v.* United States, 159 U. S. 695, 698, 40 L. Ed. 310.

80. Certificate of trial judge.—Cosmopolitan Min. Co. *v.* Walsh, 193 U. S. 460, 48 L. Ed. 749.

81. Scope of review.—Chin Bak Kan *v.* United States, 186 U. S. 193, 201, 46 L. Ed. 1121, reaffirmd in United States *v.* Meng, 196 U. S. 636, 49 L. Ed. 629; Ah Sou *v.* United States, 200 U. S. 611, 50 L. Ed. 619.

82. Act of March 3, 1891, c. 517, § 5; 26 Stat. 827, 828; Horner *v.* United States, 143 U. S. 570, 36 L. Ed. 266; Chappell *v.* United States, 160 U. S. 499, 40 L. Ed. 510; Press Publishing Co. *v.* Monroe, 164 U. S. 105, 110, 41 L. Ed. 367; Holder *v.* Aultman, 169 U. S. 81, 89, 42 L. Ed. 669; Burton *v.* United States, 196 U. S. 283, 295, 49 L. Ed. 482; Home Life Ins. Co. *v.* Fisher, 188 U. S. 726, 47 L. Ed. 667; German Savings Society *v.* Dormitzer, 192 U. S. 125, 126, 48 L. Ed. 373; Field *v.* Barber Asphalt Co., 194 U. S. 618, 48 L. Ed. 1142, reaffirmed in Field *v.* Barber Asphalt Co., 203 U. S. 585, 51 L. Ed. 328.

Although no question of jurisdiction has been separately certified or specified, yet if the writ of error was allowed without restriction or qualification, and this court has acquired appellate jurisdiction under that clause of the statute giving it jurisdiction by direct appeal in cases in which the constitutionality of a law of the United States was drawn in question, we have power to dispose, not merely of the constitutional question, but of the entire case, including all questions, whether of jurisdiction or of merits. Chappell *v.* United States, 160 U. S. 499, 40 L. Ed. 510, citing Ekiu *v.* United States, 142 U. S. 651, 35 L. Ed. 1146; Horner *v.* United States, 143 U. S. 570, 577, 36 L. Ed. 266; United States *v.* Jahn, 155 U. S. 109, 112, 113, 39 L. Ed. 87, reaffirmed in Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209; Press Publishing Co. *v.* Monroe, 164 U. S. 105, 111, 41 L. Ed. 367.

In Holder *v.* Aultman, 169 U. S. 81, 88, 42 L. Ed. 669, discussing the act of March, 1891, Mr. Justice Gray said: "Upon such a writ of error, differing in these respects from a writ of error to the highest court of a state, the jurisdiction of this court does not depend upon the question whether the right claimed under the constitution of the United States has been upheld or denied in the court below; and the jurisdiction of this court is not limited to the constitutional question, but includes the whole case. Whitten *v.* Tomlinson, 160 U. S. 231, 238, 40 L. Ed. 406; Penn., etc., Ins. Co. *v.* Austin, 168 U. S. 685, 42 L. Ed. 626." Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 45 L. Ed. 280. See, also, Chappell *v.* United States, 160

authority of the United States and the constitutionality of an act of congress are drawn in question in the circuit court, this court having acquired jurisdiction of the cause by direct appeal from the circuit court, it can determine any question of the jurisdiction of the circuit court appearing upon the record, whether certified or not.[83]

ii. *Necessity for Finality of Decision.*—**In General.**—Soon after the passage of this act, it was settled that none of these cases mentioned in § 5 could be taken to this court in advance of the final judgment.[84] Nor does § 14 of the act of March 3, 1891, 26 Stat. 826, c. 517, repealing § 691 of the Revised Statutes and § 3 of the act of February 16, 1875, give a wider scope to the revisory powers of this court, and make a final judgment unnecessary to the exercise of these powers in the cases specified in the fifth section. "If it was the purpose of the act to repeal that part of those sections which refers to final judgments, such intention would have been indicated in express and explicit terms, inasmuch as there were, when the act was passed, other sections and other statutes containing the same limitation of appeals to final judgments."[85] The only provision in the act, authorizing appeals from interlocutory orders or decrees of the circuit courts, is in § 7, which provides that where, upon a hearing in equity, "an injunction shall be granted or continued by an interlocutory order or decree, in a cause in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting or continuing such injunction to the circuit court of appeals;" "and the proceedings in other respects in the court below shall not be stayed, unless otherwise ordered by that court, during the pendency of such appeal."[86]

U. S. 499, 509, 40 L. Ed. 510; Horner *v.* United States, 143 U. S. 570, 577, 36 L. Ed. 266; Field *v.* Barber Asphalt Co., 194 U. S. 618, 620, 48 L. Ed. 1142, reaffirmed in Field *v.* Barber Asphalt Co., 203 U. S. 585, 51 L. Ed. 328.

Privilege of representatives from arrest.—A case which involves the construction or application of § 6, art. 1, of the constitution of the United States, providing that senators and representatives shall, in all cases except treason, felony and breach of the peace, be privileged from arrest during their attendance at the sessions of their respective houses and in going to and returning from the same, may be taken to this court directly from a district court. And in such case the statute grants this court jurisdiction to issue the writ of error directly to the district court, and then to decide the case without being restricted to the constitutional question. Burton *v.* United States, 196 U. S. 283, 49 L. Ed. 482, citing Horner *v.* United States, 143 U. S. 570, 36 L. Ed. 266.

83. Robinson *v.* Caldwell, 165 U. S. 359, 41 L. Ed. 745, citing Chappell *v.* United States, 160 U. S. 499, 40 L. Ed. 510, reaffirmed in Daugherty *v.* Hood, 179 U. S. 680, 45 L. Ed. 383.

"Although the question of the jurisdiction of the court below has not been certified to us in the manner provided by the fifth section of the judiciary act of March 3, 1891, yet, as the case is before us, in a case in which the law of a state is claimed to be in contravention of the constitution of the United States, under another clause of that statute, we have jurisdiction of the entire case and of all questions involved in it. Horner *v.* United States, 143 U. S. 570, 36 L. Ed. 266; Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 181, 37 L. Ed. 1041; Chappell *v.* United States, 160 U. S. 499, 40 L. Ed. 510." Scott *v.* Donald, 165 U. S. 58, 71, 41 L. Ed. 632.

84. Decision must be final.—McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893; Wishkah Boom Co. *v.* United States, 202 U. S. 613, 50 L. Ed. 1171; Smith *v.* Iverson, 203 U. S. 586, 51 L. Ed. 329; International Trust Co. *v.* Weeks, 193 U. S. 667, 48 L. Ed. 839; Johnson *v.* Thomas, 197 U. S. 619, 49 L. Ed. 909; Shoesmith *v.* Boot & Shoe Mfg. Co., 198 U. S. 582, 49 L. Ed. 1172; Perea *v.* Perea de Harrison, 195 U. S. 623, 49 L. Ed. 349; Reaves *v.* Oliver, 168 U. S. 704, 42 L. Ed. 1212; Hurlbut Land, etc., Co. *v.* Truscott, 165 U. S. 719, 41 L. Ed. 1185; Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179; Farmers Bank *v.* Roselle, 172 U. S. 641, 43 L. Ed. 1180; Lubin *v.* Edison, 195 U. S. 624, 625, 49 L. Ed. 349; Wirgman *v.* Persons, 196 U. S. 636, 49 L. Ed. 629.

85. McLish *v.* Roff, 141 U. S. 661, 667, 35 L. Ed. 893, reaffirmed in Chicago, etc., R. Co. *v.* Roberts, 141 U. S. 690, 35 L. Ed. 905; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 37 L. Ed. 486; United States *v.* Jahn, 155 U. S. 109, 114, 39 L. Ed. 87; Reaves *v.* Oliver, 168 U. S. 704, 42 L. Ed. 1212.

86. American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 381, 37 L. Ed. 486.

Direct Appeals.—It has accordingly been adjudged that a writ of error or appeal to this court under § 5, in a case concerning the jurisdiction of the circuit court, does not lie until after final judgment, and cannot, therefore, be taken from an order of the circuit court remanding a case to a state court, there being, as said by Mr. Justice Lamar, speaking for this court, "no provision in the act, which can be construed into so radical a change in all the existing statutes and settled rules of practice and procedure of federal courts, as to extend the jurisdiction of the supreme court to the review of jurisdictional cases in advance of the final judgments upon them."[87]

(2) *Proceedings by the Interstate Commerce Commission.*—A direct appeal lies to this court under the act of February 19, 1903, § 3, from a judgment of a circuit court, in a proceeding brought by the interstate commerce commission, by authority of the attorney general, to obtain orders requiring the taking of testimony of witnesses and the production of books and documents.[88] It was the purpose of the act to eliminate an appeal to the circuit court of appeals and permit the litigation to be shortened by direct appeal to this court. Accordingly, if the appeal in the first instance was to the court of appeals the judgment of that court would not be final under the act of March 3, 1891, and in such case this court would still be required to consider it on final appeal.[89]

3. Over Circuit Court of Appeals—a. *In General.*—By § 6, the appellate jurisdiction from final decisions of the circuit court, in all cases other than those provided for in § 5, is conferred upon the circuit court of appeals, "unless otherwise provided by law;" and its judgments or decrees "shall be final" in all cases in which the jurisdiction depends entirely on the citizenship of the parties, as well as in cases arising under the patent laws, the revenue laws, or the criminal laws, and in admiralty cases.[90] By the same section, however, the circuit court of appeals, "in any such subject within its appellate jurisdiction," may, at any time, certify to this court questions or propositions of law, and this court may thereupon either instruct it on such questions, or may require the whole case to be sent up for decision: and any case "made final in the circuit court of appeals" may be required by this court, by certiorari or otherwise, to be certified "for its review and determination, with the same power and authority in the case" as if it had been brought up by appeal or writ of error.[91] "In all cases not hereinbefore, in this section, made final, there shall be of right an appeal or writ of error or review of the case by the supreme court of the United States where the matter in controversy shall exceed one thousand dollars besides costs."[92] The jurisdiction of this court to review the decisions of the circuit court of appeals depends on the statute (circuit court of appeals act of March 3, 1891) and cannot be enlarged by the supposed hardship of particular cases.[93]

b. *By Appeal or Writ of Error*—(1) *In General.*—The last clause of § 6 of the judiciary act of March 3, 1891, refers to the circuit court of appeals and not to the circuit court.[94] Therefore, a writ of error from this court to the circuit court, does not reach the proceedings in the circuit court of appeals refusing to

87. McLish *v.* Roff, 141 U. S. 661, 666, 35 L. Ed. 893; Chicago, etc., Railway *v.* Roberts, 141 U. S. 690, 35 L. Ed. 905; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 382, 37 L. Ed. 486.

88. Interstate Commerce Commission *v.* Baird, 194 U. S. 25, 48 L. Ed. 860.

89. Interstate Commerce Commission *v.* Baird, 194 U. S. 25, 48 L. Ed. 860.

90. American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 381, 37 L. Ed. 486; Lau Ow Bew *v.* United States, 144 U. S. 47, 57, 36 L. Ed. 340; Northern Pac. R. *v.* Amato, 144 U. S. 465, 472, 36 L. Ed. 506.

91. American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 381, 37 L. Ed. 486.

92. 26 Stat. 826, 828, § 6, ch. 517; Colorado, etc., Mining Co. *v.* Turck, 150 U. S. 138, 141, 37 L. Ed. 1030; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 381, 37 L. Ed. 486.

93. Huguley Mfg. Co. *v.* Galeton Cotton Mills, 184 U. S. 290, 46 L. Ed. 546, reaffirmed in Harding *v.* Hart, 187 U. S. 638, 47 L. Ed. 344.

94. Lutcher *v.* United States, 157 U. S. 427, 39 L. Ed. 759; Webster *v.* Daly, 163 U. S. 155, 41 L. Ed. 111.

allow the cause to be docketed and the record to be filed therein on the ground that the cause should be taken to this court and not to that court.

(2) Jurisdiction as Dependent on Amount in Controversy.—**In General.**—In all cases in which the judgments of a circuit court of appeals are not made final by the act of March 3, 1891, c. 517, there is of right an appeal, or writ of error, to this court, where the matter in controversy exceeds one thousand dollars in value besides costs.[95]

Must Be Susceptible of Pecuniary Estimation.—The matter in dispute must be susceptible of an estimate in money before an appeal or writ of error will lie to this court from the circuit court of appeals.[96] The matter in controversy must have actual value, and that cannot be supplied by speculation on the possibility that if a discharge were refused, something might be made out of the bankrupt.[97]

As a case of habeas corpus is not one in which the matter in controversy involves a money value, therefore no appeal lies from the circuit court of appeals under this act.[98]

Discharge of Bankrupt.—This court has no jurisdiction to review a refusal of the circuit court of appeals to revise the decree of the circuit court discharging a bankrupt, even though the question, whether the bankrupt was entitled to a certificate of discharge, is in controversy, where there was no evidence whatever in the record tending to show that the value of the certificate was susceptible of an estimate in money.[99]

Aggregate Amount of Demand.—Although there is in form a separate judgment in favor of each of the persons for whose benefit an action is brought under the Texas statute, providing for an action for wrongful death, which shall be for the exclusive benefit of the surviving husband, wife, children and parents, and authorizing the action to be brought by all the parties interested, or by any one or more of them for the benefit of all, and requiring the jury to divide the amount recovered among the persons entitled to the benefit of the action, the Texas statute creates a single liability on the part of the defendant, and contemplates but one action for the sole and exclusive benefit of the surviving husband, wife, children and parents, of the person whose death was caused in any of the specified modes. Accordingly the matter in controversy within the meaning of the 6th section of the act of March 3, 1891, c. 517, which declares that in all cases not by that section made final "there shall be of right an appeal or writ of error or review of the case by the supreme court of the United States where the matter in controversy shall exceed one thousand dollars besides costs," is the liability of the defendant company in that amount by reason of the single injury complained of. If the defendant was liable in that sum, and such liability is fixed upon it by the verdict and final judgment thereon, it is of no concern to it how that amount was divided among the parties entitled to sue on account of the single injury alleged to have been committed.[1]

Showing as to Amount.—The bill need not state, in so many words, that a certain amount exceeding one thousand dollars is in controversy in order that

95. Howard *v.* United States, 184 U. S. 676, 680, 46 L. Ed. 754; Whitney *v.* Dick, 202 U. S. 132, 135, 50 L. Ed. 963.

96. Huntington *v.* Saunders, 163 U. S. 319, 41 L. Ed. 174.

97. Durham *v.* Seymour, 161 U. S. 235, 40 L. Ed. 682; Huntington *v.* Saunders, 163 U. S. 319, 321, 41 L. Ed. 174.

98. Lau Ow Bew *v.* United States, 144 U. S. 47, 36 L. Ed. 340; Whitney *v.* Dick, 202 U. S. 132, 135, 50 L. Ed. 936; Kurtz *v.* Moffitt, 115 U. S. 487.

99. Huntington *v.* Saunders, 163 U. S. 319, 41 L. Ed. 174, citing South Carolina *v.* Seymour, 153 U. S. 353, 358, 38 L. Ed. 742.

1. Texas, etc., R. Co. *v.* Gentry, 163 U. S. 353, 41 L. Ed. 186, citing Shields *v.* Thomas, 17 How. 3, 15 L. Ed. 93; Ex parte Baltimore, etc., R. Co., 106 U. S. 5, 27 L. Ed. 78; Market Co. *v.* Hoffman, 101 U. S. 112, 25 L. Ed. 782; The Connemara, 103 U. S. 754, 26 L. Ed. 322; Estes *v.* Gunter, 121 U. S. 183, 30 L. Ed. 884; Gibson *v.* Shufeldt, 122 U. S. 27, 30 L. Ed. 1083; Clay *v.* Field, 138 U. S. 464, 34 L. Ed. 1083; New Orleans Pac. R. Co. *v.* Parker, 143 U. S. 42, 36 L. Ed. 66.

this court may have jurisdiction on appeal. The statutory amount must as a matter of fact be in controversy, yet that fact may appear by affidavit after the appeal is taken to this court.[2] Or it may be made to appear in such other manner as shall establish it to the satisfaction of the court.[3] A stipulation between the parties as to the amount is not controlling, but in the discretion of the court it may be regarded in a particular case, and with reference to the other facts appearing in the record as sufficient proof of the amount in controversy to sustain the jurisdiction of this court.[4]

(3) *Jurisdiction as Dependent on Finality of Decision.*—**In General.**—That provision of the sixth section of the act of March 3, 1891, c. 517, 26 Stat. 826, providing that in all cases not made final in the circuit court of appeals, there shall be of right, within one year, an appeal or writ of error or review of the case by this court, where the matter in controversy exceeds $1,000 exclusive of costs, applies only to final judgments, orders or decrees.[5] There is no provision in the act of March 3, 1891, or any other act, except in section seven, which is treated elsewhere in this title, authorizing an appeal to this court from interlocutory orders or decrees.[6]

A decree of affirmance, without specifying the sum for which it is rendered, is a final decree for the purpose of a writ of error to the circuit court of appeals, because it terminates the litigation between the parties.[7] But this court has no jurisdiction to review a judgment of the circuit court of appeals affirming an interlocutory order of the circuit court for the issue of a temporary injunction, because such order is not final.[8]

2. Whiteside *v.* Haselton, 110 U. S. 296, 28 L. Ed. 152; Red River Cattle Co. *v.* Needham, 137 U. S. 632, 34 L. Ed. 799; United States *v.* Freight Ass'n, 166 U. S. 290, 310, 41 L. Ed. 1007.

3. United States *v.* Freight Ass'n, 166 U. S. 290, 310, 41 L. Ed. 1007.

4. United States *v.* Freight Ass'n, 166 U. S. 290, 310, 41 L. Ed. 1007.

A suit is brought for the dissolution of an association of railroad companies, and to enjoin them from further competing together to control rates, etc. The bill shows an agreement entered into for the purpose of maintaining reasonable rates to be received by each company executing the agreement, and the stipulation entered into between the parties hereto shows that the daily freight charges on interstate shipments collected by the railway companies at points where they compete with each other were, at the time of the making of the agreement mentioned in the pleadings herein and have been since, more than one thousand dollars. This agreement so made, the government alleges, is illegal as being in restraint of trade, and was entered into between the companies for the purpose of enhancing the freight rates. The companies, while denying the illegality of the agreement or its purpose to be other than to maintain reasonable rates, yet allege that without some such agreement the competition between them for traffic would be so severe as to cause great losses to each defendant and possibly ruin the companies represented in the agreement. Such a result, it is claimed, is avoided by reason of the agreement. Upon the existence, therefore, of this or some similar agreement directly depends (as is alleged) the prosperity, if not the life, of each company. It must follow that an amount much more than a thousand dollars is involved in the maintenance of the agreement or in the right to maintain it or something like it. These facts, appearing in the record and the stipulation, show that the right involved is a right which is of the requisite pecuniary value. A reduction of the rates by only the fractional part of one per centum would, in the aggregate, amount to over a thousand dollars in a very few days. This is sufficient to give the court jurisdiction on appeal. South Carolina *v.* Seymour, 153 U. S. 353, 357, 38 L. Ed. 742; United States *v.* Freight Ass'n, 166 U. S. 290, 310, 311, 41 L. Ed. 1007.

5. Kirwan *v.* Murphy, 170 U. S. 205, 42 L. Ed. 1009, citing Young *v.* Grundy, 6 Cranch 51, 3 L. Ed. 149; Keystone Iron Co. *v.* Martin, 132 U. S. 91, 33 L. Ed. 275; McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 37 L. Ed. 486, reaffirmed in International Trust Co. *v.* Weeks, 193 U. S. 667, 48 L. Ed. 839; Southern R. Co. *v.* Postal Tel. Cable Co., 179 U. S. 641, 45 L. Ed. 355.

6. In re Tampa Suburban R. Co., 168 U. S. 583, 42 L. Ed. 589; Kirwan *v.* Murphy, 170 U. S. 205, 210, 42 L. Ed. 1009, reaffirmed in International Trust Co. *v.* Weeks, 193 U. S. 667, 48 L. Ed. 839.

7. Texas, etc., R. Co. *v.* Gentry, 163 U. S. 353, 41 L. Ed. 186.

8. Kirwan *v.* Murphy, 170 U. S. 205, 42 L. Ed. 1009, reaffirmed in International Trust Co. *v.* Weeks, 193 U. S. 667, 48 L. Ed. 839, distinguishing Smith *v.* Vulcan

Reversal and Remand.—It has been held, that a decree of the circuit court of appeals, reversing the judgment of the trial court and remanding the cause for further proceedings in accordance with the views expressed in its opinion, is not a final judgment reviewable by this court.[9]

Remand to State Court.—Nor is an order of a court of appeals directing a circuit court to remand a case to a state court.[10]

Nor is an order made in condemnation proceedings, appointing commissioners to assess damages.[11]

On the other hand, where the circuit court of appeals reversed a decree of the circuit court with specific direction to enter a decree in accordance with the mandate, for the purpose of an appeal to the supreme court, the decree of the circuit court of appeals is final.[12]

(4) *Decisions Reviewable*—aa. *In General.*—No appeal lies to this court from the circuit court of appeals in those cases in which the judgments or decrees of the circuit court of appeals are made final by statute.[13]

Determination of Finality of Decision of Court of Appeals.—But this court has jurisdiction to pass upon the jurisdiction of the circuit court of appeals when involving the question of the finality of its judgment under § 6 of the circuit court of appeals act.[14] For example, this court has jurisdiction to review on a writ of error the judgment of the circuit court of appeals refusing jurisdiction

Iron Works, 165 U. S. 518, 41 L. Ed. 810, on the ground that here the court of appeals did not finally determine the case by its judgment, and whether the temporary injunctions should be made permanent or not was left to the circuit court to decide when the final decree was entered.

9. United States *v.* Krall, 174 U. S. 385, 43 L. Ed. 1017, reaffirmed in Wishkah Boom Co. *v.* United States, 202 U. S. 613, 50 L. Ed. 1171.

A circuit court of the United States sustained a demurrer to a bill for specific performance for the reason that there was an adequate remedy at law and dismissed the bill. This decree was reversed by the circuit court of appeals, and the bill was ordered to be dismissed for want of equity without prejudice to an action at law. There was a motion to dismiss the appeal to the supreme court of the United States on the ground that the decree was not final in form. It was held, that the decree of the circuit court of appeals is final and can be reviewed under the act of March 3, 1891, and the motion must be overruled. Beasley *v.* Texas, etc., R. Co., 191 U. S. 492, 48 L. Ed. 274, citing and approving Merrill *v.* National Bank, 173 U. S. 131, 43 L. Ed. 640. See Western Telegraph Co. *v.* Burnham, 162 U. S. 339, 342, 40 L. Ed. 991.

10. Morey *v.* Lockhart, 123 U. S. 56, 31 L. Ed. 68; Sherman *v.* Grinnell, 123 U. S. 679, 31 L. Ed. 278; Gurnee *v.* Patrick County, 137 U. S. 141, 34 L. Ed. 601; In re Pennsylvania Co., 137 U. S. 451, 34 L. Ed. 738; Railroad Co. *v.* Wiswall, 23 Wall. 507, 22 L. Ed. 103; Richmond, etc., R. Co. *v.* Thouron, 134 U. S. 45, 33 L. Ed. 871; Missouri Pac. R. *v.* Fitzgerald, 160 U. S. 556, 580, 40 L. Ed. 536; German Nat. Bank *v.* Speckert, 181 U. S. 405, 45 L. Ed. 926, reaffirmed in Cole *v.* Garland, 183 U. S. 693, 46 L. Ed. 393.

An order of remand to a state court by a United States circuit court of appeals of its own motion, is not subject to review by the supreme court of the United States, in any manner either by appeal from that court, or by mandamus to that court, or by writ of error to the state court. German Nat. Bank *v.* Speckert, 181 U. S. 405, 45 L. Ed. 926, reaffirmed in Cole *v.* Garland, 183 U. S. 693, 46 L. Ed. 393.

11. Southern R. Co. *v.* Postal Tel. Cable Co., 179 U. S. 641, 45 L. Ed. 355, following Luxton *v.* North River Bridge Co., 147 U. S. 337, 37 L. Ed. 194, and distinguishing Wheeling, etc., Bridge Co. *v.* Wheeling Bridge Co., 138 U. S. 287, 34 L. Ed. 967.

12. Merrill *v.* National Bank, 173 U. S. 131, 134, 43 L. Ed. 640.

13. Anglo-Californian Bank *v.* United States, 175 U. S. 37, 44 L. Ed. 64. See post, "Under Circuit Court of Appeals Act," III, E.

14. Aztec Mining Co. *v.* Ripley, 151 U. S. 79, 38 L. Ed. 80; Southern R. Co. *v.* Postal Tel. Cable Co., 179 U. S. 641, 45 L. Ed. 355.

In Aztec Mining Co. *v.* Ripley, 151 U. S. 79, 38 L. Ed. 80, it was held, that this court had jurisdiction by appeal or writ of error to pass upon the jurisdiction of the circuit courts of appeals in cases involving the question whether their judgments were made final by § 6 of the act of March 3, 1891, ch. 517, 26 Stat. 826. Kingman *v.* Western Mfg. Co., 170 U. S. 675, 677, 42 L. Ed. 1192, reaffirmed in International Trust Co. *v.* Weeks, 193 U. S. 667, 48 L. Ed. 839.

of an appeal from a territorial supreme court, on the ground that the case is not of the kind made final in the circuit court of appeals.[15]

bb. *Cases in Which United States Is a Party.*—The appellate jurisdiction of this court over controversies to which the United States are parties has not been circumscribed by congress in respect to the right of appeal.[16] Judgments or decrees in cases in which the ground of jurisdiction of the circuit court is that the United States are plaintiffs or petitioners are not made final in terms, and such cases would fall within the last paragraph, unless restricted by the previous enumeration.[17]

Suit by United States to Cancel Patents.—That part of the 6th section of the circuit court of appeals act which provides that "cases arising under the patent laws," shall be final in the circuit court of appeals, cannot be construed as narrowing the appellate jurisdiction of this court in a suit brought by the United States as a sovereign in respect of alleged miscarriage in the exercise of one of its functions as such; deeply concerning the public interests; and not falling within the reason of the limitations of the act.[18] Accordingly, this court still has appellate jurisdiction over a judgment rendered by the circuit court of appeals of the United States in a suit brought by the United States to cancel a patent for an invention.[19]

cc. *Bankruptcy Decisions.*[20]—This court has jurisdiction to review a decision of the circuit court of appeals dismissing an appeal by a creditor from a decision of a circuit court dismissing a petition filed by one objecting to the discharge of a bankrupt.[21]

dd. *Cases Arising under the Revenue Laws.*—That interpretation of the act of 1891 will be adopted which enables the defeated party in a case carried to the circuit court of appeals, which, although arising under the revenue laws, and involving a construction of those laws, depends for a full determination of the rights of the parties upon the construction or application of the constitution, or upon the constitutionality of an act of congress to have, as of right, upon writ of error to that court, a re-examination in the supreme court of the judgment, the requisite amount being involved.[22] The meaning of the words "arising * * * under the revenue laws," in the sixth section, is satisfied if they are held as embracing a case strictly arising under laws providing for internal revenues and which does not, by reason of any question in it, belong also to the class mentioned in the fifth section of that act. The words quoted do not necessarily embrace a case carried to the circuit court of appeals, which, although arising under the revenue laws, and involving a construction of those laws, depends for a full determination of the rights of the parties upon the construction or application of the constitution, or upon the constitutionality of an act of congress.[23] The judgment of the circuit court of appeals is not final, within the meaning of the sixth section of the act of 1891, in a case which, although arising under a law providing for internal revenue and involving the construction of that law, is yet a case also involving, from the outset, from the plaintiff's showing, the construction or application of the constitution or the constitutionality of an act of congress.[24]

ee. *Cases Dependent upon Citizenship of Parties.*—Under § 6 of the circuit court of appeals act, which provides that judgments or decrees of the circuit court of

15. Aztec Mining Co. *v.* Ripley, 151 U. S. 79, 38 L. Ed. 80.

16. United States *v.* American Bell Tel. Co., 159 U. S. 548, 550, 40 L. Ed. 255.

17. United States *v.* American Bell Tel. Co., 159 U. S. 548, 552, 40 L. Ed. 255.

18. United States *v.* American Bell Tel. Co., 159 U. S. 548, 40 L. Ed. 255; Anglo-Californian Bank *v.* United States, 175 U. S. 37, 39, 44 L. Ed. 64.

19. United States *v.* American Bell Tel. Co., 159 U. S. 548, 40 L. Ed. 255. In this case, the court said: "We cannot impute to congress the intention of narrowing the appellate jurisdiction of this court in a suit brought by the United States as a sovereign in respect of alleged miscarriage in the exercise of one of its functions as such; deeply concerning the public interests; and not falling within the reason of the limitations of the act."

20. See the title BANKRUPTCY.

21. Huntington *v.* Sanders, 163 U. S. 319, 41 L. Ed. 174.

22. Spreckels Sugar Refining Co. *v.* McClain, 192 U. S. 397, 408, 48 L. Ed. 496.

23. Spreckels Sugar Refining Co. *v.* McClain, 192 U. S. 397, 408, 48 L. Ed. 496.

24. Spreckels Sugar Refining Co. *v.* Mclain, 192 U. S. 397, 410, 48 L. Ed. 496.

appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of the different state, in order to maintain a writ of error from the decision of the circuit court of appeals to this court, it must appear that the judgment of the circuit court is not dependent entirely upon the opposite parties being citizens of the different states.[25] When the jurisdiction of a circuit court is invoked solely on the ground of diverse citizenship, the judgment of the circuit court of appeals is final, although another ground for jurisdiction in the circuit court may be developed in the course of subsequent proceedings in the case.[26]

Where Jurisdiction Rests on Independent Grounds.—But if the plaintiff, by proper pleading, places the jurisdiction of the circuit court on diverse citizenship, and also on grounds independent of that, and the case is taken to the court of appeals, propositions as to the latter grounds may be certified, or, if that course is not pursued and the case goes to judgment (and the power to certify assumes the power to decide), an appeal or writ of error would lie under the last clause of § 6, because the jurisdiction would not depend solely on diverse citizenship.[27]

Where One of the Parties Is a Foreign State.—As the decree of a circuit court of appeals in a controversy between a citizen of a state and a for-

25. Colorado, etc., Min. Co. *v.* Turck, 150 U. S. 138, 37 L. Ed. 1030; Bankers' Casualty Co. *v.* Minneapolis, etc., R. Co., 192 U. S. 371, 380, 48 L. Ed. 484; Florida, etc., R. Co. *v.* Bell, 176 U. S. 321, 44 L. Ed. 486, citing Press Pub. Co. *v.* Monroe, 164 U. S. 105, 41 L. Ed. 367.

"At the last term of this court motion was made to dismiss the writ of error upon the ground that under § 6 of the act of congress of March 3, 1891, establishing the circuit courts of appeals, the judgment of the court of appeals affirming the judgment of the circuit court was final. By this section the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction depends entirely upon the opposite parties to the suit being aliens and citizens of the United States, or citizens of different states. In this case, the plaintiff, Sonnentheil, was a citizen of the state of Texas; the defendant Brewing Company was a corporation created by the laws of Ohio, and a citizen of that state, and Dickerson, a citizen of the state of Texas; but it also appears upon the face of the original petition that Dickerson was marshal of the United States for the eastern district of Texas, and that he made the seizure of the goods in question through his deputy, John H. Whalen, and under a writ of attachment sued out by the Brewing Company against Frieberg, Klein & Co., as defendants. It thus appears that the jurisdiction of the circuit court did not depend entirely upon diversity of citizenship between the plaintiff and the Brewing Company, but upon the fact that one of the defendants was marshal of the United States, and was acting in that capacity when he seized the goods in question." Sonnentheil *v.* Moerlein Brewing Co., 172 U. S. 401, 404, 43 L. Ed. 492.

26. Borgmeyer *v.* Idler, 159 U. S. 408, 413, 40 L. Ed. 199, following Colorado, etc., Mining Co. *v.* Turck, 150 U. S. 138, 37 L. Ed. 1030; Spencer *v.* Duplan Silk Co., 191 U. S. 526, 48 L. Ed. 287.

27. Union Pac. R. Co. *v.* Harris, 158 U. S. 326, 39 L. Ed. 1003; American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 282, 282, 45 L. Ed. 859. But see Ayres *v.* Polsdorfer, 187 U. S. 585, 589, 47 L. Ed. 314.

"Motion was made to dismiss this appeal for the reason that, as the jurisdiction of the circuit court was invoked upon the ground of diverse citizenship, the decree of the circuit court of appeals is final, under § 6 of the court of appeals act of 1891, as interpreted by the decisions of this court in Colorado, etc., Mining Co. *v.* Turck, 150 U. S. 138, 37 L. Ed. 1030; Borgmeyer *v.* Idler, 159 U. S. 408, 40 L. Ed. 199, and Press Pub. Co. *v.* Monroe, 164 U. S. 105, 41 L. Ed. 367, but, to impress the attribute of finality upon a judgment of the circuit court of appeals, it must appear that the original jurisdiction of the circuit court was dependent 'entirely' upon diverse citizenship." Northern Pac. R. *v.* Soderberg, 188 U. S. 526, 528, 47 L. Ed. 575.

The jurisdiction of the circuit court rested on diverse citizenship. One of the defenses interposed asserted exemption from a license tax sought to be enforced, and another denied the constitutionality of the legislation by which the tax was imposed. Both defenses were overruled and judgment rendered for the plaintiff. The case was then carried on error to the circuit court of appeals, which gave judgment dismissing the writ of error for want of jurisdiction. It was held, that in this the circuit court of appeals erred, and that a certiorari should issue that its judgment to that effect may be reversed. American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 45 L. Ed. 859.

eign state is not made final by § 6 of the act of March 3, 1891, ch. 517, 26 Stat. 826, 828, an appeal lies to the supreme court of the United States.[28]

Where Parties Claim under Grants from Different States.—A decision of the circuit court of appeals in an action between citizens of different states claiming land under grants from different states is final, and is not subject to review by the supreme court of the United States.[29]

Cases Arising under the Federal Constitution and Laws.—Where the jurisdiction of the circuit court does not depend entirely on diversity of citizenship, but also rests on the ground that the case arose under the constitution or laws of the United States, then the decision is not final, and that must be tested by the settled rule that a suit does not so arise unless it really and substantially involves a dispute or controversy as to the effect or construction of the constitution or some law or treaty of the United States, upon the determination of which the result depends, and which appears on the record by plaintiff's own statement of his case in legal and logical form, such as is required in good pleading.[30] This court has jurisdiction to review the judgment of the circuit court of appeals under § 6 of the judiciary act of March 3, 1891, where the case turns on the construction of the laws of the United States, because the jurisdiction of the circuit court is not dependent entirely upon the opposite parties being citizens of different states.[31]

28. Columbia *v.* Cauca Co., 190 U. S. 524, 525, 47 L. Ed. 1159.

29. Stevenson *v.* Fain, 195 U. S. 165, 49 L. Ed. 142, citing Ayres *v.* Polsdorfer, 187 U. S. 585, 47 L. Ed. 314.

30. Tennessee *v.* Union & Planters' Bank, 152 U. S. 454, 38 L. Ed. 511; Arbuckle *v.* Blackburn, 191 U. S. 405, 48 L. Ed. 239; Defiance Water Co. *v.* Defiance, 191 U. S. 184, 48 L. Ed. 140; Gold-Washing & Water Co. *v.* Keyes, 96 U. S. 199, 24 L. Ed. 656; Starin *v.* New York, 115 U. S. 248, 29 L. Ed. 388; Bankers' Casuality Co. *v.* Minneapolis, etc., R. Co., 192 U. S. 371, 380, 381, 48 L. Ed. 484; Bonin *v.* Gulf Co., 198 U. S. 115, 117, 118, 49 L. Ed. 970; Howard *v.* United States, 184 U. S. 676, 681, 46 L. Ed. 754.

"Where the jurisdiction of the circuit court is invoked on the ground of diverse citizenship, it will not be held to rest also on the ground that the suit arose under the constitution of the United States, unless it really and substantially involves a dispute or controversy as to the effect or construction of the constitution upon the determination of which the result depends, and which appears on the record by a statement in legal and logical form such as good pleading requires; and where the case is not brought within the rule, the decree of the circuit court of appeals is final. Arbuckle *v.* Blackburn, 191 U. S. 405, 48 L. Ed. 239; Western Union Tel. Co. *v.* Ann Arbor R. Co., 178 U. S. 239, 44 L. Ed. 1052." Empire State-Idaho, etc., Co. *v.* Hanley, 198 U. S. 292, 298, 49 L. Ed. 1056.

Where the complainant by proper pleadings, sets up not only the diversity of citizenship, but also a constitutional question, the complainant has the right to appeal from the judgment of the circuit court, to the circuit court of appeals, and from its decision in such a case an appeal or writ of error may be taken to this court. Mississippi Railroad Commission *v.* Illinois, etc., R. Co., 203 U. S. 335, 51 L. Ed. 209, citing American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 281, 45 L. Ed. 859; Huguley Mfg. Co. *v.* Galeton Cotton Mills, 184 U. S. 290, 295, 46 L. Ed. 546, and distinguishing the case of Field *v.* Barber Asphalt Co., 194 U. S. 618, 48 L. Ed. 1142, on the ground that "It simply holds that where the jurisdiction of the circuit court attaches on the ground of diverse citizenship, and also upon a separate and independent constitutional ground, the party may take a direct appeal to this court, bnt it does not hold that the defeated party must do so and that he cannot go to the circuit court of appeals."

31. Florida, etc., R. Co. *v.* Bell, 176 U. S. 321, 44 L. Ed. 486; American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 45 L. Ed. 859; Northern Pac. R. Co. *v.* Soderberg, 188 U. S. 526, 528, 47 L. Ed. 575.

Where the jurisdiction of a circuit court of the United States is invoked on the ground of diverse citizenship, and at the trial plaintiff relied wholly upon a common-law right, but defendant invoked the constitution and laws of the United States, judgment having passed for the plaintiff, which was affirmed by the circuit court of appeals, the action is not one arising under the constitution and laws of the United States, the judgment of the circuit court of appeals is made final by the statute, and the supreme court of the United States will dismiss a writ of error to that court. Spencer *v.* Duplan Silk Co., 191 U. S. 526, 48 L. Ed. 287, citing Empire, etc., Min. Co. *v.* Bunker Hill, etc., Min. Co., 200 U. S. 613, 50 L. Ed. 620; Russell *v.*

Qualifications of Rule.—But in a case where the jurisdiction of a circuit court of the United States is invoked on the ground of diverse citizenship, it will not be held that jurisdiction also rested on the ground that the suit was one arising under the constitution of the United States, etc., unless it appears in the record by the plaintiffs pleading that it really and substantially involved a dispute or con-

Russell, 200 U. S. 613, 50 L. Ed. 620; Warder *v.* Loomis, 197 U. S. 619, 49 L. Ed. 909; Watkins *v.* American Nat. Bank, 199 U. S. 599, 50 L. Ed. 327; Transportation Co. *v.* Mobile, 199 U. S. 604, 50 L. Ed. 330.

Suits upon bond of clerk of United States court.—"The suit was directly upon a bond taken by the circuit court in conformity with the statutes of the United States, and the case depends upon the scope and effect of that bond and the meaning of those statutes. It was, therefore, a suit arising under the laws of the United States, of which the circuit court (concurrently with the courts of the state) was entitled to take original cognizance, even if the parties had been citizens of the same state. Act of August 13, 1888, 25 Stat. 434, c. 866. This court has heretofore decided that a suit upon a bond of a marshal of the United States was one arising under the laws of the United States. Feibelman *v.* Packard, 109 U. S. 421, 423, 27 L. Ed. 984; Bachrack *v.* Norton, 132 U. S. 337, 33 L. Ed. 377; Reagan *v.* Aiken, 138 U. S. 109, 34 L. Ed. 892; Bock *v.* Perkins, 139 U. S. 628, 630, 35 L. Ed. 314. The same principle must be held to be applicable to suits upon the bond of a clerk of a court of the United States. It could not be that a suit upon the bond of a marshal was one arising under the laws of the United States, and that a suit upon the bond of a clerk of a court of the United States was not of that class. It results that although the petition shows a case of diverse citizenship, jurisdiction was not dependent entirely upon such citizenship. Jurisdiction was likewise invoked, and rightfully, upon federal grounds. And as the case was one which could not have been brought here directly from the circuit court, the final judgment of the circuit court of appeals could be reviewed in this court upon writ of error sued out by the defendants." Howard *v.* United States, 184 U. S. 676, 681, 46 L. Ed. 754.

Infringement of trademark.—The averments of a bill, which charge the infringement of a trademark registered under the act of March 3, 1881, 21 Stat., ch. 138, p. 502, though quite defective, are sufficient to invoke the jurisdiction of a circuit court of the United States on the ground that the case arose under the law of the United States, and a judgment of the circuit court of appeals will not be final in the sense that there can be no appeal to the supreme court of the United States, because the jurisdiction did not depend entirely on diversity of citizenship. Warner *v.* Searle, etc., Co., 191 U. S. 195, 48 L. Ed. 145.

Pure food laws.—The averments of a bill filed in a United States circuit court to restrain the food commissioner of Ohio from certain action on his part as such officer, including prosecution for violation of the pure food laws of that state and the institution of proceedings to prevent the sale of certain alleged adulterated foods, does not bring the case within this rule, although such averments are in effect that the construction which said food commissioner places upon statute will render it in contravention of the constitution of the United States. Arbuckle *v.* Blackburn, 191 U. S. 405, 48 L. Ed. 239; Transportation Co. *v.* Mobile, 199 U. S. 604, 50 L. Ed. 330; Farmers' Loan, etc., Co. *v.* Souix Falls, 199 U. S. 601, 50 L. Ed. 328; Kimball *v.* Chicago Press Brick Co., 194 U. S. 631, 48 L. Ed. 1158; Warder *v.* Loomis, 197 U. S. 619, 49 L. Ed. 909.

Due process of law and impairment of obligation of contract.—Where a bill avers that the property of a certain water company was taken without due process of law by the state statute which enabled it to sell its property to a municipal corporation to defeat municipal construction of a water supply system, because such statute, as construed by the highest court of the state, does not entitle any company to compensation for its franchises and other incorporeal rights, and the additional averment that the obligation of the company's contract with the city to furnish water for fire protection was impaired by the failure to value the future profits arising from such contract, where it is conceded that the charter of the water company is not excluded, but was subject to repeal, alteration, or amendment at the will of the legislature, it was held, that the rights asserted in the bill under the constitution of the United States, upon which the jurisdiction of this court depends, are so attenuated and unsubstantial as to be absolutely devoid of merit. Newburyport Water Co. *v.* Newburyport, 193 U. S. 561, 48 L. Ed. 795, reaffirmed in Farmers' Loan, etc., Co. *v.* Souix Falls, 199 U. S. 601, 50 L. Ed. 328.

Additional liability of stockholders of national banks.—A national bank went into liquidation under § 5220, Rev. Stat., and one who held its notes sought to enforce the additional liability imposed by § 5151, Rev. Stat., against a stockholder by a suit in the nature of a creditor's bill on behalf of himself and all other creditors. It was held, that under these cir-

troversy as to the effect or construction of the constitution, or the validity or construction of the laws or treaties of the United States, upon the determination of which the result depends; and which appears on the record by a statement in legal and logical form such as is required in good pleading.[32] If no definite issue in re-

cumstances a case was presented under the laws of the United States giving the circuit court jurisdiction independently of diverse citizenship, and the decree of the circuit court of appeals is not final but an appeal therefrom will lie to this court. Wyman *v.* Wallace, 201 U. S. 230, 50 L. Ed. 738; Frenzer *v.* Wallace, 201 U. S. 244, 50 L. Ed. 742; Poppleton *v.* Wallace, 201 U. S. 245, 50 L. Ed. 743.

Federal corporations.—The judgments of the circuit courts of appeals are final in that class of cases only when the jurisdiction is dependent "entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States or citizens of different states." The judgment is not final, where the jurisdiction depends not solely on diverse citizenship, but also upon the fact that the plaintiff in error is a federal corporation. Union Pac. R. Co. *v.* Harris, 158 U. S. 326, 39 L. Ed. 1003, explained in Ayres *v.* Polsdorfer, 187 U. S. 585, 589, 47 L. Ed. 314.

Writs of error lie to the circuit courts of appeals in actions for damages for negligence of railroad corporations if the corporations are chartered under the laws of the United States. Union Pac. R. Co. *v.* Harris, 158 U. S. 326, 328, 39 L. Ed. 1003, citing Northern Pac. R. Co. *v.* Amato, 144 U. S. 465, 36 L. Ed. 506. These cases are explained in Ayres *v.* Polsdorfer, 187 U. S. 585, 589, 47 L. Ed. 314.

In Northern Pac. R. Co. *v.* Amato, 144 U. S. 465, 36 L. Ed. 506, a suit was brought in the supreme court of New York against the railroad company to recover damages for personal injuries sustained by the plaintiff, and was removed by the defendant into the circuit court of the United States for the southern district of New York on the ground that it arose under an act of congress in that the defendant was a corporation created thereby, and a writ of error to the circuit court of appeals for the second district was sustained. In that case, the citizenship of the plaintiff was not mentioned in the complaint or in the petition for removal, and the petition stated that the action arose under an act of congress. It was accordingly held, that the judgment of the circuit court of appeals was not made final by § 6 of the judiciary act of March 3, 1891, c. 517, 26 Stat. 826. Union Pac. R. Co. *v.* Harris, 158 U. S. 326, 327, 39 L. Ed. 1003.

Receivers of national banks.—Where a motion is made to dismiss a writ of error to the circuit court of appeals on the ground that the jurisdiction of the case depends on diversity of citizenship, and hence that the judgment of the circuit court of appeals is final, the motion to dismiss will be denied, if one of the defendants, though a citizen of a different state from the plaintiff in the action, is also a receiver of a national bank appointed by the comptroller of the currency, and is an officer of the United States, because an action against him is one arising under the laws of the United States. Auten *v.* National Bank, 174 U. S. 125, 43 L. Ed. 920, citing Kennedy *v.* Gibson, 8 Wall. 498, 19 L. Ed. 476; In re Chetwood, 165 U. S. 443, 41 L. Ed. 782; Sonnentheil *v.* Moerlein Brewing Co., 172 U. S. 401, 43 L. Ed. 492.

32. Arbuckle *v.* Blackburn, 191 U. S. 405, 48 L. Ed. 239, reaffirmed in Transportation Co. *v.* Mobile, 199 U. S. 604, 50 L. Ed. 330; Farmers' Loan, etc., Co. *v.* Souix Falls, 199 U. S. 601, 50 L. Ed. 328; Kimball *v.* Chicago Press Brick Co., 194 U. S. 631, 48 L. Ed. 1158; Warder *v.* Loomis, 197 U. S. 619, 49 L. Ed. 909; Defiance Water Co. *v.* Defiance, 191 U. S. 184, 191, 48 L. Ed. 140; Western Union Tel. Co. *v.* Ann Arbor R. Co., 178 U. S. 239, 44 L. Ed. 1052; Gold-Washing & Water Co. *v.* Keyes, 96 U. S. 199, 24 L. Ed. 656; Blackburn *v.* Portland Gold Min. Co., 175 U. S. 571, 44 L. Ed. 276; Shreveport *v.* Cole, 129 U. S. 36, 32 L. Ed. 589; New Orleans *v.* Benjamin, 153 U. S. 411, 424, 38 L. Ed. 764; Spencer *v.* Duplan Silk Co., 191 U. S. 526, 530, 48 L. Ed. 287, citing and approving Arbuckle *v.* Blackburn, 191 U. S. 405, 48 L. Ed. 239; Western Union Tel. Co. *v.* Ann Arbor R. Co., 178 U. S. 239, 44 L. Ed. 1052; Muse *v.* Arlington Hotel Co., 168 U. S. 430, 42 L. Ed. 531, reaffirmed in Empire, etc., Min. Co. *v.* Bunker Hill, etc., Min. Co., 200 U. S. 613, 50 L. Ed. 620; Russell *v.* Russell, 200 U. S. 613, 50 L. Ed. 620; Warder *v.* Loomis, 197 U. S. 619, 49 L. Ed. 909; Watkins *v.* American Nat. Bank, 199 U. S. 599, 50 L. Ed. 327; Transportation Co. *v.* Mobile, 199 U. S. 604, 50 L. Ed. 330; Newburyport Water Co. *v.* Newburyport, 193 U. S. 561, 48 L. Ed. 795, citing Underground Railroad *v.* New York City, 193 U. S. 416, 48 L. Ed. 733; Owensboro *v.* Owensboro Waterworks Co., 191 U. S. 358, 48 L. Ed. 217; Swafford *v.* Templeton, 185 U. S. 487, 46 L. Ed. 1005; McCain *v.* Des Moines, 174 U. S. 168, 181, 43 L. Ed. 936.

Where jurisdiction of the circuit court is invoked both upon the ground of diversity of citizenship and upon a constitutional question, the decree of the circuit court of appeals will nevertheless be final, and not subject to review by the

spect of a right claimed under the Constitution or any law of the United States is deducible from the plaintiff's statement of his case, the averments of the complainant cannot be helped out by resort to the other pleadings or to judicial knowledge.[33] The rule is settled that a case does not arise under the constitution or laws of the United States unless it appears from the plaintiff's own statement, in the outset, that some title, right, privilege or immunity on which recovery depends will be defeated by one construction of the constitution or laws of the United States, or sustained by the opposite construction.[34] Suits though involving the constitution or laws of the United States are not suits arising under the constitution or laws where they do not turn on a controversy between the parties in regard to the operation of the constitution or laws, but on the facts.[35]

Necessity for Adverse Decision.—An appeal will not lie from the circuit court of appeals to this court, on the ground that the suit arose under the con-

supreme court, where the federal question presented is so wanting in merits as to cause it to be frivolous or without any support whatever. Farrell *v.* O'Brien, 199 U. S. 89, 50 L. Ed. 101, citing Fayerweather *v.* Ritch, 195 U. S. 276, 49 L. Ed. 193.

Postal laws.—A suit against a railway company engaged in carrying the United States mails under the federal laws and postal regulations, to recover the value of a registered package alleged to have been lost through its negligence, does not arise under the federal constitution and laws so as to deprive the judgment of the circuit court of appeals therein of the finality which exists when the jurisdiction of the circuit court depends entirely on diverse citizenship, where plaintiff relied on principles of general law, and nowhere asserted a right which might be defeated or sustained by one or another construction of the constitution or of any law of the United States. Bankers' Casualty Co. *v.* Minneapolis, etc., R. Co., 192 U. S. 371, 48 L. Ed. 484.

Denial of due process of law.—An allegation by a party claiming an interest in a mining claim by virtue of a purchase from an administrator under a decree of the probate court, that a subsequent decree of that court annulling the prior decree was invalid for want of jurisdiction to render it at a subsequent term, for want of notice and for lack of evidence, does not amount to an assertion that he was deprived of his interest by the court without due process of law, which would support the jurisdiction of a federal circuit court irrespective of diversity of citizenship, and therefore permit an appeal to the supreme court from a decree of the circuit court of appeals in the cause. Empire State-Idaho Mining, etc., Co. *v.* Hanley, 198 U. S. 292, 49 L. Ed. 1056. See Farrell *v.* O'Brien, 199 U. S. 89, 50 L. Ed. 101.

Probate of nuncupative will.—Assertions that the requirements of a state statute had not been complied with in respect to the preliminary issue of citations to the next of kin of the decedent; that the hearing on the application to probate a nuncupative will was had before service of citations in the mode prescribed by law, etc., and that this amounted to a deprivation of property without due process of law, in violation of the constitution of the United States, were held to be so unsubstantial and devoid of merit as to furnish no real support to a contention that the decree of the circuit court of appeals was not final because not invoked solely on the ground of diversity of citizenship. Farrell *v.* O'Brien, 199 U. S. 89, 50 L. Ed. 101.

33. Mountain View, etc., Co. *v.* McFadden, 180 U. S. 533, 45 L. Ed. 656; Arkansas *v.* Kansas, etc., Coal Co., 183 U. S. 185, 46 L. Ed. 144; Bankers' Casualty Co. *v.* Minneapolis, etc., R. Co., 192 U. S. 371, 383, 48 L. Ed. 484.

34. Gold-Washing & Water Co. *v.* Keyes, 96 U. S. 199, 24 L. Ed. 656; Starin *v.* New York, 115 U. S. 248, 29 L. Ed. 388; New Orleans *v.* Benjamin, 153 U. S. 411, 38 L. Ed. 764; Blackburn *v.* Portland Gold Min. Co., 175 U. S. 571, 44 L. Ed. 276; Shoshone Min. Co. *v.* Rutter, 177 U. S. 505, 44 L. Ed. 864; Bankers' Casualty Co. *v.* Minneapolis, etc., R. Co., 192 U. S. 371, 385, 48 L. Ed. 484.

35. Bankers' Casualty Co. *v.* Minneapolis, etc., R. Co., 192 U. S. 371, 384, 48 L. Ed. 484, citing Provident Savings Society *v.* Ford, 114 U. S. 635, 29 L. Ed. 261; Metcalf *v.* Watertown, 128 U. S. 586, 32 L. Ed. 543; Colorado, etc., Mining Co. *v.* Turck, 150 U. S. 138, 37 L. Ed. 1030; St. Joseph, etc., R. Co. *v.* Steele, 167 U. S. 659, 42 L. Ed. 315; Pratt *v.* Paris Gas Light etc., Co., 168 U. S. 255, 42 L. Ed. 458; Western Union Tel. Co. *v.* Ann Arbor R. Co., 178 U. S. 239, 44 L. Ed. 1052; Gableman *v.* Peoria, etc., R. Co., 179 U. S. 335, 45 L. Ed. 220.

Assertion of title under a patent.—Where the jurisdiction of the circuit court rests alone on diversity of citizenship, the assertion of title under a patent from the United States, presents no question, which, of itself, confers jurisdiction on this court over the court of appeals. Bonin *v.* Gulf Co., 198 U. S. 115, 117, 49 L. Ed. 970, citing Florida, etc., R. Co. *v.* Bell, 176 U. S. 321, 328, 44 L. Ed. 486.

stitution of the United States, where, even if the judgment of the court of appeals disposed of any such question, it was in their favor. The appellants cannot make a grievance of their own success.[36]

ff. *Copyright Cases.*—This court has appellate jurisdiction to review the final judgments and decrees of the circuit court of appeals in cases arising under the copyright laws of the United States, where the matter in controversy exceeds $1,000.[37] But this court has no appellate jurisdiction over the decree of a circuit court entered upon a return of the mandate from the circuit court of appeals in a suit to enjoin the infringement of a copyright, and in which it is ordered, adjudged and decreed that the decree of the circuit court of appeals be, and the same hereby is, made a decree of this court, although copyright cases are not made final in the circuit court of appeals, and an appeal may be taken from the circuit court of appeals to this court in such cases; because this is not an appeal from the circuit court of appeals. "It does not help the matter that the circuit courts may, by the form of their entries, make the judgments and decrees of the circuit court of appeals their judgments and decrees. We cannot revise the judgments and decrees of the appellate tribunals except when brought before us by appeal therefrom, writ of error thereto, or by certiorari."[38] And where the plaintiff claims no right under the copyright laws of the United States, or in any way mentions or refers to them, but at the trial relies wholly upon a right given by the common law to an author in his unpublished manuscript, and maintains the action upon such a right only, this is insufficient to support the jurisdiction of this court to review, by appeal or writ of error, the judgment of the circuit court of appeals. The test of the appellate jurisdiction in such a case is whether the case was one arising under the copyright laws of the United States, or was one in which the jurisdiction of the circuit court wholly depended upon the parties being citizens of different states.[39]

(5) *Hearing and Determination.*—**In General.**—Where an appeal to this court from a decision of the circuit court of appeals revises a ruling of the circuit court, this court has to determine whether in its judgment the circuit court of appeals did or did not err, and affirm or reverse accordingly, although the point was not called to the attention either of the circuit court or the circuit court of appeals, but is raised for the first time in the court. "It is true that our decision necessarily reviews the decree of the circuit court in reviewing the action of the court of appeals upon it, and, under the statute, or mandate, goes to the circuit court directly, but it is, notwithstanding, the judgment of the circuit court of appeals that we are called on primarily to revise. It will be seen, then, that the judgments of the courts of appeals should not ordinarily be re-examined on the suggestion of error in that court in that it did not hold action of the circuit court erroneous which was not complained of."[40]

(6) *Supersedeas.*—An appeal to this court from the circuit court of appeals, operates as a supersedeas, notwithstanding "the sixteenth section of the act of February 4, 1887, c. 104, to regulate commerce, 24 Stat. 379, as amended by the act of March 2, 1889, c. 382, 25 Stat. 855, under which resort to the circuit courts could be had for the enforcement of lawful orders or requirements of the interstate commerce commission, provides that: 'When the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceeding before said court may appeal to the supreme court of the United States, under the

36. Empire, State-Idaho Min. etc., Co. *v.* Hanley, 198 U. S. 292, 49 L. Ed. 1056, citing Anglo-American Provision Co. *v.* Davis Provision Co., 191 U. S. 373, 376, 48 L. Ed. 225; Lampasas *v.* Bell, 180 U. S. 276, 45 L. Ed. 527.

37. Press Pub. Co. *v.* Monroe, 164 U. S. 105, 41 L. Ed. 367; Webster *v.* Daly, 163 U. S. 155, 159, 41 L. Ed. 111.

38. Webster *v.* Daly, 163 U. S. 155, 41 L. Ed. 111.

39. Press Pub. Co. *v.* Monroe, 164 U. S. 105, 41 L. Ed. 367.

40. Union Pacific R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 564, 593, 41 L. Ed. 265; Union Pacific R. Co. *v.* Chicago, etc., R. Co., 163 U. S. 611, 41 L. Ed. 282.

same regulations now provided by law in respect of security for such appeals; but such appeals shall not operate to stay or supersede the order of the court or the execution of any writ or process thereon.' "[41]

(7) *Reversal or Affirmance.*—When this court has jurisdiction to examine the proceedings in the circuit court of appeals, if the supreme court of the United States finds its ruling erroneous, it will reverse it. But if it holds that its ruling was correct, its judgment will be affirmed.[42]

(8) *Mandate.*—**To What Court Directed.**—Where, on appeal or writ of error from this court to the United States circuit court of appeals, the judgment is affirmed or reversed, the case will be remanded to the circuit court for further proceedings as required by § 10 of the act of March 3, 1891, 26 Stat. 829.[43]

An appeal will not lie to this court from a decree entered by the circuit court in conformity with the mandate from the circuit court of appeals. If error was committed by the circuit court of appeals in taking jurisdiction, it is not for the circuit court to pass upon this question. But if the circuit court of appeals erred, or if, for any reason, its judgment could be held void, the appropriate remedy lay in a certiorari from this court to that court.[44]

Appeal after Mandate.—Although the mandate of the circuit court of appeals has gone down to the circuit court and the circuit court has entered its decree in conformity with the mandate, this will not cut off an appeal to the supreme court from the court of appeal.[45]

c. *By Mandamus.*—This court cannot, by mandamus, review the judicial action of a circuit court of appeals had in the exercise of legitimate jurisdiction. As, for example, upon an application for a writ of mandamus to compel the circuit court of appeals to receive and duly consider certain deposition or further proofs taken by petitioner on appeal in an admiralty cause pending in that court wherein he is the libelant and appellee.[46] This court cannot issue a writ of mandamus either to the circuit court of appeals or to the circuit court, on the ground that the circuit court of appeals on the hearing of an appeal from an interlocutory order of the circuit court granting an injunction, erred in going beyond the modification of the injunction, and in setting aside so much of the orders appealed from as appointed a receiver and permitted him to issue receiver's notes.[47]

d. *By Certiorari*—(1) *In General.*—While this division of appellate power between this court and the circuit court of appeals was the means adopted to re-

41. Louisville, etc., R. Co. *v.* Behlmer, 169 U. S. 644, 645, 42 L. Ed. 889.

42. Southern R. Co. *v.* Postal Tel. Cable Co., 179 U. S. 641, 45 L. Ed. 355, citing and approving Aztec Min. Co. *v.* Ripley, 151 U. S. 79, 38 L. Ed. 80.

43. Northern Pac. R. Co. *v.* Amato, 144 U. S. 465, 36 L. Ed. 506; Lau Ow Bew *v.* United States, 144 U. S. 47, 36 L. Ed. 340; Northern Pac. R. Co. *v.* Walker, 148 U. S. 391, 392, 37 L. Ed. 494.

When a case reaches this court through the circuit court of appeals, by appeal, writ of error or certiorari, the cause shall be remanded to the proper district or circuit court for further proceedings in pursuance of the determination of this court, exactly as if the case came here directly from the district or circuit court. Louisville, etc., R. Co. *v.* Behlmer, 169 U. S. 644, 646, 42 L. Ed. 889.

When cases are brought here from the circuit courts of appeals, we are, of course, called on to review the judgments of those courts in revision of the judgments of the courts below, but our mandate goes to the court of first instance, and is there carried into effect, though the court of appeals may have sent its own mandate down before the case was brought to this court by appeal, writ of error or certiorari. The Conqueror, 166 U. S. 110, 41 L. Ed. 937; Kirwan *v.* Murphy, 170 U. S. 205, 42 L. Ed. 1009; Louisville, etc., R. Co. *v.* Behlmer, 169 U. S. 644, 648, 42 L. Ed. 889.

44. Aspen Mining, etc., Co. *v.* Billings, 150 U. S. 31, 37 L. Ed. 986, citing American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 37 L. Ed. 486.

45. Merrill *v.* National Bank, 173 U. S. 131, 134, 43 L. Ed. 640.

46. In re Hawkins, 147 U. S. 486, 37 L. Ed. 251, citing In re Morrison, 147 U. S. 14, 37 L. Ed. 60; Ex parte Morgan, 114 U. S. 174, 29 L. Ed. 135; Ex parte Burtis, 103 U. S. 238, 26 L. Ed. 392; Ex parte Schwab, 98 U. S. 240, 25 L. Ed. 105.

47. American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 37 L. Ed. 486, citing In re Morrison, 147 U. S. 14, 26, 37 L. Ed. 60; In re Hawkins, 147 U. S. 486, 37 L. Ed. 251; In re Haberman Mfg. Co., 147 U. S. 525, 37 L. Ed. 266; Virginia *v.* Paul, 148 U. S. 107, 124, 37 L. Ed. 386.

duce the accumulation of business in this court, it was foreseen that injurious results might follow if an absolute finality of determination was given to the courts of appeal. Nine separate appellate tribunals might, by their differences of opinion, unless held in check by the reviewing power of this court, create an unfortunate confusion in respect to the rules of federal decision. As the courts of appeal would often be constituted of two circuit judges and one district judge, a division of opinion between the former might result in a final judgment where the opinions of two judges of equal rank were on each side of the questions involved. Cases of a class in which finality of decision was given to the circuit courts of appeal might involve questions of such public and national importance as to require that a consideration and determination thereof should be made by the supreme tribunal of the nation. It was obvious that all contingencies in which a decision by this tribunal was of importance could not be foreseen, and so there was placed in the act creating the courts of appeal, in addition to other provisions for review by this court, this enactment: "And excepting also, that in any such case as is hereinbefore made final in the circuit court of appeals, it shall be competent for the supreme court to require, by certiorari or otherwise, any such case to be certified to the supreme court for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court."[48] Thus, in the interest of jurisprudence and uniformity of decision, the supervision of this court, by way of advice or direct revision, is secured.[49]

The general language of this clause is noticeable. It applies to every case in which, but for it, the decision of the circuit court of appeals would be absolutely final, and authorizes this court to bring before it for review and determination the case so pending in the circuit court of appeals, and to exercise all the power and authority over it which this court would have in any case brought to it by appeal or writ of error. Unquestionably, the generality of this provision was not a mere matter of accident. It expressed the thought of congress distinctly and clearly, and was intended to vest in this court a comprehensive and unlimited power. The power thus given is not affected by the condition of the case as it exists in the court of appeals. It may be exercised before or after any decision by that court and irrespective of any ruling or determination therein. All that is essential is that there be a case pending in the circuit court of appeals, and of those classes of cases in which the decision of that court is declared a finality, and this court may, by virtue of this clause, reach out its writ of certiorari and transfer the case here for review and determination. Obviously, a power so broad and comprehensive, if carelessly exercised, might defeat the very thought and purpose of the act creating the courts of appeal. So exercised, it might burden the docket of this court with cases which it was the intent of congress to terminate in the courts of appeal, and which, brought here, would simply prevent that promptness of decision which, in all judicial actions, is one of the elements of justice.[50]

Adequacy of Other Remedies.—But a certiorari can be issued only when a writ of error cannot. It must not be supposed, however, that it will issue merely because the writ of error will not lie.[51]

48. Forsyth *v.* Hammond, 166 U. S. 506, 512, 513, 41 L. Ed. 1095, reaffirmed in Archer *v.* Building & Loan Ass'n, 179 U. S. 679, 45 L. Ed. 383; Warner *v.* New Orleans, 167 U. S. 467, 474, 42 L. Ed. 239, reaffirmed in O'Neill, etc., R. Co. *v.* Trust Co., 172 U. S. 642, 43 L. Ed. 1180; Louisville, etc., R. Co. *v.* Behlmer, 169 U. S. 644, 646, 42 L. Ed. 889; Law Ow Bew, 141 U. S. 583, 35 L. Ed. 868; Kingman & Co. *v.* Western Mfg. Co., 170 U. S. 675, 42 L. Ed. 1192; Northern Pac. R. Co. *v.* Walker, 148 U. S. 391, 392, 37 L. Ed. 494.

49. In re Woods, 143 U. S. 202, 36 L. Ed. 125; Law Ow Bew, 141 U. S. 583, 35 L. Ed. 868; Law Ow Bew *v.* United States, 144 U. S. 47, 58, 36 L. Ed. 340; Columbus Watch Co. *v.* Robbins, 148 U. S. 266, 268, 37 L. Ed. 445.

50. Forsyth *v.* Hammond, 166 U. S. 506, 513, 41 L. Ed. 1095, reaffirmed in Archer *v.* Building & Loan Ass'n, 179 U. S. 679, 45 L. Ed. 383.

51. Fields *v.* United States, 205 U. S. 292, 51 L. Ed. 807.

Necessity for Request.—The supreme court of the United States, in the absence of request for instructions, may, by certiorari or otherwise, require any cases made final in the circuit court of appeals to be certified to it for review.[52]

(2) *Allowance of Writ.*—The writ of certiorari, authorized by the act of 1891, being in the nature of a writ of error to bring up for review the decree of the circuit court of appeals, the question whether the writ should be granted rests in the discretion of this court; but when the writ has been granted, and the record certified in obedience to it, the questions arising upon that record must be determined according to fixed rules of law.[53]

Time of Allowance.—Where a cause is brought from the circuit court of appeals to the supreme court by writ of error, when the proper course of proceeding was to have asked for a writ of certiorari to bring up the final judgment of the circuit court of appeals here for review, the supreme court, under the powers possessed by it under the judiciary act of 1891, may then allow a writ of certiorari, and direct that the copy of the record heretofore filed under the writ of error be taken and deemed as a sufficient return to the certiorari.[54]

(3) *In What Cases the Writ May Issue*—aa. *In General.*—The authority conferred on this court by the provision, by which it is enacted that "in any such case as is hereinbefore made final in the circuit court of appeals, it shall be competent for the supreme court to require, by certiorari or otherwise, any such case to be certified to the supreme court for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court," has been held to be a branch of its jurisdiction which should be exercised sparingly and with great caution, and only in cases of peculiar gravity and general importance, or in order to secure uniformity of decision.[55] This must necessarily be so in any view, and especially when it is considered that

52. United States *v.* Jahn, 155 U. S. 109, 39 L. Ed. 87.

53. Harris *v.* Barber, 129 U. S. 366, 369, 32 L. Ed. 697; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 387, 37 L. Ed. 486.

54. Security Trust Co. *v.* Dent, 187 U. S. 237, 47 L. Ed. 158.

55. Law Ow Bew, 141 U. S. 583, 35 L. Ed. 868, and Lau Ow Bew *v.* United States, 144 U. S. 47, 36 L. Ed. 340; In re Woods, 143 U. S. 202, 36 L. Ed. 125; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 383, 37 L. Ed. 486; Fields *v.* United States, 205 U. S. 292, 51 L. Ed. 807.

The general rule is well settled that a writ of certiorari can only issue from this court under the circuit court of appeals act, where the question involved is one of gravity and general importance. As, for example, where there is a conflict between the decisions of the state and federal courts or between those of federal courts of different circuits; or where there is something affecting the relations of this nation to foreign nations, or indeed some matter of general interest to the public. Fields *v.* United States, 205 U. S. 292, 51 L. Ed. 807.

"Accordingly, while there have been many applications to this court for writs of certiorari to the circuit court of appeals under this provision, two only have been granted; the one in Law Ow Bew's Case, 141 U. S. 583, 35 L. Ed. 868, which involved a grave question of public international law, affecting the relations between the United States and a foreign country; the other in Fabre, Petitioner, No. 1237 of the present term, an admiralty case, which presented an important question as to the rules of navigation, and in which the decree of the circuit court of appeals for the second circuit reversed a decree of the district judge, and was dissented from by one of the three circuit judges; and in each of those cases the circuit court of appeals had declined to certify the question to this court." American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 383, 37 L. Ed. 486.

The power of this court to require a case in which the judgment and decree of the circuit court of appeals is made final, to be certified for review and determination, as if it had been brought here on appeal or writ of error, can only be properly invoked under section six of the act of congress entitled "An act to establish circuit courts of appeals and to define and regulate in certain cases the jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891 (26 Stat. 826, 828, c. 517), when questions of gravity and importance are involved. In re Woods, 143 U. S. 202, 205, 36 L. Ed. 125; Law Ow Bew, 141 U. S. 583, 35 L. Ed. 868.

Where the circuit court of appeals on the hearing of an appeal from an interlocutory order of the circuit court granting an injunction, errors in going beyond a modification of the injunction, and in setting aside so much of the orders ap-

the circuit courts of appeals were created for the purpose of relieving this court of the oppressive burden of general litigation, which impeded the examination and disposition of cases of public concern, and delayed suitors in the pursuit of justice. But in the interest of jurisprudence and uniformity of decision, to use the language of the eminent jurist and statesman who had charge of the bill, provision was made under section six for such supervision on our part as would tend to avert diversity of judgments and guard against inadvertence of conclusion in controversies involving weighty and serious matters.[56] So it has been that this court, while not doubting its power, has been chary of action in respect to certioraries. It has said: "It is evident that it is solely questions of gravity and importance that the circuit courts of appeal should certify to us for instruction; and that it is only when such questions are involved that the power of this court to require a case in which the judgment and decree of the court of appeals is made final, to be certified, can be properly invoked."[57]

Matters of Private Interest.—This court will decline to issue the writ of certiorari in cases where, there being only a matter of private interest, there had been no final judgment in the court of appeals.[58]

Determination of Importance of Case.—But the power of determining what cases should be so brought up was vested in this court, and it was not intended to give to any one of the courts of appeal the right to avoid the responsibility cast upon it, by statute, by transmitting any case it saw fit to this court for decision. If such practice were tolerated, it is easy to perceive that the purpose of the act might be defeated, and the courts of appeal, by transferring cases here, not only relieve themselves of burden, but also crowd upon this court the very cases which it was the intent of congress they should finally determine.[59]

bb. *Particular Cases as Involving Questions of Sufficient Importance Considered.*—The difference between an affirmance and dismissal not affecting the essential rights of the parties, is no ground upon which this court should exercise its discretionary powers of issuing a writ of certiorari.[60]

pealed from as appointed a receiver and permitted him to issue receiver's notes, the error is one in the judicial determination of a case within the jurisdiction of that court, and neither so important in its immediate effect, nor so far reaching in its consequences, as to warrant this court in issuing the writ of certiorari before final judgment. American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 37 L. Ed. 486.

Where a bill in equity was filed against the county auditors of twelve counties in the state, praying for a decree adjudging certain assessments and taxes levied upon lands in each of said counties to be illegal and void and a cloud upon complainant's title, and to enjoin the collection of such taxes from a railroad company, this court issued a certiorari to the circuit court of appeals requiring the whole record and cause to be sent up for consideration. Northern Pacific R. Co. *v.* Walker, 148 U. S. 391, 37 L. Ed. 494.

56. In re Woods, 143 U. S. 202, 205, 36 L. Ed. 125.

57. Law Ow Bew, 141 U. S. 583, 587, 35 L. Ed. 868; In re Woods, 143 U. S. 202, 36 L. Ed. 125; Lau Ow Bew *v.* United States, 144 U. S. 47, 58, 36 L. Ed. 340; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 383, 37 L. Ed. 486; Forsyth *v.* Hammond, 166 U. S. 506, 513, 514, 41 L. Ed. 1095, reaffirmed in Archer *v.* Building & Loan Ass'n, 179 U. S. 679, 45 L. Ed. 383.

58. Forsyth *v.* Hammond, 166 U. S. 506, 41 L. Ed. 1095.

Matters of private interest.—In every case within its appellate jurisdiction, the circuit court of appeals may certify to this court any questions or propositions of law in respect of which it desires instruction, and this court may then require the whole record and cause to be sent up; and so it is competent for this court by certiorari to direct any case to be certified, whether its advice is requested or not, except those which may be brought here by appeal or writ of error, and the latter are specified as those where the money value exceeds a certain amount, and which have not been made final "in this section," that is, made final in terms. And as certiorari will only be issued where questions of gravity and importance are involved or in the interest of uniformity of decision, the object of the act is thereby attained. Lau Ow Bew *v.* United States, 144 U. S. 47, 58, 36 L. Ed. 340.

59. Warner *v.* New Orleans, 167 U. S. 467, 474, 42 L. Ed. 239, reaffirmed in O'Neill, etc., R. Co. *v.* Trust Co., 172 U. S. 642, 43 L. Ed. 1180.

60. Smith *v.* Vulcan Iron Works, 165 U. S. 518, 526, 41 L. Ed. 810.

Construction and Interpretation of Neutrality Laws.—A writ of certiorari may be allowed from this court to the circuit court of appeals in a case involving the construction and interpretation of the neutrality laws of the United States pending an insurrection against a foreign government, because of the great public importance of the question.[61]

Qualification of Judges.—If a decree of the circuit court of appeals is void, because one of the judges who took part in the decision was forbidden by law to sit at the hearing, a writ of certiorari may be issued to that court to bring up and quash the decree, and "is manifestly a more decorous, as well as a more appropriate, form of proceeding than a writ of mandamus to the circuit court to disregard the mandate of the appellate court."[62]

Conflicting Decisions of Courts of Appeals.—The fact that a circuit court of appeals for one circuit has rendered a different judgment from that of the circuit court of appeals for another circuit, under the same conditions, may furnish ground for a certiorari on proper application.[63]

Conflict between State Court and Court of Appeals.—And this court will issue the writ of certiorari in case of a conflict between the decisions of a circuit court of appeals and a state court.[64]

Construction of Chinese Exclusion Act.—Where the case involves the application of the Chinese restriction acts to Chinese merchants domiciled in the United States, who temporarily leave the country for purposes of business or pleasure, animo revertendi, in the light of the treaties between the government of the United States and that of China, "it is of sufficient importance in itself, and sufficiently open to controversy, to make it the duty of this court to issue the writ applied for in order that the case may be reviewed and determined as if brought here on appeal or writ of error."[65]

Res Adjudicata and Master and Servant Questions.—But the inquiry as to whether it was settled law in the state of Minnesota that a judgment of dis-

61. The Three Friends, 166 U. S. 1, 41 L. Ed. 897.

62. American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 378, 37 L. Ed. 486.

Qualification of judges of court of appeals.—"The more important suggestion is that the decree of the circuit court of appeals is void, because Judge Pardee took part in the hearing and decision in that court, though disqualified from so doing by § 3 of the judiciary act of 1891, which provides that "no justice or judge, before whom a cause or question may have been tried or heard" in the circuit court "shall sit on the trial or hearing of such cause or question in the circuit court of appeals." 26 Stat. 827. The question whether this provision prohibited Judge Pardee from sitting in an appeal which was not from his own order, but from an order setting aside his order, is a novel and important one, deeply affecting the administration of justice in the circuit court of appeals. If the statute made him incompetent to sit at the hearing, the decree in which he took part was unlawful, and perhaps absolutely void, and should certainly be set aside or quashed by any court having authority to review it by appeal, error or certiorari. United States *v.* Lancaster, 5 Wheat. 434, 5 L. Ed. 127; The Queen *v.* Justices of Hertfordshire, 6 Q. B. 753; United States *v.* Emholt, 105 U. S. 414, 26 L. Ed. 1077; Oakley *v.* Aspinwall, 3 N. Y. 547; Tolland *v.* County Commissioners, 13 Gray 12. For the reasons above stated, this court is of opinion that the writ of certiorari prayed for in the second case should not be granted, unless Judge Pardee was disqualified by the act of 1891 to sit at the hearing in the circuit court of appeals; but that, if he was so disqualified, the writ should be granted, for the purpose of bringing up and quashing the decree of that court." American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 378, 37 L. Ed. 486.

63. Columbus Watch Co. *v.* Robbins, 148 U. S. 266, 37 L. Ed. 445.

64. Forsyth *v.* Hammond, 166 U. S. 506, 41 L. Ed. 1095.

65. Law Ow Bew, 141 U. S. 583, 587, 35 L. Ed. 868.

In the matter of Lau Ow Bew, the construction of acts of congress in the light of treaties with a foreign government, and the status of domicil in respect of natives of one country domiciled in another, a matter of international concern, were brought under consideration upon the record, and we were of opinion that the grounds of the application were sufficient to call for our interposition. In re Woods, 143 U. S. 202, 206, 36 L. Ed. 125.

missal in a former suit, was not a bar to a second suit upon the same cause of action, or whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of the case, does not fall within the category of questions of such gravity and general importance as to require the review of the conclusions of the circuit court of appeals in reference to them.[66]

cc. *Habeas Corpus Proceedings.*—A case of habeas corpus, although made final by the effect of § 6 in giving the circuit court of appeals jurisdiction over that class of cases, is nevertheless reviewable upon certiorari.[67]

dd. *Admiralty Cases.*—In admiralty cases, among others enumerated, the decree of the circuit court of appeals is made final in that court by the terms of section six of the judiciary act of March 3, 1891, but this court may require any such case, by certiorari or otherwise, to be certified "for its review and determination with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court;" that is, as if it had been brought directly from the district or the circuit court.[68]

ee. *Bankruptcy Proceedings.*—In view of the terms of the act and of the nature of the writ, we have held that under a reasonable construction of subdivision d of § 25 of the bankrupt act, certiorari lies to decrees of the circuit court of appeals revising proceedings of the inferior courts of bankruptcy.[69]

ff. *Where There Is No Judgment in Court of Appeals.*—The writ may be issued by this court to the circuit court of appeals under § 6 of the act of March 3, 1891, on application, and ordinarily after judgment, in cases in which judgments are made final in those courts by the section, and also where questions of law have been certified to this court by those courts for their guidance in disposing of such cases. But in a case where there is no judgment in the circuit court of appeals, and the sole question certified relates to the jurisdiction of that court, and it having been determined that jurisdiction does not exist, the writ of certiorari cannot properly be issued to require the court to send up a cause over which it has no jurisdiction for determination on the merits. The remedy is by writ of error from this court to the circuit court.[70]

(4) *Limitations upon Time of Application.*—The act does not fix the time within which application for a certiorari must be made. And while such application should be made with reasonable promptness, if it is made during the term and within a year after the original decree, it is within the time. The party complaining is not limited to the six months allowed by § 11 of the court of appeals act for suing out a writ of error from the court of appeals to review the judgment of the district or circuit court; and it would seem that he is, by analogy, entitled to the year within which, by § 6, an appeal shall be taken or writ of error sued out from this court to review judgments or decrees of the court of appeals in cases where the losing party is entitled to such review.[71] The fact that the mandate of

66. In re Woods, 143 U. S. 202, 206, 36 L. Ed. 125.

67. Lau Ow Bew *v.* United States, 144 U. S. 47, 36 L. Ed. 340.

68. The Three Friends, 166 U. S. 1, 49, 41 L. Ed. 897.

69. Bryan *v.* Bernheimer, 175 U. S. 724, 44 L. Ed. 338; S. C., 181 U. S. 188, 46 L. Ed. 814; Mueller *v.* Nugent, 180 U. S. 640, 45 L. Ed. 711; S. C., 184 U. S. 1, 46 L. Ed. 405; Louisville Trust Co. *v.* Comingor, 181 U. S. 620, 45 L. Ed. 1031; S. C., 184 U. S. 18, 46 L. Ed. 413; Holden *v.* Stratton, 191 U. S. 115, 119, 48 L. Ed. 116, reaffirmed in Hatch *v.* Ketcham, 198 U. S. 580, 49 L. Ed. 1172.

70. Good Shot *v.* United States, 179 U. S. 87, 88, 45 L. Ed. 101.

71. Spencer *v.* Duplan Silk Co., 191 U. S. 526, 532, 48 L. Ed. 287, reaffirmed in Empire, etc., Min. Co. *v.* Bunker Hill, etc., Min. Co., 200 U. S. 613, 50 L. Ed. 620; Russell *v.* Russell, 200 U. S. 613, 50 L. Ed. 620; Warder *v.* Loomis, 197 U. S. 619, 49 L. Ed. 909; Watkins *v.* American Nat. Bank, 199 U. S. 599, 50 L. Ed. 327; Transportation Co. *v.* Mobile, 199 U. S. 604, 50 L. Ed. 330, citing The Conqueror, 166 U. S. 110, 114, 41 L. Ed. 937; Ayres *v.* Polsdorfer, 187 U. S. 585, 595, 47 L. Ed. 314.

Where the judgment of the circuit court of appeals was entered December 7, 1900, and petition for rehearing denied February 25, 1901, and a party, acting under the idea that the judgment was re-

the circuit court of appeals to the district court, affirming the decree of that court, has gone down, is immaterial. The transcript of the record is still in the court of appeals, and if a writ of certiorari can be issued at all after a final disposition of the case in that court, it could not be defeated by the issue of a mandate to the court below. That certiorari can issue, and, indeed, is ordinarily only issued, after a final decree in the court of appeals, is settled.[72] Although it may be issued before, if this court be of opinion that the facts of the case require an earlier interposition.[73]

(5) *Review of Interlocutory Orders.*—**In General.**—This court should not issue a writ of certiorari "to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."[74] In short, a writ of certiorari from this court to re-examine the decisions of the circuit court of appeals should generally be issued only after a final decree.[75] But the power of this court in certiorari extends to every case pending in the circuit courts of appeal, and may be exercised at any time during such pendency, provided the case is one which, but for this provision of the statute, would be finally determined in that court. And this court need not await the final decree in that court,[76] although this is a power not ordinarily to be exercised, and is only to be exercised in exceptional cases.[77] While this power is coextensive with all possible necessities and sufficient to secure to this court a final control over the litigation in all the courts of

viewable by the supreme court, obtained a writ of error from that court April 13, 1901, it was held, that a motion for certiorari as under § 6 of the act of March 3, 1891, filed October 9, 1902, would not be entertained. Ayers *v.* Polsdorfer, 187 U. S. 585, 595, 47 L. Ed. 314.

Where judgment was entered in the circuit court of appeals May 22, 1902, a writ of error allowed May 26, 1903, and the case docketed in the United States supreme court June 1, 1903, and a petition for certiorari filed February 17, 1905, it was held, that the petition should not be granted. Bonin *v.* Gulf Co., 198 U. S. 115, 49 L. Ed. 970, citing Ayres *v.* Polsdorfer, 187 U. S. 585, 595, 47 L. Ed. 314.

72. American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 384, 37 L. Ed. 486; The Conqueror, 166 U. S. 110, 113, 41 L. Ed. 937.

73. The Three Friends, 166 U. S. 1, 41 L. Ed. 897; The Conqueror, 166 U. S. 110, 113, 114, 41 L. Ed. 937.

74. American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 37 L. Ed. 486.

There are much stronger reasons against the interposition of this court to review a decree made by the circuit court of appeals, on appeal from an interlocutory order, than in the case of a final decree. Before the act of 1891, as has been seen, no interlocutory order was subject to appeal, except as involved in an appeal from a final decree. The only appeal from an interlocutory order under the act of 1891 is that allowed by § 7 to the circuit court of appeals, the same court to which an appeal lies from the final decree. The question whether a decree is an interlocutory or a final one is often nice and difficult, as appears by the cases collected in Keystone Iron Co. *v.* Martin, 132 U. S. 91, 33 L. Ed. 275, and in McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 36 L. Ed. 1079. Whether an interlocutory order may be separately reviewed by the appellate court in the progress of the suit, or only after and together with the final decree, is a matter of procedure rather than of substantial right; and many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters. American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 378, 37 L. Ed. 486.

A decree of the circuit court of appeals, by which, on appeal from an interlocutory order of the circuit court, vacating an order appointing a receiver, the order appealed from has been reversed, the receivership restored and the case remanded to the circuit court to determine who should be receiver, will not be reviewed by this court by writ of certiorari, either because no appeal lies from such an interlocutory order, or because the order appointing the receiver was made by a circuit judge when outside of his circuit. American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 37 L. Ed. 486.

75. Panama R. Co. *v.* Napier Shipping Co., 166 U. S. 280, 41 L. Ed. 1004, citing The Conqueror, 166 U. S. 110, 41 L. Ed. 937.

76. Forsyth *v.* Hammond, 166 U. S. 506, 514, 41 L. Ed. 1095, reaffirmed in Archer *v.* Building & Loan Ass'n, 179 U. S. 679, 45 L. Ed. 383.

77. American Construction Co. *v.* Jacksonville Railway, 148 U. S. 372, 37 L. Ed. 486; The Three Friends, 166 U. S. 1, 49, 41 L. Ed. 897.

appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a state, or some matter affecting the interests of this nation in its internal or external relations, demands such exercise.[78]

In such an exceptional case, the power and the duty of this court to require, by certiorari or otherwise, the case to be sent up for review and determination, cannot well be denied, as will appear if the provision now in question is considered in connection with the preceding provisions for the interposition of this court in cases brought before the circuit court of appeals. In the first place, the circuit court of appeals is authorized, "in every such subject within its appellate jurisdiction," and "at any time," to certify to this court "any questions or propositions of law," concerning which it desires the instruction of this court for its proper decision. In the next place, this court, at whatever stage of the case such questions or propositions are certified to it, may either give its instruction thereon, or may require the whole record and cause to be sent up for its consideration and decision. Then follows the provision in question, conferring upon this court authority "in any such case as is hereinbefore made final in the circuit court of appeals," to require, by certiorari or otherwise, the case to be certified to this court for its review and determination. There is nothing in the act to preclude this court from ordering the whole case to be sent up, when no distinct questions of law have been certified to it by the circuit court of appeals, at as early a stage as when such questions have been so certified. The only restriction upon the exercise of the power of this court, independently of any action of the circuit court of appeals, in this regard, is to cases "made final in the circuit court of appeals," that is to say, to cases in which the statute makes the judgment of that court final, not to cases in which that court has rendered a final judgment. Doubtless, this power would seldom be exercised before a final judgment of the circuit court of appeals, and very rarely indeed before the case was ready for decision upon the merits in that court. But the question at what stage of the proceedings, and under what circumstances, the case should be required, by certiorari or otherwise, to be sent up for review, is left to the discretion of this court, as the exigencies of each case may require.[79]

Reversal and Remand.—A writ of certiorari may be issued from this court to review a decree of the circuit court of appeals reversing a decree of the circuit court and remanding the case for further proceedings.[80] But generally it should not be issued in such case.[81] Where the record presents the whole case to the circuit court of appeals in such way that it might properly have been finally disposed of by that court on its merits, the supreme court may review the decision upon certiorari, notwithstanding the fact that the decree of the circuit court of

78. Forsyth *v.* Hammond, 166 U. S. 506, 514, 515, 41 L. Ed. 1095, reaffirmed in Archer *v.* Building & Loan Ass'n, 179 U. S. 679, 45 L. Ed. 383.

79. American Construction Co. *v.* Jacksonville, etc., Co. 148 U. S. 372, 37 L. Ed. 37 L. Ed. 486, followed in Forsyth *v.* Hammond, 166 U. S. 506, 41 L. Ed. 1095.

80. Forsyth *v.* Hammond, 166 U. S. 506, 41 L. Ed. 1095; Archer *v.* Building & Loan Ass'n, 179 U. S. 679, 45 L. Ed. 383.

81. Chicago, etc., R. Co. *v.* Osborne, 146 U. S. 354, 36 L. Ed. 1002; Forsyth *v.* Hammond, 166 U. S. 506, 41 L. Ed. 1095; Taylor *v.* Louisville, etc., R. Co., 172 U. S. 647, 648, 43 L. Ed. 1182.

In each of these cases defendant in error sued plaintiff in error under the interstate commerce act, to recover alleged overcharges on the transportation of corn, and recovered judgment, to each of which judgments defendant sued out a writ of error to the circuit court of appeals. The cases being heard there, the judgment in each was reversed, upon the ground that the jury should have been instructed to find a verdict for the defendant, and the cases were remanded for further proceedings in accordance therewith. On petitions for writs of certiorari to the court of appeals to bring up the records and proceedings, held, that the petitions should be denied. Chicago, etc., R. Co. *v.* Osborne, 146 U. S. 354, 36 L. Ed. 1002, citing McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893; Rice *v.* Sanger, 144 U. S. 197, 36 L. Ed. 403; Meagher *v.* Minnesota Thresher Mfg. Co., 145 U. S. 608, 36 L. Ed. 834.

appeals was not final, but only reversed the order of the circuit court granting a preliminary injunction.[82]

Because the circuit court of appeals decides erroneously in determining the matter on an interlocutory appeal, that affords no ground for the extraordinary interposition of this court by certiorari or mandamus.[83]

(6) *Review of Questions of Fact.*—Where pure questions of fact, such as questions of payment, and of accord and satisfaction, depending on conflicting evidence and on the peculiar circumstances of the case, are the only questions presented by the record, a writ of certiorari will not be granted.[84]

(7) *Assignment of Errors.*—On the hearing of a case brought up by certiorari from a circuit court of appeals, under the judiciary act of March 3, 1891, ch. 517, § 6, 26 Stat. 826, 828, which provides that "any case in which the judgments or decrees of the circuit court of appeals are thereby made final, may be required, by certiorari or otherwise, to be certified to this court 'for its review and determination, with the same power and authority in the case as if it had been carried by appeal or writ of error to the supreme court,'" this court will confine itself to an examination only of errors assigned by the petitioner.[85]

(8) *The Record.*—Under the third subdivision of rule 37 of this court, providing that where application is made for certiorari under § 6 of the judiciary act of March 3, 1891, "a certified copy of the entire record of the case in the circuit court of appeals shall be furnished to this court by the applicant, as part of the application," it was held, that where the record has been prepared for the printer, indexed, the printing supervised, and copies thereof distributed by the clerk of the circuit court of appeals, and the clerk having been paid therefor, the rule is fully complied with by the certificate of that clerk to one of the printed copies which he had so prepared, indexed, supervised and distributed, and which he knew was an accurate transcript of the record from the circuit court, because it is shown, and is not denied, that the printed copies furnished this court are in fact correct copies of the circuit court record, and this court will treat them as if that record had been duly certified to us by the clerk of the circuit court of appeals.[86] A writ of certiorari from the circuit court of appeals to perfect the record by supplying alleged omissions therein; does not operate to bring the case before this court, or in itself to add any support to the appeal, which must stand or fall accordingly as the circuit court of appeals act of March 3, 1891, c. 317, § 6, did or did not allow an appeal to be taken.[87]

(9) *Scope of Review.*—Where, after a second appeal has been taken from a district court to a circuit court of appeals, this court, in the exercise of its supervisory jurisdiction, issues a writ of certiorari to bring up the whole record, upon such writ the entire case is before us for examination.[88]

(10) *Rendering and Ordering Final Judgment.*—Where the record in the circuit court of appeals presented the whole case to that court so that it might properly have been finally disposed of by its decree, although it only reverses the order of the circuit court granting a preliminary injunction, the supreme court, on certiorari, may do what the circuit court of appeals might have done; that is, finally dispose of the case by direction to the circuit court.[89]

e. *Simultaneous Appeal and Certiorari.*—The decision of the court of appeals

82. Harriman *v.* Northern Securities Co., 197 U. S. 244, 49 L. Ed. 739.

83. American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 37 L. Ed. 486.

84. Crossman *v.* Burrill, 179 U. S. 100, 45 L. Ed. 106.

85. Hubbard *v.* Tod, 171 U. S. 474, 494, 43 L. Ed. 246.

86. Toledo, etc., R. Co. *v.* Continental Trust Co., 176 U. S. 219, 44 L. Ed. 442.

87. Huguley Mfg. Co. *v.* Galeton Cotton Mills, 184 U. S. 290, 46 L. Ed. 546, reaffirmed in Harding *v.* Hart, 187 U. S. 638, 47 L. Ed. 344.

88. Panama R. Co. *v.* Napier Shipping Co., 166 U. S. 280, 41 L. Ed. 1004, distinguishing The Lady Pike, 96 U. S. 461, 24 L. Ed. 672.

89. Harriman *v.* Northern Securities Co., 197 U. S. 244, 49 L. Ed. 739.

can be brought to this court either by writ of error or certiorari.[90] Upon an appeal from and a certiorari to a circuit court of appeals, if the case is not appealable but is one in which the writ of certiorari should be allowed, the appeal will be dismissed and the application for certiorari granted, and the record filed with the appeal treated as a return to the writ of certiorari.[91] Where upon a writ of error and certiorari from the supreme court to the circuit court of appeals, the writ of error is dismissed, and the writ of certiorari granted, the record of the writ of error may stand as a return to the certiorari.[92]

f. *Construction of Words "Or Otherwise."*—In all cases where the decree or judgment of the circuit court of appeals is made final by the statute, an appeal does not lie, but any such case may be brought here "by certiorari or otherwise." The latter words add nothing to our power, for if some other order or writ might be resorted to, it would be ejusdem generis with certiorari. The writ is the equivalent of an appeal or writ of error as declared by the statute, and it is issued in the discretion of the court.[93]

4. Over Courts of the District of Columbia.—a. *Right to Appellate Review.*—**Review of Judgments of District Court.**—Under an act passed in 1801, organizing for the district the circuit court of the District of Columbia, it was held, that where a case has been tried in the district court of the District of Columbia, the judgment or decree rendered therein must be reviewed by the supreme court of the district, before the case can be brought before this court for examination,[94] because "our province is to exercise appellate jurisdiction touching the proceedings of the supreme court of the district. We can examine those of the district court only after they have been the subject of review by the supreme court, and then only in connection with the action of that court in affirming or reversing them. We cannot regard them until they have received the impress of the judgment of the higher local courts."[95]

Under Circuit Court of Appeals Act.—The jurisdiction of this court over the courts of the District of Columbia, cannot be based upon anything contained in the act of March 3, 1891, because no mention of the courts of the district is made in that act, and there is nothing in the eighth section to justify its expansion so as to embrace the provisions of that act.[96]

Since the passage of the act of February 9, 1893, establishing the court of appeals for the District of Columbia, the supreme court of the United States, generally speaking, and not including cases arising under the bankruptcy law,

90. Montana Min. Co. *v.* St. Louis, etc., Co., 204 U. S. 204, 51 L. Ed. 444.

Where litigation has been twice before this court, has been protracted for many years, involves a large amount, and also presents questions of federal mining law, and is otherwise of great importance, the case ought to be brought here by writ of certiorari, and this court will not stop to consider in such case whether the jurisdiction of the circuit court depended alone on diverse citizenship, in which case the decision of the court of appeals will be final, and the case could only be brought here on certiorari, or, on the other hand, whether a federal question was involved, in which case the decision of the circuit court of appeals would not be final, and in which case it could only be brought here on a writ of error, especially where both the writ of error and the writ of certiorari had been taken to the court of appeals. Montana Min. Co. *v.* St. Louis, etc., Co., 204 U. S. 204, 51 L. Ed. 444, citing Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138, 43 L. Ed. 108.

91. Farrell *v.* O'Brien, 199 U. S. 89, 50 L. Ed. 101. See Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138, 43 L. Ed. 108.

92. Cochran *v.* Montgomery County, 199 U. S. 260, 50 L. Ed. 182.

93. Huguley Mfg. Co. *v.* Galeton Cotton Mills, 184 U. S. 290, 295, 46 L. Ed. 546, reaffirmed in Harding *v.* Hart, 187 U. S. 638, 47 L. Ed. 344.

94. Garnett *v.* United States, 11 Wall. 256, 20 L. Ed. 79, citing Ex parte Bradley, 7 Wall. 364, 19 L. Ed. 214.

95. Garnett *v.* United States, 11 Wall. 256, 258, 259, 20 L. Ed. 79.

96. Chapman *v.* United States, 164 U. S. 436, 41 L. Ed. 504; Prather *v.* United States, 164 U. S. 452, 41 L. Ed. 510; In re Heath, 144 U. S. 92, 36 L. Ed. 358; Falk *v.* United States, 180 U. S. 636, 45 L. Ed. 709.

cannot review the judgments and decrees of the supreme court of the district, directly by appeal or writ of error.[97]

b. *What Law Governs*—(1) *In General.*—By the eleventh section of 12 Stat. at Large, 764, it was provided that writs of error from this court to the courts of this district are governed by the same rules and regulations as are writs of error from this court to the circuit courts of the United States.[98]

(2) *Effect of State Laws.*—The early decisions of this court held that the right to a writ of error exists by virtue of the appellate power of this court as defined in the act of 1801, creating the circuit court of the district; and we are governed by the same act regardless of any state statutes to the contrary.[99]

In Cases Where Bank of Alexandria Is Plaintiff.—Thus, an appeal or writ of error lies from the judgment of the circuit court of the District of Columbia, to this court, in cases where the bank of Alexandria is plaintiff, and the judgments below are in its favor, notwithstanding the clause in its charter to the contrary. "The mere saving in an act of congress which expressly renders all judgments of the circuit court, for a larger sum than one hundred dollars, re-examinable by writ of error in this court, cannot be considered as exempting judgments rendered in favor of the bank, from the operation of this general enacting clause respecting writs of error. If the act of March, 1801, be considered as giving the bank a right to proceed in the circuit court for Alexandria in the same manner as by the act of incorporation, it might proceed in Virginia, yet that act

97. Ex parte Massachusetts, 197 U. S. 482, 49 L. Ed. 845.

98. Law regulating appeals from circuit court governs.—Brown *v.* Wiley, 4 Wall. 165, 18 L. Ed. 384; Thompson *v.* Riggs, 5 Wall. 663, 676, 18 L. Ed. 704; Pomeroy *v.* Bank of Indiana, 1 Wall. 592, 597, 17 L. Ed. 638; Stanton *v.* Embrey, 93 U. S. 548, 555, 23 L. Ed. 983.

Writs of error and appeal, under the prior law, applicable to the district, were required to be prosecuted in the same manner and under the same regulations as in case of writs of error and appeals from judgments and decrees rendered in the circuit courts of the United States. 2 Stat. 106; United States *v.* Hooe, 1 Cranch 318, 2 L. Ed. 121. Important changes were undoubtedly made by the act reorganizing the courts of the district; but the eleventh section provides that any final judgment, order, or decree of said court may be re-examined and reversed or affirmed in the supreme court of the United States upon writ of error or appeal, in the same cases and in like manner as is now provided by law in reference to the final judgments, orders, and decrees of the circuit court of the the United States for the District of Columbia, 12 Stat. 764. Stanton *v.* Embrey, 93 U. S. 548, 554, 23 L. Ed. 983.

The eleventh section of 12 Stat. at Large 764, provides that any final judgment, order, or decree of the supreme court of the District of Columbia may be re-examined, and reversed or affirmed, in the supreme court of the United States upon writ of error or appeal in the same cases and in like manner as is now provided by law in reference to the final judgments, orders, or decrees of the circuit court of the United States for this district. Writs of error and appeals were required to be prosecuted under that law, in the same manner, and under the same regulations as in the case of writs of error or appeals from judgments and decrees rendered in the circuit court of the United States. 2 Stat. at Large 106; United States *v.* Hooe, 1 Cranch 318, 2 L. Ed. 121. Conclusion is, that the regulations respecting the removal of cases from the supreme court of this district, on writs of error or appeal, are the same as from the circuit courts of the United States. Thompson *v* Riggs, 5 Wall. 663, 676, 18 L. Ed. 704.

The act which created the supreme court of the District of Columbia vested in it the same powers and jurisdiction that had previously belonged to the circuit court, which it superseded, and the appellate power of this court was declared to be the same as that which it had, by law, over the circuit court. The act of February 27th, 1801, organizing the circuit court, declares that any final judgment, order, or decree in said circuit court, where the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be re-examined and reversed or affirmed in the supreme court of the United States by writ of error or appeal, and though the sum limiting this jurisdiction has been increased to $1,000, this statute remains the sole rule governing the right of appeal in all other respects. Baltimore, etc., R. Co. *v.* Sixth Presbyterian Church, 19 Wall. 62, 63, 22 L. Ed. 97.

99. Baltimore, etc., R. Co. *v.* Sixth Presbyterian Church, 19 Wall. 62, 22 L. Ed. 97, following Carter *v.* Cutting, 8 Cranch 251, 3 L. Ed. 553.

does not affect the writ of error as given in the act of the 27th of February."[1]

(3) *Review of Decisions of Court of Appeals.*—When both the proceeding by appeal and that by writ of error were allowed, the jurisdiction of this court to review the judgments and decrees of the court of appeals of the District of Columbia was regulated by § 233 of the Code of the District of Columbia. 31 Stat. 1189, 1227. In effect that section was but a re-enactment of the then-existing provisions of the eighth section of the act of February 9, 1893, which act established the court of appeals of the District of Columbia. By said section of the Code, the power of this court to review by writ of error or appeal the judgments or decrees of the court of appeals, excluding certain exceptional and enumerated cases, is limited to cases where the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars, and such power to review is to be exerted only in the same manner and under the same regulations as theretofore prevailed before the organization of the court of appeals in cases of writs of error on judgments or appeals from decrees rendered in the supreme court of the District of Columbia.[2]

c. *Proceedings Reviewable*—(1) *Probate Proceedings.*—A proceeding involving the validity of the probate of wills, and proceedings involving the validity of an instrument offered for probate as a will, both constitute a "case" within the meaning of the act of congress defining the jurisdiction of this court over the final judgments and decrees of the supreme court of the District of Columbia.[3]

(2) *Criminal Proceedings.*—**In General.**—No appeal or writ of error lies from the judgments of the courts of the District of Columbia in criminal cases.[4]

1. Young *v.* Bank, 4 Cranch 384, 2 L. Ed. 655.

2. Metropolitan R. Co. *v.* District of Columbia, 195 U. S. 322, 328, 49 L. Ed. 219.

3. Ormsby *v.* Webb, 134 U. S. 47, 33 L. Ed. 805, citing Carter *v.* Cutting, 8 Cranch 251, 3 L. Ed. 553.

An appeal lies to this court from the sentence of the circuit court of the District of Columbia affirming the sentence of the Orphan's Court of Alexandria county, which dismissed a petition to revoke the probate of a will. "We are of the opinion that the conclusiveness of its sentence forms no part of the essence of the powers of the court." Carter *v.* Cutting, 8 Cranch 251, 3 L. Ed. 553, reviewed in Ormsby *v.* Webb, 134 U. S. 47, 33 L. Ed. 805.

4. United States *v.* More, 3 Cranch 159, 2 L. Ed. 397; Cross *v.* United States, 145 U. S. 571, 36 L. Ed. 821.

United States *v.* More, 3 Cranch 159, 2 L. Ed. 397, was decided in February, 1805, and from that time it has been assumed that criminal cases could not be brought from the courts of the district to this court. Cross *v.* United States, 145 U. S. 571, 574, 36 L. Ed. 821.

We have held, that this court has no jurisdiction to grant a writ of error to review the judgments of the supreme court of the district in criminal cases, either under the judiciary act of March 3, 1891 (26 Stat. 826, c. 517); or under the act of congress of February 6, 1889 (25 Stat. 655, c. 113), or any other. In re Heath, 144 U. S. 92, 36 L. Ed. 358; Cross *v.* United States, 145 U. S. 571, 36 L. Ed. 821; Cross *v.* Burke, 146 U. S. 82, 84, 36 L. Ed. 896; In re Lennon, 150 U. S. 393, 397, 37 L. Ed. 1120.

We have heretofore decided that this court has no appellate jurisdiction over the judgments of the supreme court of the District of Columbia in criminal cases or on habeas corpus. In re Heath, 144 U. S. 92, 36 L. Ed. 358; Cross *v.* United States, 145 U. S. 571, 36 L. Ed. 821; Cross *v.* Burke, 146 U. S. 82, 36 L. Ed. 896; In re Chapman, 156 U. S. 211, 215, 39 L. Ed. 401.

It was held, in Ex parte Bigelow, 113 U. S. 328, 329, 28 L. Ed. 1005, that no appeal could be taken or writ of error sued out to the supreme court of the District of Columbia in a capital case, the court saying: "No appeal or writ of error in such case as that lies to this court. The act of congress has made the judgment of that court conclusive, as it had a right to do, and the defendant, having one review of his trial and judgment, has no special reason to complain." In re Heath, 144 U. S. 92, 36 L. Ed. 358; Cross *v.* Burke, 146 U. S. 82, 84, 36 L. Ed. 896; Brown *v.* United States, 171 U. S. 631, 637, 43 L. Ed. 312.

Section 8 of the act of February 27, 1801, c. 15, entitled "An act concerning the District of Columbia," 2 Stat. 103, and creating a circuit court for the district, provided: "That any final judgment, order or decree in said circuit court, wherein the matter in dispute, exclusive of costs, shall exceed the value of one hundred dollars, may be re-examined and reversed or affirmed in the supreme court of the United States, by writ of error or appeal,

Certificate of Division of Opinion.—By §§ 651 and 697 of the Revised Statutes, provision was made for a review of questions arising in criminal cases under certificates of division of opinion, and this was so provided as early as 1802. Act of April 29, 1802, § 6, 2 Stat. 156, 159, c. 31. But this provision has never been supposed to refer to the courts of the District of Columbia.[5]

The act of March 3, 1891, was passed to facilitate the prompt disposition of cases in this court and to relieve it of the oppressive burden of general litigation by the creation of the circuit court of appeals and the distribution of the appellate jurisdiction, and such act cannot be invoked in order to give this court appellate jurisdiction over judgments of the supreme court of the District of Columbia in criminal cases, although § 846 of the Revised Statutes of the District of Columbia, provides that "Any final judgment, order or decree of the supreme court of the district may be re-examined and reversed or affirmed in the supreme court of the United States upon writ of error or appeal, in the same cases and in like manner as provided by law in reference to the final judgments, order and decrees of the circuit court of the United States."[6]

The act of congress of February 6, 1889, entitled "An act to abolish circuit

which shall be prosecuted in the same manner, under the same regulations, and the same proceedings shall be had therein, as is or shall be provided in the case of writs of error on judgments, or appeals upon orders or decrees, rendered in the circuit court of the United States." In United States *v.* More, 3 Cranch 159, 173, 2 L. Ed. 397 (decided in 1805), it was held, that this court had no jurisdiction under that section over the judgments of the circuit court of the district in criminal cases, and Chief Justice Marshall said: "On examining the act, 'concerning the District of Columbia,' the court is of opinion, that the appellate jurisdiction, granted by that act, is confined to civil cases. The words, 'matter in dispute,' seem appropriated to civil cases, where the subject in contest has a value beyond the sum mentioned in the act. But, in criminal cases, the question is the guilt or innocence of the accused. And although he may be fined upwards of one hundred dollars, yet that is, in the eye of the law, a punishment for the offense committed, and not the particular object of the suit." Chapman *v.* United States, 164 U. S. 436, 446, 41 L. Ed. 504; Falk *v.* United States, 180 U. S. 636, 45 L. Ed. 709.

5. Cross *v.* United States, 145 U. S. 571, 574, 36 L. Ed. 821.

6. In re Heath, 144 U. S. 92, 36 L. Ed. 358, distinguishing Wales *v.* Whitney, 114 U. S. 564, 29 L. Ed. 277.

By section five of the judiciary act of March 3, 1891, 26 Stat. 826, c. 517, it is provided that appeals and writs of error may be taken "from the district courts or from the existing circuit courts directly to this court in cases of conviction of a capital or otherwise infamous crime;" and we have been constrained to hold that the judgments of the supreme court of the District of Columbia in criminal cases are not embraced by the provisions of that section. In re Heath, 144 U. S. 92, 36 L. Ed. 358; Cross *v.* United States, 145 U. S. 571, 574, 36 L. Ed. 821.

The act of March 3, 1891, was passed to facilitate the prompt disposition of cases in this court and to relieve it from the oppressive burden of general litigation by the creation of the circuit courts of appeals and the distribution of the appellate jurisdiction. By sections five and six, cases of conviction of a capital or otherwise infamous crime are to be taken directly to this court, and all other cases arising under the criminal laws to the circuit courts of appeals. Sections thirteen and fifteen refer to appeals and writs of error from the decisions of the United States court in the Indian territory and the judgments, orders and decrees of the supreme courts of the territories. No mention is made of the supreme court of the District of Columbia, and we perceive no ground for holding that the judgments of that court in criminal cases were intended to be embraced by its provisions. In re Heath, 144 U. S. 92, 96, 36 L. Ed. 358.

"We have decided that this court has no jurisdiction to grant a writ of error to review the judgments of the supreme court of the District of Columbia in criminal cases either under the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, In re Heath, 144 U. S. 92, 36 L. Ed. 358; or under the act of February 6, 1889, c. 113, 25 Stat. 655, Cross *v.* United States, 145 U. S. 571, 36 L. Ed. 821; or on habeas corpus, Cross *v.* Burke, 146 U. S. 82, 36 L. Ed. 896. And although the validity of any patent or copyright, or of a treaty or statute of, or an authority exercised under, the United States, was not drawn in question in those cases, it was distinctly ruled in reaching the conclusions announced that neither of the sections of the act of March 3, 1885, applied to any criminal case; and Farnsworth *v.* Montana, 129 U. S. 104, 32 L. Ed. 616; United States *v.* Sanges, 144 U. S. 310,

court powers of certain district court of the United States and to provide for writs of error in capital cases and for other purposes," does not authorize a writ of error from this court to the supreme court of the District of Columbia, to review a judgment of that court in a capital case.[7]

Under Act of February 9, 1893.—This court has no jurisdiction to review on writ of error a judgment of the court of appeals of the District of Columbia in a criminal law case under § 8 of February 9, 1893, c. 74, establishing that court.[8] And as § 8 of the act of February 9, 1893, and § 233 of the act of March 3, 1901, are in substance the same, they must bear the same construction.[9]

Small Offenses.—The rule that applies to capital cases and infamous crimes applies to criminal offenses over which the police court of the District of Columbia exercises jurisdiction.[10]

By Certiorari.—By an act approved March, 1897, this court was authorized to issue writs of certiorari in cases made final in the court of appeals of the District of Columbia to bring them up for review and determination. This was carried forward into § 234 of the District Code, and under this act this court has reviewed the judgments of the court of appeals in criminal cases on a certiorari granted under the act.[11] A certiorari can be issued only when a writ of error cannot; on the other hand, it will not be issued merely because a writ of error will not lie.[12] A writ of certiorari will not be granted by this court to review a judgment of the court of appeals of the District of Columbia in a criminal case under § 6 of the circuit court of appeals act, where the question involved was not one of gravity and general importance; where there is no conflict between the decisions of the state and federal courts or between those of federal courts of different circuits; and where there is nothing affecting the relations of this nation to foreign nations, and indeed no matter of general interest to the public is involved.[13]

(3) *Habeas Corpus Proceedings.*—This court has no appellate jurisdiction to review the judgments of the supreme court of the District of Columbia,[14] or

36 L. Ed. 445, and United States *v.* More, 3 Cranch 159, 2 L. Ed. 397, were cited with approval. Cross *v.* United States, 145 U. S. 571, 574, 36 L. Ed. 821; Cross *v.* Burke, 146 U. S. 82, 87, 36 L. Ed. 896; Chapman *v.* United States, 164 U. S. 436, 448, 41 L. Ed. 504." Falk *v.* United States, 180 U. S. 636, 45 L. Ed. 709.

7. Cross *v.* United States, 145 U. S. 571, 36 L. Ed. 821; Brown *v.* United States, 171 U. S. 631, 635, 43 L. Ed. 312.

8. Chapman *v.* United States, 164 U. S. 436, 41 L. Ed. 504; Prather *v.* United States, 164 U. S. 452, 41 L. Ed. 510; Falk *v.* United States, 180 U. S. 636, 45 L. Ed. 709, distinguishing Watts *v.* Washington Territory, 91 U. S. 580, 23 L. Ed. 328.

It is settled that a criminal case, as such, cannot be brought here on writ of error from the court of appeals of the district. Chapman *v.* United States, 164 U. S. 436, 41 L. Ed. 504; Sinclair *v.* District of Columbia, 192 U. S. 16, 48 L. Ed. 322; Fields *v.* United States, 205 U. S. 292, 296, 51 L. Ed. 807.

"But it is contended that under § 8 of the act of February 9, 1893, 27 Stat. 434, c. 74, establishing a court of appeals for the District of Columbia, the judgments of the supreme court of the district, reviewable in the court of appeals, may be reviewed ultimately in this court even in criminal cases, where the validity of a statute of, or an authority exercised under, the United States, is drawn in question. We do not feel constrained, however, to determine how this may be, as we are of opinion that the application must be denied on another ground." In re Chapman, 156 U. S. 211, 216, 39 L. Ed. 401.

9. Chapman *v.* United States, 164 U. S. 436, 41 L. Ed. 504; Sinclair *v.* District of Columbia, 192 U. S. 16, 48 L. Ed. 322.

10. Sinclair *v.* District of Columbia, 192 U. S. 16, 21, 48 L. Ed. 322.

11. Sinclair *v.* District of Columbia, 192 U. S. 16, 48 L. Ed. 322, citing Winston *v.* United States, 172 U. S. 303, 43 L. Ed. 456; Winston *v.* United States, 171 U. S. 690.

12. Fields *v.* United States, 205 U. S. 292, 295, 51 L. Ed. 807.

13. Fields *v.* United States, 205 U. S. 292, 51 L. Ed. 807.

14. By act of congress of March 3, 1885, 23 Stat. 437, c. 353, § 764 of the Revised Statutes was so amended as to remove the restriction to the second clause of § 763, and restore the appellate jurisdiction of this court from decisions of the circuit courts in habeas corpus cases as it had existed prior to the passage of the act of March 27, 1868. 15 Stat. 44, c. 34. But this did not have that effect as to judgments of the supreme court of

the judgments of the court of appeals of the district under the act of February 9, 1893,[15] in habeas corpus proceedings.[16]

(4) *Patent Proceedings.*—**Applications for Patents.**—In one case Mr. Chief Justice Fuller said that it appeared quite inconsistent with the intention of congress for this court to take jurisdiction on appeal from the court of appeals of the District of Columbia, of applications for patents in view of the provisions in relation to appeals from the circuit courts of appeals under the act of March 3, 1891, c. 517, 26 Stat. 826.[17]

d. *Decisions Reviewable*—(1) *Cases Involving the Validity of Federal Statutes.*—By § 8 of the act establishing the court of appeals for the District of Columbia, 27 Stat. 434, c. 74, "it is provided that any final judgment or decree thereof may be revised by this court on appeal or error in cases wherein the validity of a statute of the United States is drawn in question."[18]

(2) *Necessity for Finality of Judgments and Decrees.*[19]—**The act of Congress, passed on the 27th of February, 1801** (2 Stat. at Large, 102), authorizes a writ of error from this court to the circuit court for the District of Columbia in those cases only where there has been a final judgment, order, or decree in that court.[20]

the District of Columbia, in those cases for the reasons given in In re Heath, 144 U. S. 92, 36 L. Ed. 358; Cross *v.* Burke, 146 U. S. 82, 36 L. Ed. 896; Gonzales *v.* Cunningham, 164 U. S. 612, 617, 41 L. Ed. 572.

These cases were distinguished at length in Gonzales *v.* Cunningham, 164 U. S. 612, 41 L. Ed. 572, in which the court held, that an appeal would not lie to this court from a final order of the supreme court of the territory on habeas corpus. In re Lennon, 150 U. S. 393, 397, 37 L. Ed. 1120; In re Heath, 144 U. S. 92, 36 L. Ed. 358; Cross *v.* United States, 145 U. S. 571, 36 L. Ed. 821; In re Chapman, 156 U. S. 211, 215, 39 L. Ed. 401; Cross *v.* Burke, 146 U. S. 82, 36 L. Ed. 896, explaining Wales *v.* Whitney, 114 U. S. 564, 29 L. Ed. 277.

No writ of error will lie from this court to a judgment of the supreme court of the District of Columbia, refusing to issue a writ of habeas corpus which had been prayed for in a petition to that court. In re Schneider, 148 U. S. 157, 37 L. Ed. 404, citing Cross *v.* Burke, 146 U. S. 82, 36 L. Ed. 896; In re Heath, 144 U. S. 92, 36 L. Ed. 358; Cross *v.* United States, 145 U. S. 571, 36 L. Ed. 821; Baltimore, etc., R. Co. *v.* Grant, 98 U. S. 398, 25 L. Ed. 231; Dennison *v.* Alexander, 103 U. S. 522, 26 L. Ed. 313; United States *v.* Wanamaker, 147 U. S. 149, 37 L. Ed. 118.

15. Chapman *v.* United States, 164 U. S. 436, 41 L. Ed. 504; Prather *v.* United States, 164 U. S. 452, 41 L. Ed. 510; Perrine *v.* Slack, 164 U. S. 452, 41 L. Ed. 510.

"We have heretofore decided that this court has no appellate jurisdiction over the judgments of the supreme court of the District of Columbia in criminal cases or on habeas corpus; but whether or not the judgments of the supreme court of the district, reviewable in the court of appeals, may be reviewed ultimately in this court in such cases, when the validity of a statute of or an authority exercised under the United States, is drawn in question, we have as yet not been obliged to determine. In re Chapman, 156 U. S. 211, 39 L. Ed. 401." In re Belt, 159 U. S. 95, 100, 40 L. Ed. 88.

16. It will be perceived that the revision of the final judgments or decrees of the supreme court of the district depended on the provision that they should be so re-examinable in the same cases and in like manner as the final judgments of the circuit courts of the United States, and that there was no special provision in relation to the review of final orders of such courts on habeas corpus. Gonzales *v.* Cunningham, 164 U. S. 612, 618, 41 L. Ed. 572.

17 Denham *v.* Seymour, 161 U. S. 235, 40 L. Ed. 682, citing United States *v.* American Bell Telephone Co., 159 U. S. 548, 40 L. Ed. 255.

18. United States *v.* Duell, 172 U. S. 576, 581, 43 L. Ed. 559.

The contention that congress had no power to authorize the court of appeals of the District of Columbia to review the action of the commissioner of patents in an interference case, on the theory that the commissioner is an executive officer; that his action in determining which of two claimants is entitled to a patent is purely executive; and that, therefore, such action cannot be subjected to the revision of a judicial tribunal, necessarily determines the validity of an act of congress denying an appeal to the court of appeals of the District of Columbia in interference cases, and hence may be revised by this court. United States *v.* Duell, 172 U. S. 576, 43 L. Ed. 559.

19. For the applications of these rules, see post, "Decisions Reviewable," IV.

20. Van Ness *v.* Van Ness, 6 How. 62, 12 L. Ed. 344.

Under the act of March 3d, 1863, establishing the supreme court of the District of Columbia, the action of that court can be examined here in no case in which like action in the circuit court of the district, whose place it supplies, could not be re-examined. Hence, it can be examined only in those cases where there has been a final judgment, order or decree.[21]

And the present rule is that appeals cannot be taken to this court from the supreme court of the district, except after a final decree in the case by that court.[22]

Section 772 of the Revised Statutes, relating to the District of Columbia, provides as follows: "Any party aggrieved by any order, judgment or decree, made or pronounced at any special term, may, if the same involve the merits of the action or proceeding, appeal therefrom to the general term of the supreme court, and upon such appeal the general term shall review such order, judgment or decree, and affirm, reverse or modify the same, as shall be just."[23] This section does not in terms confine the right of appeal from the special to the general term to merely final orders or final decrees in a cause. An interlocutory order or decree which involves the merits may be reviewed by the general term upon the appeal of a dissatisfied party without awaiting a final determination of the cause. It is not made obligatory upon a dissatisfied party to appeal, because the other party has done so; and upon an appeal to this court from a final decree of the general term (Rev. Stat., § 705) the entire record is brought up for review.[24]

(3) *Summary and Special Proceedings.*—A writ of error lies from this court to the supreme court of the District of Columbia on a judgment confirming an assessment for damages by the use of the street in front of the church of defendants in error, although the proceedings before the jury and the marshal, and in the supreme court, are governed by a statute of Maryland, which, by the construction of the courts of that state, does not allow an appeal or writ of error.[25] An appeal lies to the supreme court from an order of the circuit court of the District of Columbia, quashing an inquisition in the nature of a writ ad quod damnum.[26]

(4) *Discretionary Matters Not Involving the Merits.*—An appeal lies to the general term of the supreme court of the District of Columbia from a denial by that court in special term of a motion for a new trial, made on the ground that the verdict was against the weight of evidence.[27] An appeal from an order of the supreme court of the District of Columbia at special term reopening an order

21. Brown *v.* Wiley, 4 Wall. 165, 18 L. Ed. 384.

In a controversy between the next of kin and the executrix, a decree of the supreme court of the District of Columbia, sitting as an orphans' court, approving the final accounts of the executrix, was reversed by the court of appeals and remanded for the restatement of the account of the executrix, and the determination of who were the next of kin, the proportions they should take, the effect of the death of one or more of them, and any other questions that might arise. It was held that the decree of the court of appeals was not final so as to justify an appeal by the executrix therefrom, although, had it been a decree of affirmance, the next of kin might have appealed. Kenaday *v.* Sinnott, 179 U. S. 606, 613, 45 L. Ed. 339, citing and approving Ormsby *v.* Webb, 134 U. S. 47, 33 L. Ed. 805.

22. Butterfield *v.* Usher, 91 U. S. 246, 248, 23 L. Ed. 318.

23. Spalding *v.* Mason, 161 U. S. 375, 381, 40 L. Ed. 738.

24. Hitz *v.* Jenks, 123 U. S. 297, 31 L. Ed. 156; District of Columbia *v.* McBlair, 124 U. S. 320, 31 L. Ed. 449; Grant *v.* Phœnix, etc., Ins. Co., 121 U. S. 105, 30 L. Ed. 905; Spalding *v.* Mason, 161 U. S. 375, 381, 40 L. Ed. 738.

25. Baltimore, etc., R. Co. *v.* Sixth Presbyterian Church, 19 Wall. 62, 22 L. Ed. 97, overruling Carter *v.* Cutting, 8 Cranch 251, 3 L. Ed. 553.

26. Custiss *v.* Georgetown, etc., Turnpike Co., 6 Cranch 233, 3 L. Ed. 209, cited in Ormsby *v.* Webb, 134 U. S. 47, 60, 33 L. Ed. 805; and approved in Baltimore, etc., R. Co. *v.* Sixth Presbyterian Church, 19 Wall. 62, 22 L. Ed. 97.

27. Inland, etc., Coasting Co. *v.* Hall, 124 U. S. 121, 31 L. Ed. 369, affirming Metropolitan R. Co. *v.* Moore, 121 U. S. 558, 30 L. Ed. 1022; District of Columbia *v.* Woodbury, 136 U. S. 450, 466, 34 L. Ed. 472.

confirming a sale of real estate by a trustee, will lie to the general term of the court, because as it is clearly an order involving the merits of the proceeding; it is not an appeal simply from an order refusing to set aside a decree of confirmation, but one that involves the integrity of the order confirming the sale, and therefore the merits of the whole case.[28] Where it is assigned for error that the court below in general term, refused to consider one of the grounds for a new trial which stated that the verdict is against the weight of evidence, this assignment cannot be supported by referring to the stenographic report of the oral opinion of the justice speaking for the general term. This report cannot control the record of the case as certified to it, especially where it does not appear from the record that the general term declined to pass upon a question which it was its duty to consider.[29]

e. *Effect of Appeal or Scope of Review.*—Upon an appeal to this court from a final decree of the general term, the entire record is brought up for review.[30] An appeal to the general term from a final order of probate made in the special term, which is not based upon a judicial determination of facts, but merely upon the finding of a jury, of necessity brings into review before the general term all the questions of law that are properly presented by the bill of exceptions taken at the trial. So an appeal to this court from the final judgment of the supreme court of the district, affirming the order of probate, of necessity, brings here for re-examination all the questions properly arising upon those bills of exceptions.[31] When the supreme court of the District of Columbia makes an order, in general term, which, under the statute, may be re-examined here, the appeal therefrom brings up for review the questions upon which the final judgment really depends, namely, those presented by the bills of exception taken at the trial of the issues submitted to the jury. It would be strange, indeed, if our re-examination of the final judgment of the supreme court of the district could not reach the errors of law which it may have committed in the conduct of that trial, and upon which that judgment is based.[32]

f. *Judgment on Reversal.*—On error from this court to the supreme court of the District of Columbia, when exceptions taken by the plaintiff to a ruling in favor of the defendant at one trial have been erroneously sustained, and a new trial ordered, and a contrary ruling upon the same point at the second trial has been erroneously affirmed upon exceptions taken by the defendant, this court, upon a writ of error sued out by him, will not, on reversing the judgment of affirmance, direct judgment to be entered on the first verdict, but will only order that the second verdict be set aside and another trial had.[33]

5. Over Court of Claims—a. *In General.*—The court of claims was established in 1855, 10 Stat. at Large, 612, for the triple purpose of relieving congress, and of protecting the government by regular investigation, and of benefiting the claimants by affording them a certain mode of examining and adjudicating upon their claims. It was required to hear and determine upon claims founded upon any law of congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the

28. Keneday *v.* Edwards, 134 U. S. 117, 33 L. Ed. 853.

29. District of Columbia *v.* Woodbury, 136 U. S. 450, 34 L. Ed. 472, citing Metropolitan R. Co. *v.* Moore, 121 U. S. 558, 561, 30 L. Ed. 1022.

30. Hitz *v.* Jenks, 123 U. S. 297, 31 L. Ed. 156; District of Columbia *v.* McBlair, 124 U. S. 320, 31 L. Ed. 449; Grant *v.* Phœnix, etc., Ins. Co., 121 U. S. 105, 30 L. Ed. 905; Spalding *v.* Mason, 161 U. S. 375, 40 L. Ed. 738.

31. Ormsby *v.* Webb, 134 U. S. 47, 62, 33 L. Ed. 805.

32. Ormsby *v.* Webb, 134 U. S. 47, 64, 33 L. Ed. 805.

33. Shepherd *v.* Thompson, 122 U. S. 231, 30 L. Ed. 1156, distinguishing Coughlan *v.* District of Columbia, 106 U. S. 7, 27 L. Ed. 74, as follows: "The reason for ordering judgment upon the first verdict in that case was not that the court in general term had wrongly decided a question of law upon a bill of exceptions allowed at the first trial; but that, as appeared of record, independently of any bill of exceptions, the question had not been legally brought before it at all, thus leaving the first verdict in full force."

United States. 10 Stat. at Large, 612. Originally it was a court merely in name, for its power extended only to the preparation of bills to be submitted to congress. In 1863 the number of judges was increased from three to five, its jurisdiction was enlarged, and, instead of being required to prepare bills for congress, it was authorized to render final judgment, subject to appeal to this court and to an estimate by the secretary of the treasury of the amount required to pay each claimant. 12 Stat. at Large, 765. This court being of opinion, 2 Wall. 561, that the provision for an estimate was inconsistent with the finality essential to judicial decisions, congress repealed that provision. 14 Stat. at Large, 9. Since then the court of claims has exercised all the functions of a court, and this court has taken full jurisdiction on appeal.[34]

The act of May 9, 1866 (14 Stat. 44), extending the jurisdiction of the court of claims, does not dispense with the existing rules regulating appeals from that court.[35]

b. *Right of Appeal.*—**In General.**—Congress has complete control over the court of claims and may confer or withhold the right of appeal from its decisions.[36]

Former Rule.—By the act of the 3d of March, 1863, it was provided that no money shall be paid out of the treasury for any claim passed upon by the court of claims till after an appropriation therefor shall be estimated for by the secretary of the treasury, which provision was of course as applicable to the judgments on appeal, rendered by this court, as to the original judgments rendered by the court of claims, as the subject matter of the suit in either case is one "passed upon by the court of claims." 12 Stat. at Large, 768. Either party by virtue of that act was allowed an appeal to the supreme court, but the supreme court declined to take jurisdiction of such appeals, chiefly for the reason that the act practically subjected the judgments of the supreme court rendered in such cases to the re-examination and revision of the secretary of the treasury.[37]

34. 14 Stat. at Large, 44, 391, 444; United States *v.* Klein, 13 Wall. 128, 144, 20 L. Ed. 519.

35. United States *v.* Clark, 94 U. S. 73, 24 L. Ed. 67.

36. Gordon *v.* United States, 2 Wall. 561, 17 L. Ed. 921; Taney, C. J., S. C., 117 U. S. 697, appendix; In re Sandorn, 148 U. S. 222, 37 L. Ed. 429; United States *v.* Old Settlers, 148 U. S. 427, 466, 37 L. Ed. 509.

"Undoubtedly the legislature has complete control over the organization and existence of that court and may confer or withhold a right of appeal from its decisions. And if this act did nothing more, it would be our duty to give it effect. If it simply denied the right of appeal in a particular class of cases, there could be no doubt that it must be regarded as an exercise of the power of congress to make 'such exceptions from the appellate jurisdiction' as should seem to it expedient. But the language of the proviso shows plainly that it does not intend to withhold appellate jurisdiction except as a means to an end. Its great and controlling purpose is to deny to pardons granted by the president the effect of which this court had adjudged them to have. The proviso declares that pardons shall not be considered by this court on appeal." United States *v.* Klein, 13 Wall. 128, 145, 20 L. Ed. 519.

37. Gordon *v.* United States, 2 Wall. 561, 17 L. Ed. 921; United States *v.* O'Grady, 22 Wall. 641, 647, 22 L. Ed. 772.

The original act of February 24th, 1855, establishing the court, gave it jurisdiction to hear and determine all claims founded upon any law of congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the government of the United States, which might be suggested to it by petition, and all claims which might be referred to the court by either house of congress; but it did not authorize any appeal from the decisions of the court. It required the court to report to congress the cases upon which it had finally acted, and the material facts established by the evidence in each, with its opinion and the reasons upon which the opinion was founded. It was not until the passage of the act of March 3d, 1863, that an appeal from its decisions was allowed. That act materially amended the original act, added two more judges, gave the court jurisdiction over set-offs and counterclaims, and authorized an appeal to the supreme court in all cases where the amount in controversey exceeded $3,000, and without reference to the amount, where the case involved a constitutional question, or the judgment or decree affected a class of cases, or furnished a precedent for the future ac-

Judicial jurisdiction implies the power to hear and determine a cause, and inasmuch as the constitution does not contemplate that there shall be more than one supreme court, it is quite clear that congress cannot subject the judgments of the supreme court to the re-examination and revision of any other tribunal or any other department of the government.[38] In other words, where a declaration by this court in relation to the matters involved would be simply advisory in its nature, and not in any legal sense a judicial determination of the rights of the parties, we will refrain from expressing any opinion.[39]

Present Rule.—Afterwards, and perhaps in view of the conclusion reached by this court in these cases, on March 17, 1866, 14 Stat. 9, c. 19, congress passed an act giving an appeal to the supreme court from judgments of the court of claims, and repealing those provisions of the act of March 3, 1863, which practically subjected the judgments of the supreme court to the re-examination and revision of the departments, and since that time no doubt has been entertained that the supreme court can exercise jurisdiction on appeal from final judgments of the court of claims.[40] The court of claims is thus constituted one of those

tion of an executive department. Ex parte Atocha, 17 Wall. 439, 443, 21 L. Ed. 696.

Congress, in establishing a court in which the United States may primarily be sued as defendants, proceeded slowly and with great caution. As at first organized, the court of claims was merely an auditing board, authorized to pass upon claims submitted to it, and report to the secretary of the treasury. He submitted to congress such confirmed claims as he approved, with an estimate for their insertion in the proper appropriation bill. Such as he disapproved demanded no further action. It was by reason of that feature of the law that this court refused to exercise the appellate jurisdiction over awards of that court which the act of congress attempted to confer, because the court was of opinion that the so called court of claims was not, in the constitutional sense, a court which could render valid judgments, and because there could be no appeal from the supreme court to the secretary of the treasury. Gordon *v.* United States, 2 Wall. 561, 17 L. Ed. 921; Langford *v.* United States, 101 U. S. 341, 344, 25 L. Ed. 1010.

The language of the act of March 3d, 1863, reorganizing the court of claims, and confering what may be called its general jurisdiction, is general: "Either party may appeal to the supreme court of the United States from any final judgment or decree which may hereafter be rendered in any case by said court." This court was organized as a special judicial tribunal to hear and render judgment in cases between the citizen and the government; the subjects of its jurisdiction were defined in the act, and, generally, the mode of conducting its proceedings, subject, of course, to such alterations and changes as congress from time to time might see fit to make. Ex parte Zellner, 9 Wall. 244, 246, 19 L. Ed. 665.

Power of supreme court to enforce its decrees.—"Further, in this connection may be noticed Gordon *v.* United States, 117 U. S. 697, appx. in which this court declined to take jurisdiction of an appeal from the court of claims, under the statute as it stood at the time of the decision, on the ground that there was not vested by the act of congress power to enforce its judgment." South Dakota *v.* North Carolina, 192 U. S. 286, 320, 48 L. Ed. 448.

38. United States *v.* O'Grady, 22 Wall. 641, 647, 22 L. Ed. 772.

39. District of Columbia *v.* Eslin, 183 U. S. 62, 65, 46 L. Ed. 85, reaffirmed in District of Columbia *v.* Barnes, 187 U. S. 638, 47 L. Ed. 344, approving Gordon *v.* United States, 117 U. S. 697, appx.; Hayburns' Case, 2 Dall. 409, 1 L. Ed. 436; United States *v.* Ferreire, 13 How. 40, 14 L. Ed. 42; In re Sanborn, 148 U. S. 222, 37 L. Ed. 429; Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047; Pam-To-Pee *v.* United States, 187 U. S. 371, 382, 47 L. Ed. 221.

Where a statute under which a proceeding is instituted in the court of claims, and which allows an appeal to the supreme court, is repealed, and it is provided in the repealing act that all proceedings under the act thereby repealed shall be vacated and that no judgment rendered in pursuance thereof shall be paid, an appeal from a decision of the court of claims pending at the time of the passage of the repealing act should be dismissed. District of Columbia *v.* Eslin, 183 U. S. 62, 64, 46 L. Ed. 85, reaffirmed in District of Columbia *v.* Barnes, 187 U. S. 638, 47 L. Ed. 344.

40. United States *v.* Alire, 6 Wall. 573, 18 L. Ed. 948; United States *v.* O'Grady, 22 Wall. 641, 22 L. Ed. 772; United States *v.* Jones, 119 U. S. 477, 30 L. Ed. 440; In re Sanborn, 148 U. S. 222, 37 L. Ed. 429; Langford *v.* United States, 101 U. S. 341, 344, 25 L. Ed. 1010.

Subsequently congress repealed the provision conferring that authority upon the secretary of the treasury, and since that time no doubt has been entertained

inferior courts which congress authorizes, and has jurisdiction of contracts between the government and the citizens, from which appeal regularly lies to this court.[41]

Accordingly the jurisdiction of the court of claims and of this court cannot be maintained, if the proceeding involves a right which in its nature is susceptible of judicial determination, and if the determination of it by the court of claims and by this court is not simply ancillary or advisory, but is the final and indisputable basis of action by the parties.[42]

Additions were made to the statutory law on this subject by the act of March 3, 1887, 24 Stat. 505, c. 359 (1 Sup. Rev. Stat. 2d ed. 559), the 9th section of which is as follows: "That the plaintiff or the United States, in any suit brought under the provisions of this act, shall have the same rights of appeal or writ of error as are now reserved in the statutes of the United States in that case made, and upon the conditions and limitations therein contained. The modes of procedure in claiming and perfecting an appeal or writ of error shall conform in all respects as near as may be to the statutes and rules of court governing appeals and writs of error in like causes."[43]

Express provision for such appeals was made by § 707 of the Revised Statutes, as follows: "An appeal to the supreme court shall be allowed, on behalf of the United States, from all judgments of the court of claims adverse to the United States, and on behalf of the plaintiff, in any case where the amount in controversy exceeds three thousand dollars, or where his claim is forfeited to the United States by the judgment of said court."[44]

c. *What Law Governs.*—When congress passes a special statute allowing a suit to be brought in the court of claims, with a right of appeal to this court, the appeal will be governed by the rules applicable to cases arising under the general jurisdiction of the court, unless provision is made to the contrary.[45]

d. *Special Acts Conferring Jurisdiction.*—When a claim on the government, not capable of being otherwise prosecuted, is referred by special act of congress to the court of claims, acting judicially in its determination, a right of appeal to this court, in the absence of provision to the contrary, is given by the act of June 25th, 1868 (§ 8707, Revised Statutes). That act gives to the United States the right of appeal from the adverse judgment of the said court, in all cases where it is required by any general or special law to take jurisdiction of a claim made against the United States, and act judicially in its determination.[46] Claims under

that it is proper that the supreme court should exercise jurisdiction of appeals in such cases. 14 Stat. at Large, 9. United States *v.* O'Grady, 22 Wall. 641, 647, 22 L. Ed. 772; In re Sanborn, 148 U. S. 222, 37 L. Ed. 429.

We are entirely satisfied that, as the law now stands, appeals do lie to this court from the judgments of the court of claims in the exercise of its general jurisdiction. United States *v.* Jones, 119 U. S. 477, 480, 30 L. Ed. 440, citing De Groot *v.* United States, 5 Wall. 419, 18 L. Ed. 700; United States *v.* Alire, 6 Wall. 573, 18 L. Ed. 948; United States *v.* O'Grady, 22 Wall. 641, 22 L. Ed. 772; Langford *v.* United States, 101 U. S. 341, 25 L. Ed. 1010, and explaining Gordon *v.* United States, 2 Wall. 561, 17 L. Ed. 921.

41. United States *v.* Klein, 13 Wall. 128, 145, 20 L. Ed. 519.

42. La Abra Silver Min. Co. *v.* United States, 175 U. S. 423, 457, 44 L. Ed. 223; citing Gordon *v.* United States, 2 Wall. 561, 17 L. Ed. 921; In re Sanborn, 148 U. S. 222, 37 L. Ed. 429; Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047.

"It remains, in our consideration of the question of jurisdiction, to inquire whether the judgment authorized by the act of 1892 to be rendered would be a final, conclusive determination, as between the United States and the defendants, of the rights claimed by them respectively, or only ancillary or advisory. In our opinion the act of congress authorized a final judgment of the former character and therefore the judgment of the court of claims is reviewable by this court in the exercise of its appellate judicial power." La Abra Silver Min. Co. *v.* United States, 175 U. S. 423, 461, 44 L. Ed. 223.

43. In re Sanborn, 148 U. S. 222, 37 L. Ed. 429.

44. In re Sanborn, 148 U. S. 222, 37 L. Ed. 429.

45. McClure *v.* United States, 116 U. S. 145, 149, 29 L. Ed. 572.

46. Vigo's Case, 21 Wall. 648, 22 L. Ed. 690.

treaty stipulations are excluded from the general jurisdiction of the court of claims conferred by the acts of congress of February 24th, 1855, and March 3d, 1863; and when jurisdiction over such claims is conferred by special act, the authority of that court to hear and determine them, and of this court to review its action, is limited and controlled by the provisions of that act.[47]

e. *Appeal as a Matter of Right.*—The act of March 3, 1863, concerning the court of claims, confers a right of appeal in cases involving over $3,000, which the party desiring to appeal can exercise by his own volition, and which is not dependent on the discretion of that court.[48] The language of the act of March

47. Ex parte Atocha, 17 Wall. 439, 21 L. Ed. 696, cited in United States *v.* Gilliat, 164 U. S. 42, 46, 41 L. Ed. 344.

The commissioners appointed under the treaty between the United States and Mexico concluded July 4, 1868, and proclaimed February 1, 1869 (15 Stat. 679), having differed in opinion as to the allowance of the claim of the La Abra Silver Mining Company, a New York corporation, against Mexico, the umpire decided for that company and allowed its claim, amounting, principal and interest, to the sum of $683,041.32. Mexico met some of the installments of the award and then laid before the United States certain newly-discovered evidence which, it contended, showed that the entire claim of the La Abra Company was fictitious and fraudulent. The secretary of the state thereafter withheld the remaining installments paid by Mexico, and upon examining the new evidence, reported to the president that in his judgment the honor of the United States was concerned to inquire whether in submitting the La Abra claim to the commission, its confidence had not been seriously abused, and recommended that congress exert its plenary authority in respect of the disposition of the balance of the funds received from Mexico and remaining in the hands of the United States. Finally, congress passed the act of December 28, 1892 (27 Stat. 409, c. 14), by which the attorney general was directed to bring suit in the name of the United States in the court of claims against the La Abra Company and all persons asserting any interest in the award of the commission to determine whether that award was obtained, as to the whole sum included therein or as to any part thereof, by fraud effectuated by means of false swearing or other false and fraudulent practices on the part of the company, or its agents, attorneys or assigns, and if so determined, to bar and foreclose all claim in law or equity on the part of the company, its legal representatives or assigns to the money or any such part thereof received from the republic of Mexico for or on account of the award. By that act full jurisdiction was conferred on the court of claims, with right of appeal to this court, to determine such suit, to make all proper interlocutory and final decrees therein, and to enforce the same by injunction or other final process. "While that act does not, in express words, direct the attorney general to institute a suit 'in equity' or declare that this court on appeal should re-examine the entire case on both law and facts, a suit of that character was contemplated when congress invested the court of claims with full jurisdiction to make 'all interlocutory and final decrees therein as the evidence may warrant, according to the principles of equity and justice, and to enforce the same by injunction or any proper final process,' and gave either party the right to appeal to this court from the final decision within ninety days 'from the rendition of such final decree.'" La Abra Silver Min. Co. *v.* United States, 175 U. S. 423, 464, 44 L. Ed. 223.

An act of congress passed on the 14th of February, 1865, "for the relief of Alexander J. Atocha," directed the court of claims to examine into his claim against the government of Mexico for losses sustained by him by reason of his expulsion from that country in 1845, and provided that if the court was of opinion that the claim was a just one against Mexico when the treaty of 1848 was ratified, and was embraced by that treaty, it should "fix and determine" its amount, and declared that the loss or damage sustained by him, thus adjudicated and determined, should be paid out of any money in the treasury not otherwise appropriated, subject only to the condition that the amount did not exceed the unapplied balance of the sum provided by the treaty. Under this act the claim of Atocha was presented to that court for examination and determination. The court gave its decision to the effect that it was of opinion that the claim was a just one against Mexico when the treaty of 1848 was ratified, and was embraced by that treaty, and "fixed and determined" the amount of the loss and damage sustained by Atocha, and declared that it would be satisfied by the United States paying to the administratrix of the estate of the claimant the balance remaining unapplied of the sum designated in the treaty. Held, that the decision of the court of claims was final under the special act, and that no appeal would lie from it to this court. Ex parte Atocha, 17 Wall. 439, 21 L. Ed. 696.

48. United States *v.* Adams, 6 Wall. 101, 18 L. Ed. 792.

3d, 1863, concerning the court of claims implies that taking an appeal is a matter of right, and is something which the party as distinguished from the court may do. When the court has rendered its judgment "either party may appeal." That is, has the right to appeal, and may exercise that right by his own volition. The court cannot prevent it, nor is the right dependent upon any judicial discretion. "The appeal is to be taken within ninety days, not granted, or allowed, or permitted, but taken—a word which implies action on the part of the appellant alone. So that, whatever the proceeding may be which constitutes appealing, or taking an appeal, it must be something which the party can do; and it would seem that no regulation of the supreme court, nor any judicial discretion of the court of claims, can deprive him of the right, though the former may frame appropriate rules in accordance with which the right must be exercised."[49]

But the act of March 3rd, 1863, has been repealed.[50]

f. *Decisions Reviewable*—(1) *Jurisdiction as Dependent upon Question Whether Decision Will Affect a Class of Cases.*—By the existing statutes, congress has neither made, nor authorized an executive department or the court of claims to make, the appellate jurisdiction of this court, over claims against the United States for three thousand dollars or less, to depend upon the question whether the decision will affect a class of cases; and the omission is the more significant, because former statutes gave this court, on the certificate of the presiding justice of the court of claims, appellate jurisdiction, and the court of claims, on a submission by an executive department, original jurisdiction, of claims of such an amount, where the decision would affect a class of cases, or furnish a precedent for the future action of any executive department in the adjustment of a class of cases.[51] A case in the court of claims which involves the right of a claimant to a military bounty land warrant under the acts of congress of March 3d, 1855, and May 14th, 1856, which claim had been rejected by the commissioner of pensions, and the rejection confirmed by the secretary of the interior, is apparently within that part of the fifth section of the act of March 3d, 1863, which provides "that when the judgment or decree will affect a class of cases, or furnish a precedent for the future action of any executive department of the government in the adjustment of such class of cases, * * * and such facts shall be certified to by the presiding justice of the court of claims, the supreme court shall entertain an appeal on behalf of the United States, without regard to the amount in controversy." Accordingly, an appeal from a judgment of the court of claims in such a case, where there had been no special allowance, and which had been dismissed by this court, because not a judgment for money and over $3,000, was, on motion of the United States, reinstated, and the record remanded to the court of claims for such further proceedings as might seem fit and proper in the cause as it respected the appeal prayed for.[52]

(2) *Jurisdiction as Dependent upon Amount in Controversy.*—The jurisdiction of this court over the court of claims depends upon the provisions of § 707 providing that, "an appeal to the supreme court shall be allowed on behalf of the United States from all judgments of the court of claims adverse to the United States, and on behalf of the plaintiff in any case where the amount in controversy exceeds three thousand dollars." Congress has thus clearly manifested its will that, in any cause where the amount in controversy does not exceed three thousand dollars, the United States alone shall have a right of appeal; and that if the opinion of the court of claims in such a cause is adverse to the claimant, a final

49. Hudgins *v.* Kemp, 18 How. 530, 15 L. Ed. 511; Dos Hermanos, 10 Wheat. 306, 6 L. Ed. 328; United States *v.* Adams, 6 Wall. 101, 107, 18 L. Ed. 792.

50. In re Sanborn, 148 U. S. 222, 37 L. Ed. 429.

51. Acts of March 3, 1863, c. 92, § 5, 12 Stat. 766; June 25, 1868, c. 71, §§ 1, 7, 15 Stat. 75, 76; Rev. Stat. § 1063; Act of March 3, 1887, c. 359, §§ 9, 12, 24 Stat. 507. United States *v.* Gleeson, 124 U. S. 255, 258, 31 L. Ed. 421.

52. United States *v.* Alire, 6 Wall. 573, 18 L. Ed. 948.

and conclusive judgment shall be rendered against him in that court.[53]

(3) *Jurisdiction as Dependent upon Nature and Form of Judgment*—aa. *In General.*—By the act of June 25th, 1868, 15 Stat. at Large 75, it was provided that an appeal should be allowed on behalf of the United States "from all final judgments of the said court of claims adverse to the United States, whether the said judgment shall have been rendered by virtue of the general or special power or jurisdiction of said court." This act is substantially re-enacted in section seven hundred and seven of the Revised Statutes, and gives to the United States the right of appeal from the adverse judgment of the court of claims in all cases where that court is required by any general or special law to take jurisdiction of a claim made against the United States and act judicially in its determination.[54] The act of March 3rd, 1883, amending the act establishing the court of claims, declared that the jurisdiction of the court should not extend to or include any claim against the government, not pending in the court on the 1st of December, 1862, growing out of or dependent on any treaty stipulation entered into with foreign nations or the Indian tribes. All the cases of which the court could subsequently take cognizance, by either the original or amendatory act, were cases arising out of contracts or transactions between the government or its officers and claimants; and in their decision the court was to be governed by those established rules of evidence which determine controversies between litigants in the ordinary tribunal of the country. Those acts have since then applied only to claims made directly against the United States, and for the payment of which they were primarily liable, if liable at all, and not to claims against other governments, the payment of which the United States had assumed or might assume by treaty. The act of June 25th, 1868, whilst allowing appeals on behalf of the United States from all final judgments of the court of claims adverse to the United States, did not change the character of the claims of which that court could previously take cognizance.[55]

A claim presented in the department of the interior, for certain fees under a contract with a tribe of Indians, of ten per cent. of the amount appropriated for such Indians, by § 27 of the Indian appropriation act, is plainly not a suit against the United States with respect to which an appeal is provided for by the 9th section of the court of claims act.[56]

bb. *Decision Must Be Judicial in Its Nature.*—It has been held repeatedly that judgments of the court of claims, which are not an exercise of judicial power by that court, cannot be revised here.[57] A finding of fact and law made, at the request of a head of a department, with the consent of the claimant, and transmitted to such department, is not a judgment within the meaning of the 9th section of the act of March 3, 1887, or of the 707th section of the Revised Statutes, and is not, therefore, appealable to this court. The finding or conclusion reached by that court is not enforceable by any process of execution issuing from the court, nor is it made, by the statute, the final and indisputable basis of action either by

53. United States *v.* Gleeson, 124 U. S. 255, 258, 31 L. Ed. 421.

In an appeal from the court of claims, it was contended for the United States that the claimant has no right to appeal in regard to the items which he claims were improperly disallowed, because they do not in the aggregate amount to more than $3,000. But we are of opinion that, as § 707 of the Revised Statutes authorizes an appeal to this court on behalf of the United States, from all judgments of the court of claims adverse to the United States, and as the appeal by the United States in this case is from the judgment of $13,839.21 in favor of the claimant, it is competent for the claimant, as he also has taken an appeal from that judgment, to avail himself of anything in the case which properly shows that that judgment was not for too large a sum. United States *v.* Mosby, 133 U. S. 273, 289, 33 L. Ed. 625.

54. Vigo's Case, 21 Wall. 648, 650, 22 L. Ed. 690.

55. Ex parte Atocha, 17 Wall. 439, 444, 21 L. Ed. 696.

56. In re Sanborn, 148 U. S. 222, 37 L. Ed. 429.

57. In re Sanborn, 148 U. S. 222, 37 L. Ed. 427; Gordon *v.* United States, 117 U. S. 697, appx. La Abra Silver Min. Co. *v.* United States, 175 U. S. 423, 44 L. Ed. 223.

the department or by congress.[58] Thus, where a claim or matter is pending in one of the executive departments, which involves controverted questions of fact or law, and the head of such department, with the consent of the claimant, has transmitted the claim, with the vouchers, papers, proofs and documents pertaining thereto, to the court of claims, and that court has reported its findings of fact and law to the department by which it was transmitted, the claimant has no right by appeal to bring the action of that court before us for review.[59] The decision, of a commissioner of the circuit court upon a motion for bail and the sufficiency thereof, is a judicial determination of the very matter which the statutes authorize and require him "to hear and decide," to wit, whether a party arrested for a crime against the United States, when brought before him for examination, shall be discharged, or committed on bail for trial, and in default thereof imprisoned. With respect to motions for continuance, the granting or refusal of them is unquestionably a necessary incident to, and a part of, the hearing and determining of criminal charges; and the exercise of that power in such criminal proceedings is indispensable to the right of the accused to have a fair and full investigation of the offense charged against him and to a sufficient time for the summoning of his witness as well as for employing and consulting with counsel to aid him in his defense.[60]

cc. *Judgments Pro Forma.*—No appeal will lie by the United States to this court from a judgment of the court of claims rendered pro forma.[61]

dd. *Judgments for Money.*—The only judgments which the court of claims are authorized to render against the government, or over which the supreme court have any jurisdiction on appeal, or for the payment of which by the secretary of the treasury any provision is made, are judgments for money found due from the government to the petitioner.[62]

(4) *Judgment Rejecting Set-Offs and Counterclaims.*—An appeal will lie to this court from the judgment of the court of claims rejecting a set-off or counterclaim filed by the United States. But that is not "the only remedy left to the United States, as the Court of Claims, on motion, might grant a new trial in such a case, if it appeared that any fraud, wrong, or injustice had been done to the United States."[63]

g. *Finding of Facts*—(1) *In General.*—The act of March 3, 1863, 12 Stat. 766, c. 92; Rev. Stat. § 708, provides that in connection with any final judgment rendered in the court of claims there shall be a finding of facts.[64]

Our rules regulating appeals from the court of claims require that the record shall contain, among other things, "a finding by the court of claims of the facts in the case established by the evidence, in the nature of a special verdict, but not the evidence establishing them, and a separate statement of the conclusions of law upon said facts on which the court founds its judgment or decree.

58. In re Sanborn, 148 U. S. 222, 226, 37 L. Ed. 427.

59. In re Sanborn, 148 U. S. 222, 223, 37 L. Ed. 427.

60. United States *v.* Jones, 134 U. S. 483, 33 L. Ed. 1007.

61. United States *v.* Gleeson, 124 U. S. 255, 31 L. Ed. 421, distinguishing United States *v.* Stone, 14 Pet. 524, 10 L. Ed. 572.

62. United States *v.* Alire, 6 Wall. 573, 575, 18 L. Ed. 948, citing Gordon *v.* United States, 2 Wall. 561, 17 L. Ed. 921.

63. United States *v.* O'Grady, 22 Wall. 641, 646, 22 L. Ed. 772.

64. La Abra Silver Min. Co. *v.* United States, 175 U. S. 423, 463, 44 L. Ed. 223; United States *v.* Henry, 17 Wall. 405, 21 L. Ed. 673.

In a proceeding before the court of claims, by an officer in the continental service for half pay for life, whether the claimant was an officer in the continental service on the 22d of March, 1783, and continued therein as such officer until the end of the war, is a question of law, and not a conclusion of fact drawn from other specific facts and circumstances established by the testimony, and therefore it was not error for the court to refuse to make the finding. Williams *v.* United States, 137 U. S. 113, 136, 34 L. Ed. 590, citing United States *v.* Pugh, 99 U. S. 265, 25 L. Ed. 322; Sun Mutual Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485, 27 L. Ed. 337; The Belgenland, 114 U. S. 355, 29 L. Ed. 152; McClure *v.* United States, 116 U. S. 145, 29 L. Ed. 572.

The finding of facts and conclusions of law to be certified to this court as a part of the record."[65]

Documents Not Referred to in Findings.—Upon an appeal from the court of claims, this court may consider documents though not referred to in the findings of fact by the court below, if they are documents of which this court can take judicial notice. In such case the fact that they are not incorporated in the findings of the court will not preclude us from examining them, with a view of inquiring whether they have the bearing claimed.[66]

Judicial Notice.—While it is ordinarily true that this court takes notice of only such facts as are found by the court below, it may take notice of matters of common observation, of statutes, records or public documents, which were not called to its attention, or other similar matters of judicial cognizance.[67]

(2) *In Cases of Equity Jurisdiction.*—The rule that on appeal to this court, the appeal cannot be heard where there is not in the record any finding of the facts in the case, in the nature of a special verdict, with a separate statement of the conclusions of law upon such facts, has no reference to a case in the court of claims of equity jurisdiction conferred in a special case by a special act; in such a case, where an appeal lies and is taken under § 707 of the Revised Statutes, this court must review the facts and the law as in other cases in equity, appealed from other courts.[68]

(3) *Form, Sufficiency and Contents*—**In General.**—Rule one regulating appeals from the court of claims provides that the finding of the facts and the conclusions of law shall be stated separately and certified to this court as part of the record.[69] The court of claims should set forth in its finding of facts the amount of loss, if any, which the petitioner has sustained.[70] But it is no ground for dismissing an appeal from the court of claims, that the statement of facts found by the court of claims is not a sufficient compliance with the rules prescribed by the supreme court on that subject. The supreme court will of its own motion, while retaining jurisdiction of such cases, remand the records to the court of claims for a proper finding.[71]

We are not at liberty to refer to the opinion for the purpose of eking out,

65. Rule 1, § 2. United States *v.* Clark, 94 U. S. 73, 24 L. Ed. 67; United States *v.* Pugh, 99 U. S. 265, 25 L. Ed. 322, explaining United States *v.* Crusell, 14 Wall. 1, 20 L. Ed. 821; United States *v.* Ross, 92 U. S. 281, 23 L. Ed. 707; Intermingled Cotton Cases, 92 U. S. 651, 23 L. Ed. 756.

66. New York Indians *v.* United States, 170 U. S. 1, 42 L. Ed. 927, citing Jones *v.* United States, 137 U. S. 202, 34 L. Ed. 691.

67. New York Indians *v.* United States, 170 U. S. 1, 32, 42 L. Ed. 927.

68. United States *v.* Old Settlers, 148 U. S. 427, 464, 37 L. Ed. 509, citing and approving Harvey *v.* United States, 105 U. S. 671, 26 L. Ed. 1206.

"The present proceeding, we think, comes within the principle announced in Harvey *v.* United States, 105 U. S. 671, 691, 26 L. Ed. 1206, where it was said that the rule in regard to findings of fact in the court of claims had no reference to a case "of equity jurisdiction conferred in a special case by a special act" in which "this court must review the facts and the law as in other cases in equity appealed from other courts." This principle was approved and applied in United States *v.* Old Settlers, 148 U. S. 427, 428, 465, 37 L. Ed. 509." La Abra Silver Min. Co. *v.* United States, 175 U. S. 423, 465, 44 L. Ed. 223.

Upon an appeal to this court from the court of claims it is contended on the part of the United States that this court cannot, under its rules, hear this appeal, because there is not, in the record, any finding by the court of claims of the facts in the case, in the nature of a special verdict, with a separate statement of the conclusions of law upon such facts. But the rule in regard to findings of fact has no reference to a case like the present, of equity jurisdiction conferred in a special case by a special act; and, in such a case, where an appeal lies and is taken under § 707 of the Revised Statutes, this court must review the facts and the law as in other cases in equity, appealed from other courts. Harvey *v.* United States, 105 U. S. 671, 691, 26 L. Ed. 1206.

69. Mahan *v.* United States, 14 Wall. 109, 110, 20 L. Ed. 764.

70. United States *v.* Clark, 94 U. S. 73, 24 L. Ed. 67.

71. United States *v.* Adams, 6 Wall. 101, 18 L. Ed. 792.

controlling or modifying the scope of the findings,[72] where the finding of the court of claims does not disclose its testimony, but only describes its character, and without questioning its competency, simply declares its insufficiency.[73]

(4) *Right to Bring Up Evidence on Which Findings Are Based*—aa. *In General.*—Rule one regulating appeals from the court of claims provides that the facts so found are to be the ultimate facts or propositions which the evidence shall establish, in the nature of a special verdict, and not the evidence on which those ultimate facts are founded.[74] The 4th and 5th rules regulating appeals from the court of claims, were designed to enable a party to secure a finding of fact on any point material to the decision by that court. But a failure of the court to find the fact as the party alleges it to be, will not justify the bringing of all the evidence on that subject before this court, though on a refusal of that court to make any finding on the subject, the supreme court may remand the case for such finding.[75] And when the court of claims sends here as part of its finding all the evidence on which a fact essential to the judgment there rendered was found, from which it appears that there was no legal evidence to establish such fact, this court must, on appeal, reverse the judgment.[76] In other words, this court cannot under the rule governing appeals from the court of claims, remand a cause to the court of claims with directions to send the evidence from which their findings of fact were made to this court for revision.[77]

bb. *Where Rights of Parties Depend upon Circumstantial Facts.*—The judgment of the court of claims as to the legal effect of what may, perhaps not improperly, be termed the ultimate circumstantial facts of the case, is, if the question is properly presented, subject on appeal to be here reviewed; and where the rights of the parties depend upon such circumstantial facts alone, and there is doubt as to the legal effect of them, it is the duty of that court to frame its findings so that the question as to such effect shall be presented by the record.[78] Where in a suit arising in the court of claims under the abandoned and captured property act, which authorizes the recovery in the court of claims of the proceeds of property captured and without judicial condemnation sold by the military authorities, no direct proof is given that the proceeds of the sale were paid in the treasury, but the evidence as to that fact is circumstantial, the judgment of the

72. British Queen Min. Co. *v.* Baker Silver Min. Co., 139 U. S. 222, 35 L. Ed. 147; Lehnen *v.* Dickson, 148 U. S. 71, 37 L. Ed. 373; Saltonstall *v.* Birtwell, 150 U. S. 417, 37 L. Ed. 1128; Stone *v.* United States, 164 U. S. 380, 383, 41 L. Ed. 477.

73. Stone *v.* United States, 164 U. S. 380, 41 L. Ed. 477, distinguishing United States *v.* Clark, 96 U. S. 37, 24 L. Ed. 696, on the ground that in that case in one finding the testimony was stated, and in another the conclusion as to the ultimate fact, and therefore the court held, that it might consider the sufficiency of such testimony to establish that principal fact.

74. Mahan *v.* United States, 14 Wall. 109, 110, 20 L. Ed. 764.

75. Mahan *v.* United States, 14 Wall. 109, 20 L. Ed. 764.

The fourth rule regulating appeals in a court of claims, requires that court to make and file their finding of facts in all cases where an appeal can be taken, in open court, at or before the time of entering their judgment. The fifth rule enables a party to obtain a finding of that court on any question of fact arising in the case and deemed by him essential to its decision. These rules were designed to enable a party to secure a finding of fact on any point material to the decision of that court. But a failure of the court to find the fact as the party alleges it to be, will not justify the bringing of all the evidence on that subject before this court, though on a refusal of that court to make any finding on the subject, the supreme court may remand the case for such finding. Mahan *v.* United States, 14 Wall. 109, 20 L. Ed. 764.

76. United States *v.* Clark, 96 U. S. 37, 24 L. Ed. 696.

77. United States *v.* Smoot, 131 U. S. appx. ccvi, 21 L. Ed. 107.

The court refuses a rule on the court of claims to certify up evidence used in that court on the trial of a cause which has been brought here by appeal from that court. Stark *v.* United States, 131 U. S. appx. ccv.

78. United States *v.* Pugh, 99 U. S. 265, 25 L. Ed. 322, distinguishing United States *v.* Ross, 92 U. S. 281, 23 L. Ed. 707; Intermingled Cotton Cases, 92 U. S. 651, 23 L. Ed. 756; United States *v.* Crusel, 14 Wall. 1, 20 L. Ed. 821; Williams *v.* United States, 137 U. S. 113, 136, 34 L. Ed. 590.

court of claims as to the legal effect of what may, perhaps not improperly, be termed the ultimate circumstantial facts of the case, is if the question is properly presented, subject to be reviewed here on appeal.[79] And the rule is equally applicable to appeals from decrees in admiralty in the circuit court of the United States under the act of 1875.[80]

(5) *Requests for Findings.*—Rule five regulating appeals from the court of claims provides that in all such cases either party, on or before the hearing of the cause, may submit to the court a written request to find specifically as to the matter of fact which such party may deem material to the judgment in the case, and if the court fails or refuses to find in accordance with such prayer, then such prayer and refusal shall be made a part of the record, certified on the appeal, to this court. It will be seen that the fifth rule enables a party to obtain a finding of that court on any question of fact arising in the case and deemed by him essential to its decision. He has only to file a written request that, as to that point, the court will make a finding. The rule does say that if the court of claims refuses to find as prayed, the prayer and refusal must be made part of the record. The remedial purpose of this rule is that when a party has, in writing, indicated a specific question of fact on which he desires the court of claims to make a finding, and the court has neglected or refused to do so, this court may be able to determine whether the question is one so necessary to the decision of the case that it will send it back for such finding.[81] A request for an order upon the court of claims for an additional finding will be refused, where that court has not been requested to make the findings, in accordance with rules 4 and 5 regulating appeals therefrom.[82]

(6) *Time of Filing Findings.*—The fourth requires the court of claims to make and file their finding of facts in all cases where an appeal can be taken, in open court, at or before the time of entering their judgment.[83]

(7) *Remedy in Case of Mistakes as to Findings.*—The remedy in case the court of claims falls into a mistake as to the finding of the facts, is familiar. It is by an application to this court to remit the case back for correction, if it be shown, satisfactorily, that a mistake has been committed. Where, after an appeal

79. United States *v.* Pugh, 99 U. S. 265, 25 L. Ed. 322.

Where, in a suit arising under the act of March 12, 1863 (12 Stat. 820), relative to abandoned and captured property, as extended by the act of July 2, 1864 (13 Stat. 375), no direct proof was given that the proceeds of the sale of the property were paid into the treasury, if the circumstantial facts which are established by the evidence are set forth in the finding of the court of claims, which it sends here as that upon which alone its judgment was rendered, and they are, in the absence of anything to the contrary, the legal equivalent of a direct finding that such proceeds were so paid, this court will not on that account reverse the judgment. United States *v.* Pugh, 99 U. S. 265, 25 L. Ed. 322.

80. Sun Mut. Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485, 27 L. Ed. 337, following United States *v.* Pugh, 99 U. S. 265, 25 L. Ed. 322; The Edwin I. Morrison, 153 U. S. 199, 38 L. Ed. 688.

81. Mahan *v.* United States, 14 Wall. 109, 110, 111, 112, 20 L. Ed. 764.

The fourth rule regulating appeals from the court of claims, requires that court to file its findings of facts at or before the time of entering the judgment, and the fifth permits either party to call for a finding upon a special question deemed material to the judgment in the case, and, if refused, to ask this court to pass upon the materiality of the fact alleged, and, should it be considered material, to send down for the finding. The object is to present the question here as upon an exception to the ruling of the court below in respect to the materiality of the fact. For that purpose it must have been submitted to the court in a written request, as provided in the rule. United States *v.* Driscoll, 131 U. S. appx. clix, 24 L. Ed. 596; Mahan *v.* United States, 14 Wall. 109, 20 L. Ed. 764.

82. United States *v.* Adams, 9 Wall. 661, 19 L. Ed. 808; Mahan *v.* United States 14 Wall. 109, 112, 20 L. Ed. 764; United States *v.* Driscoll, 131 U. S. appx. clix, 24 L. Ed. 596.

A motion for an order upon the court of claims to make and return additional findings, will be denied, unless that application has been submitted to the court in a written request, as provided in the fourth rule regulating appeals from the court of claims. United States *v.* Driscoll, 131 U. S., appx. clix, 24 L. Ed. 596.

83. Mahan *v.* United States, 14 Wall. 109, 112, 20 L. Ed. 764.

taken to this court from the court of claims, a party and his counsel are aware that the finding of the court of claims on a point of fact is erroneous, in time to have it corrected, before the hearing here, by an application to this court to remit the case to that court for correction, this court will not, after it has heard the case and given a decree as if the finding were in all respects correct, stay the mandate and reform their decree, so that the party alleging the error may obtain a correction of the record from the court of claims, and have the cause heard again. And this is so, although the party and his counsel honestly entertained the opinion that the fact, so erroneously found and stated, was not a material one in the case; an opinion in which they were not sustained by the opinion of this court as afterwards given.[84]

(8) *Conclusiveness of Findings.*—The finding of facts by the court of claims, in the nature of a special verdict, is conclusive here, unless impeached for some error in law appearing in the record.[85]

(9) *Construction of Findings.*—Within the well-known rules governing the construction of findings of facts by trial courts, we cannot so construe a finding of the court of claims as to render the result arrived at by the court below erroneous, when another construction much more reasonable and natural may be given it, and the judgment thus rendered valid.[86]

h. *Review of Findings on Questions of Fact*—(1) *In General.*—This court does not sit to review findings of fact made in the court of claims. They are regarded as conclusive here, and our jurisdiction is limited to a determination of such questions of law as are properly brought to our attention upon the record.[87] The findings of the court of claims in an action at law determines all matters of fact, like the verdict of a jury, and where there is any evidence of a fact which they find, and no exception is taken, their finding is final.[88] Under our rule the facts are to be settled by the court of claims, and an appeal brings up for review only the decisions of that court upon questions of law arising in the course of the trial or in the application of the law to the facts as finally found. There is nothing unusual in this. In an ordinary suit at law the facts are settled in the trial court, and only questions of law are carried to the appellate court for review. Upon writs of error we hear the case only on findings of fact or exceptions to rulings of the court in the progress of the trial. Generally, in a suit at law, there is but one trial upon questions of fact.[89] Where no exception has been taken to the findings of fact of the court of claims, and as the testimony is not, and under our rules cannot be, sent up with the record, these findings must

84. United States *v.* Adams, 9 Wall. 661, 664, 19 L. Ed. 808.

85. United States *v.* Smith, 94 U. S. 214, 24 L. Ed. 115.

86. United States *v.* Andrews, 179 U. S. 96, 99, 45 L. Ed. 105.

87. District of Columbia *v.* Barnes, 197 U. S. 146, 150, 49 L. Ed. 699; United States *v.* Smith, 94 U. S. 214, 218, 24 L. Ed. 115; United States *v.* Milliken Printing Co., 202 U. S. 173, 174, 50 L. Ed. 980; Harvey *v.* United States, 105 U. S. 671, 26 L. Ed. 1206.

88. Act of March 3, 1887, c. 359; §§ 2, 7, 24 Stat. 505, Act of March 3, 1891, c. 538; §§ 1, 4, 26 Stat. 851, 852; Desmare *v.* United States, 93 U. S. 605, 610, 23 L. Ed. 959; McClure *v.* United States, 116 U. S. 145, 29 L. Ed. 572; Stone *v.* United States, 164 U. S. 380, 382, 41 L. Ed. 477; Talbert *v.* United States, 155 U. S. 45, 38 L. Ed. 64; United States *v.* New York Indians, 173 U. S. 464, 470, 43 L. Ed. 769.

89. Union Pac. R. Co. *v.* United States, 116 U. S. 154, 157, 29 L. Ed. 584, citing McClure *v.* United States, 116 U. S. 145, 29 L. Ed. 572.

On appeal to this court from the court of claims, only questions of law can be reviewed. Accordingly a finding of fact, if there is nothing in the other findings or elsewhere in the record which authorizes us to go behind that finding and conclude that there was error in respect thereof, will not be reviewed here. Talbert *v.* United States, 155 U. S. 45, 38 L. Ed. 64.

The supreme court will not review the findings of fact made by the court of claims in an action at law. This court accepts the findings of ultimate fact made by the court below and cannot review them. Collier *v.* United States, 173 U. S. 79, 43 L. Ed. 621; Mahan *v.* United States, 14 Wall. 109, 20 L. Ed. 764; Stone *v.* United States, 164 U. S. 380, 41 L. Ed. 477.

be accepted as conclusive.[90] Therefore, this court will not remand a cause to the court of claims with directions to make return to this court whether or not the evidence upon which such cause was heard and determined does, or does not, establish and prove the several separate and distinct propositions of fact contained in the requests for findings of fact presented, if that would require this court on appeal to decide upon the weight of evidence. The question depending on the weight of evidence must be conclusively settled below.[91] When the court of claims, on being requested by a party in a cause there pending to find specifically upon several facts which are only incidental facts and amount only to evidence touching the main facts in issue, and the court disregards the requests and finds the facts at issue generally, and judgment is entered, and the party whose request was denied appeals, this court will not remand the case to the court of claims, with directions to specifically pass upon each of said requests, or to make a finding of facts on the subject embraced in each of said requests.[92]

Findings on Weight and Sufficiency of Evidence.—This court will not review the findings of the court of claims on the weight and sufficiency of evidence. "All we can do is to declare the law upon facts which, so far as we are concerned, must be taken to be undisputed."[93]

There is nothing in Rev. Stat., § 5261, authorizing certain railroad companies to bring suits against the United States in the court of claims to recover the price of freight or transportation, which takes those suits out of the operation of the general rules of this court regulating appeals from the court of claims, or which makes it proper for this court to require the court of claims to send up with its findings of facts the evidence in regard to them.[94]

(2) *Limitations of General Rule.*—But the rule is otherwise as to appeals in equity.[95]

Ultimate Circumstantial Facts.—And on appeal to this court from a decision of the court of claims under the abandoned and captured property act, it

90. Kirk *v.* United States, 163 U. S. 49, 41 L. Ed. 66.

The question as to what is a reasonable royalty for the use of a patented invention, is a question of fact to be determined by the court of claims, and its determination, as expressed in its findings, is conclusive upon us, unless from other findings it is apparent that there was error. United States *v.* Berdan Fire-Arms Mfg. Co., 156 U. S. 552, 38 L. Ed. 530.

91. McClure *v.* United States, 116 U. S. 145, 29 L. Ed. 572, citing Burr *v.* Des Moines, etc., Co., 1 Wall. 99, 17 L. Ed. 561; United States *v.* Pugh, 99 U. S. 265, 25 L. Ed. 322; The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100.

"In McClure *v.* United States, 116 U. S. 145, 29 L. Ed. 572, this court distinctly held, that it would not remand a case to the court of claims with directions to return whether certain distinct propositions, in requests for findings of fact, presented to that court at the trial of the case, were established and proved by the evidence, if it appeared that the object of the request to have it so remanded was to ask this court to determine questions of fact upon the evidence." United States *v.* New York Indians, 173 U. S. 464, 471, 43 L. Ed. 769.

92. Union Pac. R. Co. *v.* United States, 116 U. S. 154, 29 L. Ed. 584, following McClure *v.* United States, 116 U. S. 145, 29 L. Ed. 572.

93. Burr *v.* Des Moines, etc., Co., 1 Wall. 99, 102, 17 L. Ed. 561; United States *v.* Pugh, 99 U. S. 265, 25 L. Ed. 322; The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100; McClure *v.* United States, 116 U. S. 145, 29 L. Ed. 572; Union Pac. R. Co. *v.* United States, 116 U. S. 154, 29 L. Ed. 584.

94. Union Pac. R. Co. *v.* United States, 116 U. S. 154, 29 L. Ed. 584, following McClure *v.* United States, 116 U. S. 145, 29 L. Ed. 572.

95. In Harvey *v.* United States, 105 U. S. 671, 26 L. Ed. 1206, the suit was brought under a statute passed April 14, 1876, 19 Stat. 490, ch. 279, which authorized the court of claims "to proceed in the adjustment of the accounts between said claimants and the United States as a court of equity jurisdiction; and may, if according to the principles of equity jurisprudence in its judicial discretion, reform said contract and render such judgment as justice and right between the claimants and the said government may require." An appeal to this court was also given, and we held that, as the suit was to be in equity, the parties were entitled to an appeal in equity, which should bring up for review the facts as well as the law. United States *v.* Old Settlers, 148 U. S. 427, 464, 37 L. Ed. 509, approved in McClure *v.* United States, 116 U. S. 145, 149, 29 L. Ed. 572.

was held, that a judgment of the court of claims as to the legal effect of what may, perhaps not improperly, be called the ultimate circumstantial facts of the case, may be brought here for review on appeal if the question is properly presented, but when the rights of parties depend upon circumstantial facts alone, and there is doubt as to the legal effect of them, it is the duty of the court, when requested, to so frame its findings as to put the doubtful question into the record. This would not require us on the appeal to decide upon the weight of evidence. That is done in the court below when the particular fact is found which the evidence tends to prove. The effect of mere evidence stops when the fact it proves is established.[96] The accuracy of its ultimate finding may be reviewed by this court by a reference to the special facts found as a basis for such finding.[97]

i. *Assignment of Errors.*—Where the court of claims, on a claim embracing several items, rejects some but allows others, against which allowance the United States alone appeals, this court will not give consideration to the items rejected and against whose rejection the claimant has not appealed, except so far as may be necessary for a proper understanding of the item allowed.[98]

j. *Transfer of Cause*—(1) *Allowance of Appeal.*—**Rule of Court.**—In all cases in which judgments or decrees have heretofore been rendered, when either party is by law entitled to an appeal, the party desiring it shall make application to the court of claims by petition for the allowance of such appeal. Said petition shall contain a distinct specification of the errors alleged to have been committed by said court in its ruling, judgment, or decree in the case. The court shall, if the specification of alleged error be correctly and accurately stated, certify the same, or may certify such alterations and modifications of the points decided and alleged for error as in the judgment of said court shall distinctly, fully, and fairly present the points decided by the court. This, with the transcript mentioned in Rule I (except the statement of facts and law therein mentioned), shall constitute the record on which those cases shall be heard in the supreme court.[99] The object of this rule, as well as of the first, is to present in simple form the questions of law which arose in the progress of the case, and which were decided by the court adversely to appellant. Only such statement of facts is intended to be brought to this court as may be necessary to enable it to decide upon the correctness of the propositions of law ruled by the court of claims, and that is to be presented in the shape of the facts found by that court to be established by the evidence (in such form) as to raise the legal question decided by the court. It should not include the evidence in detail.[1]

In all cases an order of allowance of appeal by the court of claims, or the chief justice thereof, in vacation, is essential, and the limitation of time for granting such appeal shall cease to run from the time an application is made for the allowance of appeal.[2] But the allowance of an appeal to this court by the court of claims, does not absolutely and of itself remove the cause from the jurisdiction of the latter court, so that no order revoking such allowance can be made.[3]

(2) *Remedies.*—**In General.**—From the judgments of the court of claims appeals are allowed to this court (§ 707, Rev. Stat.), but no provision has been made for writs of error. Consequently, we cannot proceed by writ of error to review the decisions of that court.[4] Therefore, where an appeal from the court of claims has been dismissed on the motion of the United States, because the court

96. United States *v.* Pugh, 99 U. S. 265, 25 L. Ed. 322, explaining United States *v.* Crussell, 14 Wall. 1, 20 L. Ed. 821; United States *v.* Ross, 92 U. S. 281, 23 L. Ed. 707; Intermingled Cotton Cases, 92 U. S. 651, 23 L. Ed. 756, followed in Sun Mut. Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485, 27 L. Ed. 337.

97. United States *v.* Pugh, 99 U. S. 265, 25 L. Ed. 322; Montoya *v.* United States, 180 U. S. 261, 269, 45 L. Ed. 524.

98. United States *v.* Hickey, 17 Wall. 9, 21 L. Ed. 559.

99. Rule II, 3 Wall. vii.

1. De Groot *v.* United States, 5 Wall. 419, 427, 18 L. Ed. 700.

2. Rule III, 3 Wall. viii.

3. Ex parte Roberts, 15 Wall. 384, 21 L. Ed. 131.

4. United States *v.* Young, 94 U. S. 258, 259, 24 L. Ed. 153.

of claims has granted a new trial during the pendency of the appeal in this court, a writ of error will not be granted to compel that court to send here the proceedings subsequent to the appeal: but the appeal will be dismissed. After judgment has been finally rendered by the court of claims, the proceedings in which the new trial was obtained may be brought here by appeal alone and not by writ of error.[5]

But under the act of March 3, 1887, c. 359, entitled "An act to provide for the bringing of suits against the government of the United States," and commonly known as the Tucker Act, it is "reasonably clear that congress intended that the final determination of suits brought under this act in a district or circuit court of the United States shall be reviewed here upon writ of error, if the case be one at law, and upon appeal, if the case is one cognizable in equity or in admiralty under the existing statutes regulating the jurisdiction of those courts."[6]

The remedy by which to correct error of law in cases in the court of claims is by appeal and not by motion for a new trial under § 1088 of the Revised Statutes.[7]

(3) *Limitations.*—The act of congress, March 3d, 1863, now 708 of the Revised Statutes, authorizes appeals from the court of claims to this court under such regulations as this court cay direct, provided such appeals be taken within ninety days after such judgment or decree is rendered. By our third rule, regulating these appeals, we directed that this limitation of ninety days should "cease to run from the time of the application for the appeal." In other words, the appeal was taken, in the sense of the act, when the defeated party in the court of claims signified, by his motion for the allowance of an appeal, his desire to take one. But, by the same rule, we declared that an allowance by the court or the chief justice in vacation was essential to the perfecting of an appeal; so that there might be, between the motion for the appeal and its allowance, an interval of time, greater or less as might be determined by the convenience of counsel, subject to the discretion of the court.[8] An act of congress passed 5th of January, 1883, directed the court of claims to reopen and readjudicate the case upon evidence heretofore submitted to the court, and if it should find in such readjudication from such evidence an additional sum as being justly due, that it shall make the amount of such readjudication a part of this judgment. It was held, that this was not intended to confer an appeal from the original judgment, if at that time it was barred by lapse of time. The court said: "Certainly the old judgment is not opened to an appeal by the readjudication, and there is nothing to indicate that the new part of the judgment can be separated from the old for the purposes of review here."[9]

(4) *The Record.*—**In General.**—The original act which gave the right of appeal from the court of claims to this court was passed March 3, 1863, and provided that the appeals should be "under such regulations as the supreme court may direct." 12 Stat. 766, ch. 92, § 5. This provision is still found in § 708 of the Revised Statutes. At the December term, 1865, this court adopted certain rules for the regulation of such appeals, and Rule 1 was as follows: "Rule 1. In all cases hereafter decided in the court of claims in which, by the act of congress, such appeals are allowable, they shall be heard in the supreme court

5. United States *v.* Young, 94 U. S. 258, 24 L. Ed. 153.

6. Chase *v.* United States, 155 U. S. 480, 499, 39 L. Ed. 234; United States *v.* King, 164 U. S. 703, 41 L. Ed. 1182.

7. In re District of Columbia, 180 U. S. 250, 45 L. Ed. 516.

8. Ex parte Roberts, 15 Wall. 384, 21 L. Ed. 131.

But this period is enlarged to six months by § 10 of the Tucker act. United States *v.* Davis, 131 U. S. 36.

Suspension of limitation.—When the party desiring to appeal signifies his intention to do so in any appropriate mode within the ninety days allowed by that statute for taking an appeal, the limitation of time ceases to affect the case; and such is also the effect of the third rule of the supreme court concerning such appeals. United States *v.* Adams, 6 Wall. 101, 18 L. Ed. 792.

9. United States *v.* Grant, 110 U. S. 225, 226, 28 L. Ed. 127.

upon the following record, and none other: 1. A transcript of the pleadings in the case, of the final judgment or decree of the court, and of such interlocutory orders, rulings, judgments, and decrees as may be necessary to a proper review of the case. 2. A finding of the facts in the case by said court of claims, and the conclusions of law on said facts on which the court found its judgment or decree. The finding of the facts and the conclusions of law to be state separately and certified to this court as part of the record. The facts so found are to be the ultimate facts or propositions which the evidence shall establish, in the nature of a special verdict, and not the evidence on which those ultimate facts are founded." * * * This rule was amended in some particulars at the December term, 1872. It has been in force substantially in its original form from the time of its adoption until now, and has always been strictly adhered to.[10] In bringing appeals to this court from the court of claims, the record must be prepared strictly according to the general rules announced on the subject of that class of appeals at December Term, 1865, and printed at large in 3 Wall. 7, 8. Hence only such statement of facts is to be sent up to this court as may be necessary to enable it to decide upon the correctness of the propositions of law ruled below; and this statement is to be presented in the shape of the facts found by that court to be established by the evidence in such form as to raise the question of law decided by the court. It should not include the evidence in detail.[11]

Findings of Fact on Former Trial.—When a judgment of a court of claims is reversed and the case is remanded for new trial, the findings of fact on the first trial form no part of the record on appeal from the judgment in the second trial, unless embodied by that court in the second findings.[12]

Opinion of Court.—This court cannot act upon statements made in the opinion of the court of claims as to a fact necessary to support the claim, but must be governed by the averments of the petition.[13]

Matters to Be Shown by Record.—On an appeal from a decree in the court of claims, the record must set out the joinder of issue and the trial of the same, also the evidence, findings, and judgment of the court.[14]

k. *Certiorari.*—Certiorari, being a writ properly used to bring up to the court of error, on an allegation of diminution, outbranches of the record, or other documents and writings in the court below which have not been previously certified or sent, is not a proper thing to be asked for where it is desired to have the court of claims supply certain supposed defects in its conclusions deducible from the evidence before it. The proper method of obtaining such a finding is an order of this court, on motion duly made, directed to the court of claims, requiring it to make return as to the existence or nonexistence of such facts. But this court cannot give the court of claims any directions as to what finding it shall make, or how it shall proceed to make up its finding on the points sought to have certified.[15] Where during the pendency in this court of an appeal from the court of claims, the court of claims has granted a new trial, and the appellee is dismissed on motion of the United States, the cause will not be retained on motion of the appellee, that the proceedings under which the new trial was granted may be brought here by writ of certiorari for re-examination.[16] When a claimant in the court of claims amends his petition by filing a new one in the place of it, and the case is heard on the amended petition only, and on appeal that court sends up only the

10. McClure *v.* United States, 116 U. S. 145, 148, 29 L. Ed. 572. See Burr *v.* Des Moines, etc., Co., 1 Wall. 99, 102, 17 L. Ed. 561.

11. De Groot *v.* United States, 5 Wall. 419, 18 L. Ed. 700.

12. Union Pac. R. Co. *v.* United States, 116 U. S. 154, 158, 29 L. Ed. 584.

13. Johnson *v.* United States, 160 U. S. 546, 40 L. Ed. 529.

14. Clark *v.* United States, 131 U. S. appx. lxxxvi, 18 L. Ed. 916.

15. United States *v.* Adams, 9 Wall. 661, 19 L. Ed. 808.

16. United States *v.* Young, 94 U. S. 258, 24 L. Ed. 153.

amended petition, this court will not issue a writ of certiorari to bring up the original petition.[17]

l. *Grant of New Trial Pending Appeal.*—If, while an appeal is pending in this court from the court of claims, the latter court, assuming to act under authority of § 1088, Revised Statutes, grants a new trial, the United States may ask to dismiss their appeal.[18] Where during the pendency in this court of an appeal from the court of claims, the latter court has granted a new trial, and the appeal is dismissed, the court of claims, by granting a new trial, thereby resumes control of the cause and the party. But the proceedings under which the new trial was obtained are now a part of the record below, and after judgment is finally rendered by the court of claims, the proceedings under which the new trial was obtained may be brought here by appeal for review.[19] The mere making and pendency of a motion in the court of claims, for a new trial, under the act of June 25th, 1868, § 2, is not a sufficient ground for dismissal of an appeal taken to this court prior to the making of such motion. But the granting of such motion, and the order for a new trial, vacating, as it does, the judgment appealed from, is.[20] The power of the court of claims, under the second section of the act of June 25th, 1868, to grant a new trial in favor of the United States, if moved for within two years next after the final disposition of the suit, is not taken away by the affirmance of the judgment on appeal, and the filing in that court of the mandate of affirmance.[21]

m. *Conclusiveness of Judgment.*—It is clear that the judgments of this court, rendered on appeal from the court of claims, if no such power is conferred by an act of congress, are beyond all doubt the final determination of the matter in controversy; and it is equally certain that the judgments of the court of claims, where no appeal is taken to this court, are, under existing laws, absolutely conclusive of the rights of the parties, unless a new trial is granted by that court as provided in the act of congress.[22]

17. Union Pac. R. Co. *v.* United States, 116 U. S. 154, 158, 29 L. Ed. 584.

18. United States *v.* Young, 94 U. S. 258, 24 L. Ed. 153, citing Latham's & Deming's Appeals, 9 Wall. 145, 19 L. Ed. 771; United States *v.* Ayres, 9 Wall. 608, 609, 19 L. Ed. 625; United States *v.* Crusell, 12 Wall. 175, 20 L. Ed. 384; Ex parte Russell, 13 Wall. 664, 20 L. Ed. 632; Ex parte United States, 16 Wall. 699, 21 L. Ed. 507.

In United States *v.* Ayres, 9 Wall. 608, 609, 19 L. Ed. 625, the motion to dismiss was made by the appellee and resisted by the United States; but it was held "that the order granting the new trial has the effect of vacating the former judgment, and to render it null and void;" and the appeal was consequently dismissed. The same principle was recognized in United States *v.* Crusell, 12 Wall. 175, 20 L. Ed. 384; Ex parte Russell, 13 Wall. 664, 20 L. Ed. 632, and Ex parte United States, 16 Wall. 699, 21 L. Ed. 507.

The decision of the court of claims awarding, on the motion of the United States, a new trial, while a claim is pending before it, or on appeal from it, or within two years next after the final disposition of such claim, cannot be reviewed here. "We are all of the opinion that the decision of the court of claims, upon a motion by the United States, within the prescribed jurisdiction, is conclusive, and not subject to review. The claimant must rely upon his appeal from the final judgment upon the merits for protection against wrong under this form of proceeding." Young *v.* United States, 95 U. S. 641, 24 L. Ed. 467.

19. United States *v.* Young, 94 U. S. 258, 24 L. Ed. 153.

20. United States *v.* Ayres, 9 Wall. 608, 19 L. Ed. 625.

21. Ex parte United States, 16 Wall. 699, 21 L. Ed. 507.

22. Ex parte Russell, 13 Wall. 664, 20 L. Ed. 632; United States *v.* O'Grady, 22 Wall. 641, 647, 22 L. Ed. 772.

Where a judgment is recovered against the United States in the court of claims, if a claim of set-off or counterclaim is filed and rejected, the appropriate remedy of the United States is by appeal to the supreme court. But though an appeal to this court in such case would undoubtedly lie, it is not the only remedy left the United States as the court of claims, on motion, might grant a new trial in such a case, if it appears that any fraud, wrong, or injustice has been done the United States. But if the United States does not appeal from the judgment of the court of claims, and if it does not appear that any application in their behalf was made to that court for a new trial, the judgment of the court of claims is a final determination of the matter in

n. *Continuance, Dismissal and Reinstatement.*—A motion to dismiss an appeal from a judgment of the court of claims will be denied when the motion was made upon the sole ground that a motion for a new trial had been made by the United States, and was pending in that court, but afterwards dismissed the same appeal when a new trial had been granted.[23] So, also, a motion to dismiss an appeal from the court of claims, on the ground that since the appeal was taken congress had appropriated the amount necessary to pay the judgment, will be denied, where it appears that the appeal was taken before the right of appeal expired, because it was expressly provided in the act making the appropriation referred to "that none of the judgments herein provided for shall be paid before the right to appeal shall have expired."[24]

A continuance may be granted on an appeal from the court of claims, when there has been a motion made there by the appellant, and yet undisposed of, for a new trial on the ground of after-acquired evidence. "But the court declares that it must not be understood as giving any sanction to the idea that indefinite postponement of final hearing and determination can be obtained by repeated motions for continuance here. The court below, not this court, must determine whether the application for a new trial is seasonably made."[25]

Reinstatement.—In one case after the appeal was dismissed, on motion, for involving too small an amount, the cause was reinstated on the docket, for purpose of special appeal by United States from court of claims, under § 5, act, Mar. 3, 1863.[26]

o. *Mandamus.*—This court may award a writ of mandamus to the court of claims to require that court to hear, entertain and decide a motion made by the petitioner for a new trial, and also to correct the records of that court in certain particulars set forth in the petition.[27]

p. *Mandate.*—Where the mandate of this court is fully complied with by the court of claims, its judgment will be affirmed or the appeal dismissed.[28]

6. Over Territorial Courts—a. *In General.*—The appellate jurisdiction of this court over the territorial courts, as in other cases, is subject to and regulated by the provisions of the acts of congress.[29] The statute approved April 7, 1874, ch. 80, entitled "An act concerning the practice in territorial courts and appeals therefrom, constitutes our only right of review on appeals from the territorial courts.[30]

controversy. United States *v.* O'Grady, 22 Wall. 641, 22 L. Ed. 772.

23. United States *v.* Crusell, 12 Wall. 175, 176, 20 L. Ed. 384, citing United States *v.* Ayres, 9 Wall. 608, 19 L. Ed. 625.

24. United States *v.* Jones, 119 U. S. 477, 30 L. Ed. 440, citing 24 Stat. 282.

25. United States *v.* Crusell, 12 Wall. 175, 20 L. Ed. 384.

26. United States *v.* Alire, 6 Wall. 573, 577, 18 L. Ed. 948.

27. Ex parte Roberts, 15 Wall. 384, 21 L. Ed. 131.

28. United States *v.* Atchison, T. & S. F. R. Co., 154 U. S. 637, 38 L. Ed. 757; United States *v.* New York Indians, 173 U. S. 464, 43 L. Ed. 769.

29. It cannot be disputed that congress has the exclusive power of legislation in and over the territories, and, consequently, that the supreme court has appellate jurisdiction over the courts established therein, "under such regulations as congress may make." Constitution, Art. 3. In the case of Benner *v.* Porter, 9 How. 235, 13 L. Ed. 119, it is said: "The territorial courts were the courts of the General Government, and the records in the custody of their clerks were the records of that government, and it would seem to follow necessarily from the premises that no one could legally take possession or custody of the same without the assent, express or implied, of congress." Freeborn *v.* Smith, 2 Wall. 160, 173, 17 L. Ed. 922.

The right of appeal to this court from the territorial courts is governed by the acts of congress. Simms *v.* Simms, 175 U. S. 162, 44 L. Ed. 115.

A writ of error does not lie from the supreme court of the United States to the general court for the territory northwest of the Ohio. "On the ground that the act of congress had not authorized an appeal or writ of error from the general court of the Northwestern Territory, and, therefore, although from the manifest errors on the face of the record, they felt every disposition to support the writ of error, they were of opinion they could not take cognizance of the case." Clarke *v.* Bazadone, 1 Cranch 212, 2 L. Ed. 85.

30. Armijo *v.* Armijo, 181 U. S. 558, 45 L. Ed. 1000, citing and approving Apache

b. *Under Circuit Court of Appeals Act*—**In General.**—In harmony with previous legislation, 25 Stat. 784, c. 323; 26 Stat. 81, c. 182, § 42, section thirteen of the act of March 3, 1891, provides: "Appeals and writs of error may be taken and prosecuted from the decisions of the United States court in the Indian Territory to the supreme court of the United States, or to the circuit court of appeals in the eighth circuit, in the same manner and under the same regulations as from the circuit or district courts of the United States under this act."[31] An appeal or writ of error lies to this court from or to the decrees or judgments of the supreme court of the territories, except in cases susceptible of being taken to the circuit courts of appeals, and cases where the matter in dispute exclusive of costs does not exceed the sum of five thousand dollars.[32]

Review by Court of Appeals.—By the fifteenth section of the circuit court of appeals act it was provided that the circuit courts of appeals in cases in which the judgments or decrees of those courts were made final by the act, should have the same appellate jurisdiction by writ of error or appeal to review the judgments, orders, and decrees of the supreme courts of the several territories, as by the act they might have to review the judgments, orders, and decrees of the district and circuit courts.[33] No provision is found in the act of 1891 for the review in a circuit court of appeals of the judgment of the supreme court of a territory of the United States in a case of the class the judgment in which, if rendered in a circuit court of appeals, is not final. So that the jurisdiction of this court to review the judgments of the supreme courts of the several territories in that class of cases was the same after as before the passage of that act.[34] The district and circuit courts mentioned in the 15th section of the act of March 3, 1891, giving the circuit courts of appeals, in cases in which their judgments are final, the same jurisdiction to review the judgments of the supreme courts of the territories assigned to the respective circuits as they have "to review the judgments, orders and decrees of the district courts and circuit courts, "manifestly belong to the

County *v.* Barth, 177 U. S. 538, 541, 44 L. Ed. 878; Grayson *v.* Lynch, 163 U. S. 468, 473, 41 L. Ed. 230.

The act, approved April 7, 1874, ch. 80, provides that: "'Instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the supreme court, together with the transcript of the proceedings and judgment or decree,' etc." Armijo *v.* Armijo, 181 U. S. 558, 561, 45 L. Ed. 1000.

31. Folsom *v.* United States, 160 U. S. 121, 124, 40 L. Ed. 363.

32. Shute *v.* Keyser, 149 U. S. 649, 37 L. Ed. 884; Aztec Min. Co. *v.* Ripley, 151 U. S. 79, 81, 38 L. Ed. 80.

The act of March 3, c. 517, transferring to the circuit courts of appeals the appellate jurisdiction from the supreme courts of the territories in cases founded on diversity of citizenship, or arising under the patent, revenue or criminal laws, or in admiralty, has not otherwise affected the appellate jurisdiction of this court from the territorial courts. 26 Stat. 828, 830; Shute *v.* Keyser, 149 U. S. 649, 37 L. Ed. 884; Aztec Min. Co. *v.* Ripley, 151 U. S. 79, 38 L. Ed. 80. Simms *v.* Simms, 175 U. S. 162, 164, 44 L. Ed. 115.

Review by supreme court.—There was no provision for appeals or writs of error in cases not made final by § 6 from the supreme courts of the territories to the circuit courts of appeals, and there was no express repeal of the provisions of the prior acts regulating appeals or writs of error in such other cases from those courts to this, there is nothing to indicate an intention that the judgments and decrees of the supreme courts of the territories should not be susceptible of review in the class of cases in which there was no appeal or writ of error to the circuit courts of appeals. The result is that, as the acts regulating appeals or writs of error from or to the supreme courts of the territories to or from this court were not repealed, except to the extent specified, an appeal or writ of error lies to this court from the judgments or decrees of those courts, except in cases where the judgments of the circuit courts of appeals are made final. Shute *v.* Keyser, 149 U. S. 649, 650, 37 L. Ed. 884.

33. Shute *v.* Keyser, 149 U. S. 649, 650, 37 L. Ed. 884; Aztec Min. Co. *v.* Ripley, 151 U. S. 79, 80, 38 L. Ed. 80.

34. Shute *v.* Keyser, 149 U. S. 649, 37 L. Ed. 884; Royal Ins. Co. *v.* Martin, 192 U. S. 149, 159, 48 L. Ed. 385, reaffirmed in Rosales Cueli *v.* Rodriguez, 198 U. S. 581, 49 L. Ed. 1172; Garrozi *v.* Dastas, 204 U. S. 64, 51 L. Ed. 369; Plymouth Cordage Co. *v.* Smith, 194 U. S. 311, 314, 48 L. Ed. 992.

class of courts for which provision is made in the third article of the constitution, namely, constitutional courts, in which the judicial power conferred by the constitution on the general government can be deposited, and the judges of which are entitled, by the constitution, to receive at stated times a compensation for their services that cannot be diminished during their continuance in office, are removable from office only by impeachment, and hold, beyond the power of congress to provide otherwise, during good behavior.[35]

Assignment to Circuits.—Congress contemplated that the final orders and decrees of the courts of last resort in the organized territories of the United States—by whatever name those courts were designated in legislative enactments—should be reviewed by the proper circuit court of appeals, leaving to this court the assignment of the respective territories among the existing circuits.[36] The only limitation upon the exercise of this power by this court is found in § 13 of the act of 1891, authorizing appeals and writs of error to be taken and prosecuted to the circuit court of appeals of the eighth circuit from the decisions of the United States court in the Indian Territory. But this exception rests upon grounds peculiarly applicable to the Indian Territory, because of the character of its population, and its relation to the eighth circuit and does not at all militate against the conclusion that congress meant by the words "the supreme courts of the several territories," in the fifteenth section of the act of 1891, the highest courts or the courts of last resort in the territories, by whatever name they happen to be designated in the acts creating them.[37]

Decisions Reviewable.—In General.—This section only applies to cases in which the judgments or decrees of the circuit court of appeals are made final by the act.[38]

Criminal Cases.—Therefore, the 15th section cannot be construed so as to carry appellate jurisdiction over capital cases or cases of infamous crimes to the circuit courts of appeals, and so enlarge that jurisdiction into something other and different from "the same appellate jurisdiction" as is exercised in reviewing the judgments of district and circuit courts under § 6 of the act.[39] Since the

35. American Ins. Co. *v.* Canter, 1 Pet. 511, 546, 7 L. Ed. 242; Benner *v.* Porter, 9 How. 235, 242, 13 L. Ed. 119; Clinton *v.* Englebrecht, 13 Wall. 434, 447, 20 L. Ed. 659; Hornbuckle *v.* Toombs, 18 Wall. 648, 655, 21 L. Ed. 966; Good *v.* Martin, 95 U. S. 90, 98, 24 L. Ed. 341; Reynolds *v.* United States, 98 U. S. 145, 154, 25 L. Ed. 244; The City of Panama, 101 U. S. 453, 465, 25 L. Ed. 1061; Steamer Coquitlam *v.* United States, 163 U. S. 346, 351, 41 L. Ed. 184.

36. Steamer Coquitlam *v.* United States, 163 U. S. 346, 352, 41 L. Ed. 184.

37. Steamer Coquitlam *v.* United States, 163 U. S. 346, 352, 41 L. Ed. 184.

38. Shute *v.* Keyser, 149 U. S. 649, 650, 37 L. Ed. 884; Royal Ins. Co. *v.* Martin, 192 U. S. 149, 160, 48 L. Ed. 385.

But where the case was not a case in admiralty, nor a case arising under the criminal, revenue, or patent laws of the United States, nor a case between aliens and citizens of the United States, or between citizens of different states, it does not belong to either of the classes defined by § 6 of that act, as cases in which the judgments or decrees of the circuit courts of appeals should be final, and therefore the circuit court of appeals for the eighth circuit properly declines to take jurisdiction. Aztec Min. Co. *v.* Ripley, 151 U. S. 79, 80, 38 L. Ed. 80.

39. Folsom *v.* United States, 160 U. S. 121, 40 L. Ed. 363.

It is said that this involves the absurdity that convictions for minor offenses are reviewable on a second appeal, while convictions for capital and infamous crimes are not. Doubtless in some cases where the language of a statute leads to an absurdity, hardship, or injustice, presumably not intended, a construction may be put upon it modifying the meaning of the words so as to carry out the real intention, but where the intention is plain it is the duty of the court to expound the statute as it stands. As far as congress went in conferring this right to a second appeal, the intention is clear and the language used unambiguous. The objection really is that congress should have gone farther and given by this act a second review in this court in cases of convictions of capital and infamous crimes in the territories. Folsom *v.* United States, 160 U. S. 121, 127, 40 L. Ed. 363.

In Aztec Min. Co. *v.* Ripley, 10 U. S. App. 383, the circuit court of appeals for the eighth circuit held that it had no jurisdiction under the fifteenth section, because the case at bar did not come within

passage of the circuit court of appeals act, an appeal will still lie to this court from the supreme court of the territory in a suit brought by private individuals against a sheriff and others to enjoin the threatened sale of property claimed by the plaintiff under an execution issued on a judgment against a third party, when the matter in dispute exceeds $5,000.[40]

New Mexico.—The circuit court of appeals for the eighth circuit has no jurisdiction of a writ of error to review the judgment and proceedings of the supreme court of the territory of New Mexico in the instance of a conviction of an infamous crime.[41]

Bankruptcy cases arising in the district courts of the territory of Oklahoma are reviewable by the circuit court of appeals of the eighth circuit, in matters of law.[42]

Review of Decisions of District Court of Alaska.—The circuit court of appeals for the ninth circuit cannot review the final judgments or decrees of the Alaska district court in virtue of its appellate jurisdiction over the district and circuit courts mentioned in the act of March 3, 1891. But such appellate jurisdiction may be exercised in virtue of the general authority conferred by the fifteenth section of the act of 1891 upon the circuit court of appeals to review the judgments of the supreme court of any territory assigned to such circuit by this court.[43] Congress meant by the words "the supreme courts of the several territories" in the 15th section of the act of 1891, the highest courts or courts of last resort in the territories by whatever name they happen to be designated in the acts creating them. Accordingly: "The district court of Alaska is to be regarded as the supreme court of that territory within the meaning of the fifteenth section of the act of March 3, 1891, and of the order of this court assigning Alaska to the ninth circuit; and, consequently, that the decree of the district court of Alaska is subject to review by the circuit court of appeals of that circuit."[44]

c. *Over the Indian Territory.*—**In General.**—The acts of congress establishing a United States court for Indian Territory, and defining its jurisdiction, clearly provide that writs of error in criminal cases shall be taken to the appellate court of the United States for the Indian Territory.[45]

any one of the classes of cases wherein the judgments of that court were declared to be final, and its judgment dismissing the writ of error on that ground was affirmed by this court, while it was at the same time pointed out that as the value of the matter in dispute did not reach five thousand dollars, we could not take jurisdiction of the particular case. Aztec Min. Co. *v.* Ripley, 151 U. S. 79, 38 L. Ed. 80; Folsom *v.* United States, 160 U. S. 121, 125, 40 L. Ed. 363.

In Shute *v.* Keyser, 149 U. S. 649, which was a case not falling within either of the classes in which the judgments of the circuit courts of appeals were made final by the act of March 3, 1891, we held that as there was no provision by the fifteenth section of that act for appeals or writs of error except to the circuit courts of appeals in cases in which their judgments were made final, and no express repeal of the provisions of the prior acts regulating appeals or writs of error from the supreme courts of the territories in other cases, that an appeal or writ of error lay to this court from the judgments or decrees of those courts in such other cases. Folsom *v.* United States, 160 U. S. 121, 125, 40 L. Ed. 363.

40. Shute *v.* Keyser, 149 U. S. 649, 37 L. Ed. 884.

41. Folsom *v.* United States, 160 U. S. 121, 40 L. Ed. 363.

42. Plymouth Cordage Co. *v.* Smith, 194 U. S. 311, 48 L. Ed. 992.

43. Steamer Coquitlam *v.* United States, 163 U. S. 346, 351, 41 L. Ed. 184; Thorp *v.* Bonnifield, 168 U. S. 703, 42 L. Ed. 1211.

44. Steamer Coquitlam *v.* United States, 163 U. S. 346, 41 L. Ed. 184; Thorp *v.* Bonnifield, 168 U. S. 703, 42 L. Ed. 1121.

45. Brown *v.* United States, 171 U. S. 631, 634, 43 L. Ed. 312.

"The decisions of the court of appeals of the United States in the Indian Territory are final except so far as they are made subject to review by some express provision of law." Brown *v.* United States, 171 U. S. 631, 637, 43 L. Ed. 312.

"In the eleventh section of the act of March 1, 1895, it is provided that 'appeals and writs of error from the final decision of said appellate court shall be allowed, and may be taken to the circuit court of appeals for the eighth judicial circuit in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States;' but

The act of March 1, 1895, created a court of appeals in the Indian Territory, with such superintending control over the courts in that Territory as the supreme court of Arkansas possessed over the courts of that state by the laws thereof; and the act also provided that "writs of error and appeals from the final decisions of said appellate court shall be allowed, and may be taken to the circuit court of appeals for the eighth judicial circuit in the same manner and under the same regulations as appeals are taken from the circuit courts of the United States," which necessarily deprived that court of jurisdiction of appeals from the Indian Territory trial court under § 13 of the act of 1891.[46]

Over Capital Cases.—Jurisdiction conferred on the supreme court by the acts of February 6, 1889 and March 3, 1891 has been superseded, so far as its jurisdiction relates to capital cases from the United States court for the northern district of the Indian Territory; the act of March 1st, 1895, giving jurisdiction to the appellate court of the United States is exclusive.[47] The supreme court has no appellate jurisdiction of capital cases from the United States court for the northern district of the Indian Territory; such appellate jurisdiction is vested exclusively in the United States court of appeals in the Indian Territory.[48]

The language of the act of July 1, 1898, is as follows: "Appeals shall be allowed from the United States courts in the Indian Territory direct to the supreme court of the United States to either party, in all citizenship cases, and in all cases between either of the five civilized tribes and the United States involving the constitutionality or validity of any legislation affecting citizenship, or the allotment of lands in the Indian Territory, under the rules and regulations governing appeals to said court in other cases: Provided, that appeals in cases decided prior to this act must be perfected in one hundred and twenty days from its passage; and in cases decided subsequent thereto, within sixty days from final judgment; but in no such case shall the work of the commission to the five civilized tribes be enjoined or suspended by any proceeding in, or order of, any court, or of any judge, until after final judgment in the supreme court of the United States. In cases of appeals, as aforesaid, it shall be the duty of the supreme court to advance such cases on the docket and dispose of the same as early as possible."[49]

This statute was intended to operate retrospectively, but that fact does not render it void. And besides the whole case is not open to adjudication under this statute, as was the case under § 5 of the act of March 3, 1891, but the appeal is restricted to the constitutionality and validity of the legislation.[50]

The appeal granted by the Indian appropriation act of July 1, 1898, 30 Stat. 591, c. 545, in allowing the remedy of appeal to the supreme court of the United States from the United States courts in the Indian Territory, was intended to extend only to the constitutionality or validity of the legislation af-

it is not claimed by the counsel for the plaintiff in error that this provision applies to capital cases. And see the case of Folsom *v.* United States, 160 U. S. 121, 40 L. Ed. 363." Brown *v.* United States, 171 U. S. 631, 637, 43 L. Ed. 312.

"In Stephens *v.* Cherokee Nation, 174 U. S. 445, 43 L. Ed. 1041, we thought it unnecessary to determine whether the effect of the act of 1895 was to render the thirteenth section of the act of 1891 wholly inapplicable, as the judgments of the United States courts in the Indian Territory in the cases there considered were made final below by the act of 1896, and the appeals were regarded as having been in terms granted from those judgments by the act of 1898. But this case is not affected by the act of 1898, and we are of opinion that it does not come within the thirteenth section of the act of 1891." Ansley *v.* Ainsworth, 180 U. S. 253, 260, 45 L. Ed. 517.

46. Ansley *v.* Ainsworth, 180 U. S. 253, 259, 45 L. Ed. 517.

47. Brown *v.* United States, 171 U. S. 631, 43 L. Ed. 312.

48. Binyon *v.* United States, 195 U. S. 623, 49 L. Ed. 349; Ansley *v.* Ainsworth, 180 U. S. 253, 45 L. Ed. 517, citing and approving Brown *v.* United States, 171 U. S. 631, 43 L. Ed. 312.

49. Stephens *v.* Cherokee Nation, 174 U. S. 445, 479, 43 L. Ed. 1041.

50. Stephens *v.* Cherokee Nation, 174 U. S. 445, 479, 43 L. Ed. 1041; Ansley *v.* Ainsworth, 180 U. S. 253, 45 L. Ed. 517.

fecting citizenship or allotment of land in the Indian Territory.[51] An appeal does not lie directly to the supreme court of the United States from a decree of the United States court in the Indian Territory in a case involving the constitutionality of an act of Congress, but which is not affected by the Indian appropriation act of July 1, 1898. In accordance with the legislation subsequent to 1891, the appeal should have been prosecuted to the court of appeals in the Indian Territory.[52]

d. *Over the Territory of Hawaii.*—The act of April 30, 1900, providing a government for the territory of Hawaii, c. 339, 31 Stat. 141, enacts (§ 86) that "The laws of the United States relating to appeals, writs of error, removal of causes, and other matters and proceedings as between the courts of the United States and the courts of the several states shall govern in such matters and proceedings as between the courts of the United States and the courts of the territory of Hawaii."[53]

Source of Jurisdiction.—It follows that the jurisdiction of the supreme court to review judgments of the courts of the territory of Hawaii is more restricted than is the jurisdiction to review the judgments of the courts of other organized territories, and is to be measured by the power to review judgments of state courts.[54]

Construction of Act of 1900.—No order of the supreme court, assigning the territory of Hawaii to a judicial circuit under the act of 1891, can give a right of appeal inconsistent with the provision of § 86 of the act of 1900 restricting such appeals to cases in which by the laws of the United States they are allowable to the courts of the United States from the courts of the several states.[55] The act of congress of 1900 contains no provision authorizing an appeal from the supreme court of the territory of Hawaii to the United States circuit court of appeals for the ninth circuit in an admiralty case pending in the courts of the republic of Hawaii at the time that congress by the act of April 30, 1900, c. 339, provided a government for the territory of Hawaii, establishing therein a supreme court and other courts and enacting in § 10, that "all actions at law, suits in equity, and other proceedings, then pending in the courts of the republic of Hawaii, shall be carried on to final judgment and execution in the corresponding courts of the territory of Hawaii." "The fact that in a state cases in admiralty cannot be brought in its courts, but only in the courts of the United States, affords no reason for implying that congress, without any language expressing such an intention, meant to vest in any court of the United States either original or appellate jurisdiction in cases in admiralty pending in the courts of Hawaii when this act of congress took effect."[56]

Amount in Controversy.—The act of March 3, 1905, c. 1465, § 3 provides that writs of error and appeals may be taken from the supreme court of the territory of Hawaii to the supreme court of the United States in all cases where the amount involved, exclusive of costs, exceeds the sum or value of $5,000.[57]

Retrospective Operation of Statute.—But if at the time of final judgment

51. Ansley *v.* Ainsworth, 180 U. S. 253, 259, 45 L. Ed. 517, citing and approving Stephens *v.* Cherokee Nation, 174 U. S. 445, 43 L. Ed. 1041.

52. Ansley *v.* Ainsworth, 180 U. S. 253, 45 L. Ed. 517.

Whether an appeal lies to the supreme court of the United States from the court of appeals of the Indian Territory in cases involving the constitutionality of an act of congress, which are not affected by the Indian appropriation act of July 1, 1898, is a question not decided in Ansley *v.* Ainsworth, 180 U. S. 253, 45 L. Ed. 517.

53. Equitable, etc., Assur. Soc *v.* Brown, 187 U. S. 308, 309, 47 L. Ed. 190, reaffirmed in Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171.

54. Rev. Stat., § 709; Ex parte Wilder's Steamboat Co., 183 U. S. 545, 46 L. Ed. 321; Equitable, etc., Assur. Soc. *v.* Brown, 187 U. S. 308, 309, 47 L. Ed. 190, reaffirmed in Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171.

55. Ex parte Wilder's Steamboat Co., 183 U. S. 545, 552, 46 L. Ed. 321.

56. Ex parte Wilder's Steamship Co., 183 U. S. 545, 46 L. Ed. 321.

57. Harrison *v.* Magoon, 205 U. S. 501, 51 L. Ed. 900.

in the supreme court of Hawaii there was no right of appeal whatever, a party cannot evoke a new one by filing a petition for rehearing after the passage of this act. And although the petition for rehearing was entertained and acted upon by the supreme court of the territory after the statute went into effect, the subsequent statute does not apply.[58]

e. *Effect of Admission of Territory as State*—(1) *In Absence of Statute.*—Where a case is brought to this court from a territorial court and is pending in this court at the time the territory is admitted as a state, the writ of error will necessarily abate for the obvious reason that there is no court in existence to which the mandate of this court could be sent to carry into effect our judgment, were we to consent to a review of the case; our power, therefore, would be incomplete and ineffectual.[59] But it has been held, that where a judgment was rendered by the supreme court for Iowa territory and the record certified to this court by the supreme court of the state of Iowa, after her admission into the Union, and the subject matter is within the jurisdiction of this court, it will take jurisdiction over the case on the ground that no mandate is required to give effect to the judgment of this court.[60] It would seem to be altogether unreasonable that the judgments of territorial courts in mere matters of procedure, should be subject to reversal, because of decisions made by the courts of the state in subsequent cases, where the former cases were pending on appeal in this court.[61]

(2) *Statutory Provisions.*—**In General.**—When congress has passed an act admitting a territory into the Union as a state, but omitting to provide, by such act, for the disposal of cases pending in this court on appeal or writ of error, it may constitutionally and properly pass a subsequent act making such provision for them.[62]

The Revised Statutes provide that in all cases where the judgment or decree of any court of a territory might be reviewed by the supreme court on writ of error or appeal, such writ of error or appeal may be taken, within the time and in the manner provided by law, notwithstanding such territory has, after such judgment or decree, been admitted as a state; and the supreme court shall direct the mandate to such court as the nature of the writ of error or appeal requires.[63]

The act of 22d of February, 1848, ch. 12, which provides for cases pending in the supreme or superior court of any territory thereafter admitted as a state, made no provision for cases pending in this court on writ of error or appeal from a territorial court. In the case just mentioned, it requires the concurrent legis-

58. Harrison *v.* Magoon, 205 U. S. 501, 51 L. Ed. 900.

59. McNulty *v.* Batty, 10 How. 72, 13 L. Ed. 333, 334, reaffirmed in Preston *v.* Bracken, 10 How. 81, 13 L. Ed. 336; Hunt *v.* Palao, 4 How. 589, 11 L. Ed. 1115, and distinguished in Bird *v.* United States, 187 U. S. 118, 124, 47 L. Ed. 100.

Where a case had been brought up to this court from the supreme court of the territory of Wisconsin, and was pending in this court at the time when Wisconsin was admitted as a state, it was held, that the appeal would abate. McNulty *v.* Batty, 10 How. 72, 13 L. Ed. 333; Preston *v.* Bracken, 10 How. 81, 13 L. Ed. 336.

Upon the admission of Florida as a state, the records of the former territorial court of appeals were directed by a law of the state to be deposited for safekeeping with the clerk of the supreme court of the state. No writ of error can be issued to bring up a record thus situated, the territorial court being defunct, and the supreme court of the state not holding the records as part of its own records, nor exercising judicial power over them. Nor could a law of the state have declared the records of a court of the United States to be a part of the records of its own state court, nor have authorized any proceedings upon them. If the record were to be brought up under the fourteenth section of the act of 1789, it would be of no avail, because there is no court to which the mandate of this court could be transmitted. Hunt *v.* Palao, 4 How. 589, 11 L. Ed. 1115.

60. Webster *v.* Reid, 11 How. 437, 13 L. Ed. 761.

61. Ankeny *v.* Clark, 148 U. S. 345, 354, 37 L. Ed. 475, distinguishing Stutsman County *v.* Wallace, 142 U. S. 293, 35 L. Ed. 1018.

62. Freeborn *v.* Smith, 2 Wall. 160, 17 L. Ed. 922.

63. Rev. Stat., § 703. See Koenigsberger *v.* Richmond Silver Min. Co., 158 U. S. 41, 39 L. Ed. 889.

lation of congress and the state legislature, in cases of appellate state jurisdiction, to transfer such cases from the old to the new government.[64] By § 22, in all cases pending in this court, on appeal or writ of error, from the supreme court of the territory, at the time of the admission of the state into the Union, and afterwards decided and a mandate therein sent down by this court, the circuit or district court of the United States, or the supreme court of the state, "as the nature of the case may require," is declared to be the successor of the supreme court of the territory. This phrase, "as the nature of the case may require," would seem to treat the circuit or district court of the United States as the successor of the supreme court of the territory in all cases of federal jurisdiction, whether by reason of the subject matter, or of the parties.[65]

And congress may authorize this court to issue a mandate to a state court, even in a mere matter of state jurisdiction, for the same reason that this court may issue its mandate in cases where we have jurisdiction under 709 of the Revised Statutes; because we have jurisdiction to hear and decide the case.[66]

f. *Over Particular Proceedings*—(1) *In Criminal Cases.*—**In General.**—Under the various statutes passed by congress, regulating the review by this court of judgments or decrees of territorial courts, it has been held, upon an exhaustive review of the decisions, that this court has no jurisdiction on appeal in criminal cases from the territory.[67]

64. Freeborn *v.* Smith, 2 Wall. 160, 174, 17 L. Ed. 922; Benner *v.* Porter, 9 How. 235, 13 L. Ed. 119.

"Another objection was taken upon the motion to dismiss. It was insisted, that, Iowa having been admitted into the Union as a state since the writ of error brought, the act of 1838, regulating its judicial proceedings as a territory, is necessarily abrogated and repealed; and consequently there is no law now in force authorizing this court to re-examine and affirm or reverse a judgment rendered by the supreme court of the territory, or giving this court any jurisdiction over it. This difficulty has, however, been removed by an act of congress, passed during the present session (and since this motion was made), which authorizes the supreme court to proceed to hear and determine cases of this description." Sheppard *v.* Wilson, 5 How. 210, 212, 12 L. Ed. 120, 121.

Where a case had been brought up to this court from the supreme court of the territory of Wisconsin, and was pending in this court at the time when Wisconsin was admitted as a state, the jurisdiction of this court over it ceased when such admission took place. Provision was made in the act of congress for the transfer, from the territorial courts to the district court of the United States, of all cases appropriate to the jurisdiction of the new district court; but none for cases appropriate to the jurisdiction of state tribunals. By the admission of Wisconsin as a state, the territorial government ceased to exist, and all the authority under it, including the laws organizing its courts of justice and providing for a revision of their judgments in this court. The act of congress passed in February, 1848, supplementary to that of February, 1847, applies only to cases which were pending in the territorial courts, and does not include such as were pending in this court at the time of the admission of Wisconsin as a state. Even if congress had directed the transfer, to the district court of the United States, of cases appropriate to the jurisdiction of state courts, this court could not have carried its judgment into effect by a mandate to the district court. McNulty *v.* Batty, 10 How. 72, 13 L. Ed. 333, reaffirmed in Preston *v.* Bracken, 10 How. 81, 13 L. Ed. 336.

65. Koenigsberger *v.* Richmond Silver Min. Co., 158 U. S. 41, 49, 39 L. Ed. 889.

66. Freeborn *v.* Smith, 2 Wall. 160, 17 L. Ed. 922.

67. Farnsworth *v.* Montana, 129 U. S. 104, 32 L. Ed. 616, citing Snow *v.* United States, 118 U. S. 346, 30 L. Ed. 207; Watts *v.* Washington Territory, 91 U. S. 580, 23 L. Ed. 328.

There is no authority for the review by this court of the decision of the supreme court of the territory of Montana, in a criminal case. Farnsworth *v.* Montana, 129 U. S. 104, 109, 32 L. Ed. 616.

As to each of the territories, except Washington, the Revised Statutes provided that final judgments and decrees of its supreme court, where the value of the matter in dispute exceeded $1,000, might be reviewed by this court, upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a circuit court of the United States. Rev. Stat., §§ 702, 1909. The act of June 23, 1874, c. 469, § 3, provided that a writ of error should lie from this court to the supreme court of the territory of Utah, "in criminal cases, where the accused shall have been sen-

Territory of Washington.—This court can only review the final judgments of the supreme court of the territory of Washington in criminal cases, when the constitution or a statute or treaty of the United States is drawn in question.[68]

Territory of Utah.—A writ of error will not lie from this court to the supreme court of the territory of Utah to review the judgments of that court affirming the judgment of the lower court of that territory, rendered on a conviction of the plaintiff in error on indictments found under § 3 of the act of March 22, 1882. 22 Stat. 31, for cohabiting with more than one woman.[69] But a writ of error from this court to the supreme court of the territory of Utah is allowed by § 3 of the act of Congress of June 23, 1874 (18 Stat. 254), in criminal cases, where the accused has been sentenced to capital punishment or convicted of bigamy or polygamy.[70]

Oklahoma Territory.—A decision of the supreme court of the territory of Oklahoma in a capital case is not reviewable by the supreme court of the United States, because there is no statute giving appellate jurisdiction to this court over the judgments of the supreme court of Oklahoma in capital cases.[71]

Territory of Florida.—The act of Congress passed on the 22d of February, 1847 (Sess. Laws, 1847, Ch. 17), providing that certain cases might be brought up from the territorial courts of Florida to this court, included all cases, whether of civil or criminal jurisdiction. Under this act, this court can revise a judgment of the superior court of the district of West Flordia in a criminal case, which originated in October, 1845, and was transferred to the district court of the United States for the northern district of Florida.[72]

(2) *In Habeas Corpus Proceedings.*—The Revised Statutes of the United States conferred on this court jurisdiction, upon writ of error or appeal, to review and reverse or affirm the final judgments and decrees of the supreme courts of any territory except Washington, "in cases where the value of the matter in dispute" (or as elsewhere described, "where the value of the property or the amount in controversy"), "to be ascertained by the oath of either party, or of other

tenced to capital punishment, or convicted of bigamy or polygamy." 18 Stat. 254. The act of March 3, 1885, c. 355, provided, in § 1, that no appeal or writ of error should be allowed from the supreme court of a territory unless the matter in dispute exceeded $5,000; and in § 2 that the preceding section should not apply to any case "in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute." 23 Stat. 443. At October term, 1885, this court, without objection, decided upon the merits a writ of error to the supreme court of the territory of Utah by one convicted of a crime which was neither bigamy or polygamy, nor punishable with death. But at the same term, after argument upon its jurisdiction of a like writ of error, the court dismissed both writs of error, and, in answering the objection that it had taken jurisdiction of the first writ, said: "The question of jurisdiction was not considered in fact in that case, nor alluded to in the decision, nor presented to the court by the counsel for the United States, nor referred to by either party at the argument or in the briefs. Probably both parties desired a decision on the merits." Cannon *v.* United States, 116 U. S. 55, 29 L. Ed. 561, and 118 U. S. 355, 29 L. Ed. 561; Snow *v.* United States, 118 U. S. 346, 354, 30 L. Ed. 207. The question whether the provision of the act of March 3, 1885, c. 355, § 2, authorizing a writ of error from this court to the supreme court of any territory in any case "in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States," extended to criminal cases, was then left open, but at October term, 1888, was decided in the negative. Farnsworth *v.* Montana, 129 U. S. 104, 32 L. Ed. 616; United States *v.* Sanges, 144 U. S. 310, 319, 320, 36 L. Ed. 445.

68. Watts *v.* Washington Territory, 91 U. S. 580, 23 L. Ed. 328.

69. Snow *v.* United States, 118 U. S. 346, 30 L. Ed. 207, reaffirmed in Cannon *v.* United States, 116 U. S. 55, 29 L. Ed. 561.

70. Wiggins *v.* People, etc., in Utah, 93 U. S. 465, 23 L. Ed. 941.

71. New *v.* Oklahoma, 195 U. S. 252, 49 L. Ed. 182, citing Folsom *v.* United States, 160 U. S. 121, 40 L. Ed. 363, and explaining Queenan *v.* Oklahoma, 190 U. S. 548, 47 L. Ed. 1175.

72. Forsythe *v.* United States, 9 How. 571, 13 L. Ed. 262, reaffirmed in Simpson *v.* United States, 9 How. 578, 13 L. Ed. 265; Cotton *v.* United States, 9 How. 579, 13 L. Ed. 265.

competent witnesses, exceeds one thousand dollars," and in the territory of Washington, two thousand dollars; and also in all cases in any territory, arising under the constitution and laws of the United States, or in which the constitution or a statute or treaty of the United States is brought in question; and in all cases upon writs of habeas corpus involving the question of personal freedom.[73] By the act of March 3, 1885, c. 355, except in cases in which is involved the validity of a patent or a copyright, or in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, "no appeal or writ of error shall hereafter be allowed from any judgment or decree, in any suit at law or in equity, in the supreme court of the District of Columbia, or in the supreme court of any of the territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars." 23 Stat. 443. This act has not repealed the provision of the Revised Statutes giving an appeal from the supreme court of a territory in cases of habeas corpus.[74] Therefore, appeals lie to this court from final orders of the supreme courts of the territories on habeas corpus.[75]

Section 1909 of the Revised Statutes substantially re-enacting provisions of earlier acts, and providing that writs of error and appeals from the final decisions of the supreme courts of certain territories shall be allowed to this court in the same manner and under the same regulations as from the circuit courts of the United States, "where the value of the property or the amount in controversy exceeds one thousand dollars, except that a writ of error or appeal shall be allowed" to this court from the decisions of the courts or judges of the territory "upon writs of habeas corpus involving the question of personal freedom," clearly implies that writs of habeas corpus would not be included if not specially mentioned.[76] But that this section of the statute does not permit appeals from all cases in which the writ is issued is manifest in the use of language in the act, specifically limiting the right of review in this court to cases of writs which involve the question of personal freedom.[77]

(3) *Findings of Court.*—**In General.**—In the absence of assignments of er-

73. Revised Statute, §§ 702, 1909, 1911. Simms *v.* Simms, 175 U. S. 162, 164, 44 L. Ed. 115.

74. Gonzales *v.* Cunningham, 164 U. S. 612, 41 L. Ed. 572; Simms *v.* Simms, 175 U. S. 162, 164, 44 L. Ed. 115.

This result is not affected by the judiciary act of March 3, 1891, c. 517, 26 Stat. 826. Shute *v.* Keyser, 149 U. S. 649, 37 L. Ed. 884; Folsom *v.* United States, 160 U. S. 121, 40 L. Ed. 363; In re Lennon, 150 U. S. 393, 37 L. Ed. 1120; In re Heath, 144 U. S. 92, 36 L. Ed. 358; Gonzales *v.* Cunningham, 164 U. S. 612, 621, 41 L. Ed. 572.

75. Gonzales *v.* Cunningham, 164 U. S. 612, 616, 41 L. Ed. 572, distinguishing the cases holding that there was no jurisdiction in such cases on appeal from the courts of the District of Columbia; New York Foundling Hospital *v.* Gatti, 203 U. S. 429, 437, 51 L. Ed. 257.

"The supreme court of New Mexico declined to allow an appeal in this case because of the rule laid down in Cross *v.* Burke, and in In re Lennon, supra, and it may be admitted that the view that an appeal would not lie might well have been entertained. But we think that the legislation in respect of the review of the final orders of the territorial supreme courts on habeas corpus so far differs from that in respect of the judgments of the courts of the District of Columbia that a different rule applies." Gonzales *v.* Cunningham, 164 U. S. 612, 618, 41 L. Ed. 572.

Indeed, it was distinctly ruled in In re Snow, 120 U. S. 274, 30 L. Ed. 658, that an appeal would lie under § 1909 from a final order entered in 1886 on habeas corpus by the supreme court of the territory of Utah; and this notwithstanding the act of March 3, 1885, c. 355; which was quoted and referred to in Snow *v.* United States, 118 U. S. 346, 30 L. Ed. 207. Jurisdiction was also entertained of such an appeal in In re Neilsen, 131 U. S. 176, 33 L. Ed. 118, from a final order of a district court of the territory of Utah, and in In re Delgado, 140 U. S. 586, 35 L. Ed. 578, from a final order of a district court of New Mexico. Gonzales *v.* Cunningham, 164 U. S. 612, 620, 41 L. Ed. 572.

76. Potts *v.* Chumasero, 92 U. S. 358, 23 L. Ed. 499; Elgin *v.* Marshall, 106 U. S. 578, 580, 27 L. Ed. 249; Curtis on U. S. Courts, 65; Kurtz *v.* Moffitt, 115 U. S. 487, 497, 29 L. Ed. 458.

77. New York Foundling Hospital *v.* Gatti, 203 U. S. 429, 437, 51 L. Ed. 257.

What is "question of personal freedom."—Under § 1909 of the Revised Statutes,

ror or exceptions taken, this court has no authority to review findings of the territorial court in an action in which the jury has been waived and the trial had by the court.[78]

Waiver of Jury.—A proceeding under the act of February 25, 1885, 23 Stat. 321, giving the district attorney authority to institute a civil suit in the proper territorial district court, against anyone in unlawful occupancy of public lands, is not a common-law action, but a summary proceeding more in the nature of a suit in equity, and may be reviewed by this court although it is tried without the intervention of a jury, and without a stipulation waiving a trial by jury. The case is not governed by § 649 of the Revised Statutes, but by the territorial statutes; which provide for a waiver by oral consent in open court of a trial by jury, in actions arising on contracts, or with the assent of the court in other cases.[79]

Effect of Failure to Find Facts.—Although the record does not show any findings of fact by the territorial court, yet as the order for the judgment necessarily implies that the facts were found by the court upon which the order was made, and if the omission was probably a mistake of the copyist in making the transcript, this court will pass by this omission, and permit the party who defends the ruling below to supply the defect.[80] Where it appears that the case was before the supreme court of the Territory of Oklahoma the second time, and in its opinion it referred to and adopted its former opinion in which it had made a full statement and findings of fact, and objection that the court below found no facts upon which a review could be had in this court is untenable.[81]

which provides that a writ of error or appeal shall be allowed to the supreme court of the United States from decisions of either of the territories of New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana and Wyoming, or of any judge thereof, or of the district courts created by this title, upon writs of habeas corpus involving the question of personal freedom, it was held, that an appeal would not lie from an order awarding the custody of an infant child of the petitioner because such cases are not decided on the legal right of the petitioner to be relieved from unlawful imprisonment or detention, as in the case of an adult, but upon the court's view of the best interests of those whose welfare requires that they be in custody of one person or another. In such cases the question of personal freedom is not involved except in the sense of a determination as to which custodian shall have charge of one not entitled to be freed from restraint. New York Foundling Hospital *v.* Gatti, 203 U. S. 429, 439, 51 L. Ed. 257.

78. Fox *v.* Haarstick, 156 U. S. 674, 39 L. Ed. 576.

79. "The proceeding contemplated by this act is more nearly analogous to the summary remedies provided for the enforcement of mechanics' liens considered by this court in Idaho, etc., Land Co. *v.* Bradbury, 132 U. S. 509, 33 L. Ed. 433, or the special proceedings under the territorial statutes of Utah discussed in Stringfellow *v.* Cain, 99 U. S. 610, 25 L. Ed. 421; Cannon *v.* Pratt, 99 U. S. 619, 25 L. Ed. 446; Neslin *v.* Wells, etc., Co., 104 U. S. 428, 26 L. Ed. 802; Gray *v.* Howe, 108 U. S. 12, 27 L. Ed. 634; and in Ely *v.* New Mexico, etc., R. Co., 129 U. S. 291, 32 L. Ed. 688, appealed from the supreme court of Arizona. In these cases the validity of special statutory proceedings of this description was sustained, and in Hecht *v.* Boughton, 105 U. S. 235, 26 L. Ed. 1018, it was held, that under the act of April 7, 1874, 18 Stat. 27, c. 80, an appeal was the only proceeding by which this court could review the judgment or decree of a territorial court in a court where there was not a trial by jury." Cameron *v.* United States, 148 U. S. 301, 305, 37 L. Ed. 459.

80. "The record in stating the judgment below does not show any findings of fact by the court, which tried the case without the intervention of a jury. The order for the judgment necessarily implies that the facts were found by the court upon which the order was made, but, like a verdict of a jury, the findings should properly appear in the record. The omission, it is true, was not noticed by counsel in the supreme court of the territory, nor has it been called to our attention. It was probably a mistake of the copyist in making the transcript, for the argument has proceeded upon the theory that such findings were made. The plaintiff assigns as one of the errors committed that the court erred "in finding for plaintiff on all of the issues presented in the pleadings." We have, therefore, passed by this omission, and permit the party who defends the ruling below to supply the defect." Davis *v.* Weibbold, 139 U. S. 507, 515, 35 L. Ed. 238.

81. National, etc., Bank *v.* First National Bank, 203 U. S. 296, 51 L. Ed. 192.

Construction of Findings.—Where the jury returns a general verdict for the plaintiffs, and also makes certain findings of fact at the instance of the respective parties, the rule is that where special findings are irreconcilable with a general verdict, the former control the latter. It is also true that if the findings are fairly susceptible of two constructions, one upholding and the other overthrowing the general verdict, the former will be accepted as the true construction, because it will not be presumed that the jury had different intentions in the findings and in the verdict.[82]

Scope of Review.—Where a territorial district court makes certain findings of fact and conclusions of law, and the territorial supreme court, on appeal from the district court, makes additional findings which, however, do not modify the findings made by the district court, and therefore the findings of fact and conclusions of law made by the two courts are substantially identical, if there is no bill of exceptions, the only question before this court is whether the findings of fact made by the supreme court support the conclusion of law it made.[83] On appeal from the supreme court of a territory, the supreme court of the United States, in determining the question of the sufficiency of the facts found, to support the judgment, where the territorial supreme court, in addition to adopting the findings found by the trial court, made an additional finding of facts, may consider both the latter findings as well as the former.[84]

(4) *Miscellaneous Proceedings.*—**Validity of Fraudulent Conveyances.**—The enabling act admitting the two Dakotas, Montana and Washington territories as states authorized this court to proceed to hear and determine cases involving the validity of a sale by the debtor of his property to defraud his creditors.[85]

Divorce Proceedings.—The disclaimer of any jurisdiction in the courts of United States upon the subject of divorce, or the allowance of alimony, does not effect the appellate jurisdiction of this court over territorial courts.[86]

g. *Transfer of Cause*—(1) *In General.*—This court has no jurisdiction over a case brought from the supreme court of a territory without a writ of error, appeal or citation, or appearance by defendant or respondent.[87]

(2) *What Law Governs.*—The act of 1838, ch. 96, § 9, provides that writs of error and appeals from the final decision of the supreme court of the territory shall be allowed and taken to this court in the same manner and under the same regulations as from the circuit court of the United States, where the value in controversy shall exceed one thousand dollars.[88]

(3) *Allowance of Appeal.*—Upon an appeal to this court from the supreme court of a territory, it must appear that the appeal was allowed by the proper court.[89] Under an act of congress of 1838, providing that writs of error and appeals from the final decisions of the supreme court of the territory shall be allowed and taken to this court in the same manner, and under the same regulations as from the circuit court of the United States, a writ of error allowed by the chief justice of the territorial court was sustained.[90]

(4) *Remedies for Reviewing.*—This has been fully treated in a previous section. See ante, "The Various Remedies Considered," II.

(5) *Time for Taking Appeal.*—Upon an appeal to this court from the supreme court of a territory, it must appear that the proceedings relative to the perfecting of an appeal were taken within two years from the date of entering the judgment

82. Larkin *v.* Upton, 144 U. S. 19, 21, 36 L. Ed. 330.

83. The Blue Jacket, 144 U. S. 371, 36 L. Ed. 469.

84. Apache County *v.* Barth, 177 U. S. 538, 543, 44 L. Ed. 878.

85. North *v.* Peters, 138 U. S. 271, 34 L. Ed. 936.

86. Simms *v.* Simms, 175 U. S. 162, 44 L. Ed. 115, distinguishing Barber *v.* Barber, 21 How. 582, 16 L. Ed. 226; De La Rama *v.* De La Rama, 201 U. S. 303, 50 L. Ed. 765.

87. United States *v.* Hailey, 118 U. S. 233, 30 L. Ed. 173.

88. Sheppard *v.* Wilson, 5 How. 210, 211, 12 L. Ed. 120.

89. North *v.* Peters, 138 U. S. 271, 34 L. Ed. 936.

90. Sheppard *v.* Wilson, 5 How. 210, 12 L. Ed. 120.

in the court below.[91]

(6) *Writ of Error, Citation and Bond.*—Where a writ of error is allowed, the citation signed and the bond approved, by the chief justice of the territorial court, this in a sufficient compliance with the statute.[92]

From Washington Territory.—The act of the territory of November 23, 1883, in providing for a new mode, different from what previously existed, by which cases can be removed from the district court to the supreme court of the territory, declares that notice of appeal may be given in open court or at chambers; that such notice shall, by order of the court or judge having jurisdiction, be entered on the journal to the court; and that no other service or notice shall be required. This language is inconsistent with any requirement that notice to the opposite party shall be given that the party desirous of appealing intends to give notice of an appeal. The nature of the proceeding is such that no notice of it is required before application is made to the judge. When an appeal is taken notice of the fact is usually given to the opposite party, or a citation is served on him. The act of the territory, however, renders the entry upon the journal sufficient notice to all parties.[93] It is a part of the duty of the judge of the territory to sit in the supreme court. He is one of its members, and his chambers, whilst the supreme court is in session, and he is in attendance upon it, may be at the place where that court is sitting. Therefore, notice of an appeal from the judgment rendered by such judge within his district, may be given to him at such chambers of the supreme court.[94]

h. *Assignment of Errors.*—A rule of the supreme court of a territory which required in all law cases an assignment of errors to be made in writing, filed and served substantially as provided for in the Code of the territory, was held not to require such an assignment in an equity cause.[95]

i. *Scope and Extent of Review*—(1) *In General.*—In reviewing the judgment of the territorial court, our inquiry is limited to the matters presented to and considered by that court. It is fundamental that when the judgment of a court is challenged in error, its rulings alone are open to consideration. Of course, if the trial court had no jurisdiction, that is a matter which is always open, and the attention of the court of last resort may be called thereto in the first instance; but mere matters of error may always be waived, and they are waived when the attention of the reviewing court is not called to them.[96]

91. North *v.* Peters, 138 U. S. 271, 34 L. Ed. 936.

92. Sheppard *v.* Wilson, 5 How. 210, 12 L. Ed. 120.

Under the acts of 1789, and 1792, the clerk of the circuit court where the judgment was rendered may issue a writ of error, and a judge of that court may sign the citation and approve the bond. "The act of 1789, which regulates writs of error from the circuit courts, requires the citation to be signed by a judge of the circuit court in which the judgment was rendered, or by a justice of the supreme court; and * * * the judge or justice signing the citation shall take good and sufficient security for the prosecution of the writ of error, and the payment of the damages and costs if the plaintiff in error shall fail to make his plea good. And the act of May 8, 1792, ch. 36, § 9 (1 Stat. at Large, 278), authorizes the clerks of the circuit courts to issue writs of error in the same manner as the clerk of the supreme court might have issued them under the act of 1789." Sheppard *v.* Wilson, 5 How. 210, 12 L. Ed. 120.

93. In re Parker, 131 U. S. 221, 33 L. Ed. 123.

94. In re Parker, 131 U. S. 221, 33 L. Ed. 123.

95. The defendant in a possessory action in the nature of ejectment, brought in a court of Washington territory where the laws permitted a mingling of common-law and equity jurisdiction, pleaded the general issue, and also set up four defenses, one of which was the statute of limitations, and one of which was an equitable defense. The plaintiff filed a general demurrer to the second, third and fourth defenses. The demurrer being overruled, the plaintiff elected to stand upon it, and the case was thereupon dismissed. Held, that the final judgment was one dismissing the action at law, and was not a judgment in the exercise of chancery jurisdiction, and therefore must comply with a rule of court requiring an assignment of errors to be made in writing in all law cases. Brown *v.* Rank, 132 U. S. 216, 33 L. Ed. 340.

96. Montana R. Co. *v.* Warren, 137 U. S. 348, 34 L. Ed. 681.

Cases from New Mexico.—There is nothing in § 2190 of the compiled laws of the territory of New Mexico providing that "the supreme court, in appeals or writs of error, shall examine the record, and on the facts therein contained alone shall award a new trial, reverse or affirm the judgment of the district court, or give such other judgment as shall be agreeable to law," "which lays down a different rule from that ordinarily pursued in appellate courts. If the case be tried by jury and reviewed upon writ of error, the power of the appellate court is limited to affirming the judgment or reversing it for errors apparent upon the record, and remanding it for a new trial, as specified in this section. If it be an appeal in equity, the court retries the case upon the evidence in the court below, and gives such judgment as may be agreeable to law."[97]

(2) *Necessity for Finality of Decision.*—Writs of error and appeals to this court from the supreme court of the territory, are limited to "final decisions" which means the same thing as "final judgments and decrees."[98] It is very questionable whether a decree of a territorial supreme court modifying a decree of a territorial district court is so far final as to be the subject of an appeal to this court.[99]

(3) *Review of Questions of Fact*—aa. *In General.*—"Congress has prescribed that the appellate jurisdiction of this court over 'judgments and decrees' of the territorial courts, 'in cases of trial by juries shall be exercised by writ of error, and in all other cases by appeal;' and 'on appeal instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below,' and transmitted to this court with the transcript of the record."[1] The necessary effect of this enactment is that no judgment or decree of the highest court of a territory can be reviewed by this court in matter of fact, but only in matter of law.[2]

97. Grayson *v.* Lynch, 163 U. S. 468, 472, 41 L. Ed. 230.

98. An order of the supreme court of Washington territory dismissing a writ of error to a district court, because of the failure of the plaintiff in error to file the transcript and have the cause docketed within the time required by law, is not a final judgment or a final decision within the meaning of those terms as used in §§ 702 and 1911 of the Revised Statutes regulating writs of error and appeals to this court from the supreme court of the territory. Section 702 provides for the review of final judgments and decrees by writ of error or appeal, and § 1911 regulates the mode and manner of taking the writ or procuring the allowance of the appeal. The use of the term "final decisions" in § 1911 does not enlarge the scope of the jurisdiction of this court. It is only a substitute for the words "final judgments and decrees" in § 702, and means the same thing. Harrington *v.* Holler, 111 U. S. 796, 28 L. Ed. 602, following Insurance Co. *v.* Comstock, 16 Wall. 258, 21 L. Ed. 493; Railroad Co. *v.* Wiswall, 23 Wall. 507, 22 L. Ed. 103.

While the supreme court of New Mexico upon a second writ of error may have considered itself bound by its decision upon the question involved upon the first writ as the law of the case, the supreme court of the United States is not restrained by the same limitation. As the judgment of the territorial court upon the first writ was merely for a reversal of the court below and for a new trial, such judgment, not being final, could not be made the subject of a writ of error from the supreme court of the United States, that court is at liberty to revise the action of the court below in both instances. United States *v.* Denver, etc., R. Co., 191 U. S. 84, 93, 48 L. Ed. 106.

99. Salina Stock Co. *v.* Salina Creek Irrigation Co., 163 U. S. 109, 41 L. Ed. 90.

1. Act of April 7, 1874, c. 80, § 2, 18 Stat. 27, 28; Idaho, etc., Land Co. *v.* Bradbury, 132 U. S. 509, 33 L. Ed. 433.

2. Marshall *v.* Burtis, 172 U. S. 630, 635, 43 L. Ed. 579; Kelsey *v.* Crowther, 162 U. S. 404, 409, 40 L. Ed. 1017, citing Haws *v.* Victoria Cooper Min. Co., 160 U. S. 303, 40 L. Ed. 436.

No judgment or decree of the highest court of a territory can be reviewed by this court in matter of fact, but only in matter of law. Sturr *v.* Beck, 133 U. S. 541, 546, 33 L. Ed. 761.

As observed by Chief Justice Waite, "We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and upon an appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us." Hecht *v.* Boughton, 105 U. S. 235, 236, 26 L. Ed. 1018. See, also, Salina Stock Co. *v.*

Divorce Proceedings.—Therefore no appeal lies to this court from the supreme court of the territory allowing or denying a divorce, where the refusal of the divorce involves no question of law but mere questions of fact.[3] But this rule has no application to appeals from the supreme court of the Philippine Islands.[4]

bb. *Review of Findings of Fact by Territorial Court.*—**In General.**—Upon appeal from the supreme court of a territory, this court is precluded under the statute from reviewing any question of fact, and the finding of the court below is conclusive upon this court as to all such questions. The jurisdiction of this court on such an appeal, apart from exceptions duly taken to rulings on the admission or rejection of evidence, is limited to determining whether the findings of fact support the judgment.[5] In other words where a case is tried in the supreme court

Salina Creek Irrigation Co., 163 U. S. 109, 41 L. Ed. 90; Gildersleeve *v.* New Mexico Min. Co., 161 U. S. 573, 40 L. Ed. 812; Haws *v.* Victoria Copper Min. Co., 160 U. S. 303, 40 L. Ed. 436; San Pedro, etc., Co. *v.* United States, 146 U. S. 120, 36 L. Ed. 911; Mammoth Min. Co. *v.* Salt Lake Machine Co., 151 U. S. 447, 38 L. Ed. 229; Marshall *v.* Burtis, 172 U. S. 630, 635, 42 L. Ed. 579.

By the act of April 7, 1874, c. 80, 18 Stat. 27, the appellate jurisdiction of this court, "over the judgments and decrees of the territorial courts in cases of trial by jury, shall be exercised by writ of error, and in all other cases by appeal," with a proviso "that on appeal, instead of the evidence at large, a statement of the facts in the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence, when excepted to, shall be made and certified by the court below, and transmitted to the supreme court, together with a transcript of the proceedings and judgment or decree." It was said in the Idaho, etc., Land Co. *v.* Bradbury, 132 U. S. 509, 513, 33 L. Ed. 433, that the necessary effect of this enactment was that no judgment or decree of the highest court of a territory could be reviewed by this court in matter of fact, but only in matter of law. Grayson *v.* Lynch, 163 U. S. 468, 473, 41 L. Ed. 230.

Construction of laws of New Mexico.—Section 4, chap. 1, Laws of 1889, of New Mexico, reads as follows: "Sec. 4. In all cases now pending in the supreme court, or which may hereafter be pending in the supreme court, and which may have been tried by the equity side of the court, or which may have been tried by a jury on the common-law side of the court, or in which a jury may have been waived, and the cause tried by the court or the judge thereof, it shall be the duty of the supreme court to look into all the rulings and decisions of the court which may be apparent upon the records, or which may be incorporated in a bill of exceptions, and pass upon all of them, and upon the errors, if any shall be found therein, in the rulings and decisions of the court below, grant a new trial, or render such other judgment as may be right and just, and in accordance with law; and said supreme court shall not decline to pass upon any question of law or fact which may appear in the record, either upon the face of the record or in the bill of exceptions, because the cause was tried by the court or by the judge thereof without a jury, but shall review said cause in the same manner and to the same extent as if it had been tried by a jury." By this statute it is made the duty of the supreme court of the territory to look into and pass upon all the rulings and decisions of the court below, which may be apparent upon the record, or which may be incorporated into a bill of exceptions and, if any error be found, grant a new trial, or render such other judgment as may be right and just and in accordance with law. And the supreme court must not decline so to do because the case was tried by the court without a jury, but must review said cause in the same manner and to the same extent as if it had been tried by a jury. It is difficult to perceive wherein this statute makes any essential change in the previous practice, or even if it did, how it could affect the power of this court, under the statute of 1874, above cited. It certainly does not, in terms, require that the court shall rehear the case upon the testimony, as if it were an appeal in equity, but limits its powers of review to such questions as are apparent upon the record, or incorporated in a bill of exceptions. Grayson *v.* Lynch, 163 U. S. 468, 474, 41 L. Ed. 230.

3. Simms *v.* Simms, 175 U. S. 162, 44 L. Ed. 115, citing Young *v.* Amy, 171 U. S. 179, 43 L. Ed. 127.

4. De La Rama *v.* De La Rama, 201 U. S. 303, 50 L. Ed. 765.

5. Stringfellow *v.* Cain, 99 U. S. 610, 25 L. Ed. 421; Neslin *v.* Wells, etc., Co., 104 U. S. 428, 26 L. Ed. 802; Eilers *v.* Boatman, 111 U. S. 356, 28 L. Ed. 454; Idaho, etc., Land Co. *v.* Bradbury, 132 U. S. 509, 33 L. Ed. 433; Mammoth Min. Co. *v.* Salt Lake Machine Co., 151 U. S. 447, 450, 38 L. Ed. 229; Bear Lake, etc., Co. *v.* Garland, 164 U. S. 1, 18, 41 L. Ed. 327; Young *v.* Amy, 171 U. S. 179, 43 L. Ed. 127; San

of the territory by the court without a jury, and there is no question made in the record as to the admission or exclusion of testimony, this court is limited to the inquiry whether the findings of fact sustain the judgment or decree, and cannot enter into a consideration of the evidence.[6] In either class of cases, whether equitable

Pedro, etc., Co. *v.* United States, 146 U. S. 120, 36 L. Ed. 911; Haws *v.* Victoria Copper Min. Co., 160 U. S. 303, 312, 40 L. Ed. 436; Salina Stock Co. *v.* Salina Creek Co., 163 U. S. 109, 118, 41 L. Ed. 90; Zeckendorf *v.* Zeckendorf, 171 U. S. 686, 43 L. Ed. 1179; Consolidated Canal Co. *v.* Mera Canal Co., 177 U. S. 296, 302, 44 L. Ed. 777; Luhrs *v.* Hancock, 181 U. S. 567, 45 L. Ed. 1005, citing and approving Harrison *v.* Perea, 168 U. S. 311, 42 L. Ed. 478; Holloway *v.* Dunham, 170 U. S. 615, 42 L. Ed. 1165; Gildersleeve *v.* New Mexico Min. Co., 161 U. S. 573, 40 L. Ed. 812; Naeglin *v.* DeCordoba, 171 U. S. 638, 43 L. Ed. 315; Kelly *v.* Rhoads, 188 U. S. 1, 47 L. Ed. 359; Herrick *v.* Boquillas Cattle Co., 200 U. S. 96, 98, 50 L. Ed. 388; Gila Band Reservoir, etc., Co. *v.* Gila Water Co., 205 U. S. 279, 282, 51 L. Ed. 801.

"It is settled that, on error or appeal to the supreme court of a territory, this court is without power to re-examine the facts and is confined to determining whether the court below erred in the conclusions of law deduced by it from the facts by it found, and to reviewing errors committed as to the admission or rejection of testimony when the action of the court in this regard has been duly excepted to, and the right to attack the same preserved on the record." Harrison *v.* Perea, 168 U. S. 311, 42 L. Ed. 478; Young *v.* Amy, 171 U. S. 179, 183, 43 L. Ed. 127; Simms *v.* Simms, 175 U. S. 162, 44 L. Ed. 115.

An appeal being from the judgment of a territorial court, and no errors having been assigned on exceptions to rulings on the admission or rejection of testimony, the supreme court of the United States is limited in this review to the determination of the question whether the facts found are sufficient to sustain the judgment rendered. Thompson *v.* Ferry, 180 U. S. 484, 45 L. Ed. 633, citing and approving Gildersleeve *v.* New Mexico Min. Company, 161 U. S. 573, 40 L. Ed. 812; Harrison *v.* Perea, 168 U. S. 311, 42 L. Ed. 478; Marshall *v.* Burtis, 172 U. S. 630, 43 L. Ed. 579.

Exceptions to admission or rejection of evidence.—The supreme court of the territory was called upon to make a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court in the admission or rejection of evidence when excepted to. Our jurisdiction is limited to the consideration of such exceptions and to determining whether the findings of fact support the judgment. Harrison *v.* Perea, 168 U. S. 311, 42 L. Ed. 478; Young *v.* Amy, 171 U. S. 179, 43 L. Ed. 127; Crowe *v.* Trickey, 204 U. S. 228, 234, 51 L. Ed. 454, followed in Crowe *v.* Harmon, 204 U. S. 241, 51 L. Ed. 461.

6. Stringfellow *v.* Cain, 99 U. S. 610, 25 L. Ed. 421; Cannon *v.* Pratt, 99 U. S. 619, 25 L. Ed. 446; Neslin *v.* Wells, etc., Co., 104 U. S. 428, 26 L. Ed. 802; Hecht *v.* Boughton, 105 U. S. 235, 236, 26 L. Ed. 1018; Gray *v.* Howe, 108 U. S. 12, 27 L. Ed. 634; Eilers *v.* Boatman, 111 U. S. 356, 28 L. Ed. 454; Zeckendorf *v.* Johnson, 123 U. S. 617, 31 L. Ed. 277; Sturr *v.* Beck, 133 U. S. 541, 33 L. Ed. 761; Mammoth Min. Co. *v.* Salt Lake Machine Co., 151 U. S. 447, 38 L. Ed. 229; Naeglin *v.* De Cordoba, 171 U. S. 638, 43 L. Ed. 315; Haws *v.* Victoria Copper Min. Co., 160 U. S. 303, 312, 40 L. Ed. 436; Gildersleeve *v.* New Mexico Min. Co., 161 U. S. 573, 577, 40 L. Ed. 812.

Upon a review of a judgment in a case not tried by jury and taken by appeal from the supreme court of a territory, this court is by statute restricted to an inquiry, whether the findings of fact made by the court below support its judgment, and to a review of exceptions duly taken to rulings on admission or rejection of evidence. Grayson *v.* Lynch, 163 U. S. 468, 41 L. Ed. 230; Bear Lake, etc., Co. *v.* Garland, 164 U. S. 1, 18, 41 L. Ed. 327; Harrison *v.* Perea, 168 U. S. 311, 323, 42 L. Ed. 478; Young *v.* Amy, 171 U. S. 179, 183, 43 L. Ed. 127; Apache County *v.* Barth, 177 U. S. 538, 542, 44 L. Ed. 878.

By chapter 80 of the acts of congress, approved April 7, 1874, 18 Stat. 27, this court is required to accept the findings of fact made by the supreme courts of the territories as true on appeal to this court. See Stringfellow *v.* Cain, 99 U. S. 610, 25 L. Ed. 421; Hecht *v.* Boughton, 105 U. S. 235, 26 L. Ed. 1018; Eilers *v.* Boatman, 111 U. S. 356, 357, 28 L. Ed. 454.

Construing this statute, it was held, in the case of Idaho, etc., Land Co. *v.* Bradbury, 132 U. S. 509, 514, 33 L. Ed. 433, that "the authority of this court, on appeal from a territorial court, is limited to determining whether the court's findings of fact support its judgment or decree, and whether there is any error in rulings, duly excepted to, on the admission or rejection of evidence, and does not extend to a consideration of the weight of evidence or its sufficiency to support the conclusions of the court. Stringfellow *v.* Cain, 99 U. S. 610, 25 L. Ed. 421; Cannon *v.* Pratt, 99 U. S. 619, 25 L. Ed. 446; Neslin *v.* Wells, etc., Co., 104 U. S. 428, 26 L. Ed. 802; Hecht *v.* Boughton, 105 U. S. 235, 236, 26 L. Ed. 1018; Gray *v.* Howe,

or legal, coming up by appeal from a territorial court after a hearing or trial on the facts, the evidence at large cannot be brought up (as it is in cases in equity from the circuit courts of the United States), but only "a statement of facts in the nature of a special verdict," and rulings made at the trial, and duly excepted to, on the admission or rejection of evidence. Consequently the authority of this court, on appeal from a territorial court, is limited to determining whether the

108 U. S. 12, 27 L. Ed. 634; Eilers *v.* Boatman, 111 U. S. 356, 28 L. Ed. 454; Zeckendorf *v.* Johnson, 123 U. S. 617, 31 L. Ed. 277." San Pedro, etc., Co. *v.* United States, 146 U. S. 120, 130, 36 L. Ed. 911.

Where the supreme court of a territory in affirming the judgment of a district court in a proceeding to enforce a mechanics' lien under the statutes of the territory of Utah, which is in the nature of a suit in equity, and was tried by the court without a jury, "has determined that the findings of the trial court were justified by the evidence, and, apart from exceptions duly taken to rulings on the admission or rejection of evidence, our examination is limited to the inquiry, without reference to the weight of evidence or its sufficiency to support the special findings, whether the decree can be sustained upon those findings. Idaho, etc., Land Co. *v.* Bradbury, 132 U. S. 509, 515, 33 L. Ed. 433; Stringfellow *v.* Cain, 99 U. S. 610, 25 L. Ed. 421; Act of April 7, 1874, c. 80, 18 Stat. 27." Mammoth Min. Co. *v.* Salt Lake Machine Co., 151 U. S. 447, 38 L. Ed. 229.

Where the supreme court of the territory had before it the findings of the district court of the territory, and also by stipulation of the parties, a statement of the evidence prepared for a motion for a new trial in the lower court, but this statement is not embodied in the record, nor any findings filed by the supreme court, it was held, that "under the authority of Stringfellow *v.* Cain, 99 U. S. 610, 25 L. Ed. 421, we must, therefore, take the findings of the lower court as adopted by the supreme court and determine the case on their sufficiency, considered in connection with the pleadings, to support the judgment." O'Reilly *v.* Campbell, 116 U. S. 418, 420, 29 L. Ed. 669.

The finding in an appeal from a decree of the supreme court of a territory in a proceeding for a motion carried on under § 2326 of the Revised Statutes, that the notice of the location of the mining claim contained a sufficient description by reference to natural objects and permanent and well-known monuments to identify the same, and that the claim was so marked on the ground that its boundaries could be readily placed, is really a finding of facts, though called by the judge a conclusion of law. Eilers *v.* Boatman, 111 U. S. 356, 28 L. Ed. 454.

In a suit in a territorial court to restrain an assessment and levy of a tax for improvements on abutting owners, so far as the determination of the territorial court involves questions of fact as to the proportion of frontage covered by the protests, this court accepts the findings on that subject made by the territorial district court, and approved and adopted by the supreme court of the territory. Ogden City *v.* Armstrong, 168 U. S. 224, 42 L. Ed. 444, citing Stringfellow *v.* Cain, 99 U. S. 610, 25 L. Ed. 421; Haws *v.* Victoria Copper Min. Co., 160 U. S. 303, 40 L. Ed. 436.

The courts of Montana, under a law of the territory, exercise both common-law and equity jurisdiction. The modes of procedure in suits, both at law and in equity, are the same until the trial or hearing. As we said in Basey *v.* Gallagher, 20 Wall. 670, 679, 22 L. Ed. 452: "The suitor whatever relief he may ask, is required to state, 'in ordinary and concise language,' the facts of his case upon which he invokes the judgment of the court. But the consideration which the court will give to the question raised by the pleadings, when the case is called for trial or hearing, whether it will submit them to a jury, or pass upon them without any such intervention, must depend upon the jurisdiction which is to be exercised. If the remedy sought be a legal one, a jury is essential, unless waived by the stipulation of the parties; but if the remedy sought be equitable, the court is not bound to call a jury, and if it does call one, it is only for the purpose of enlightening its conscience, and not to control its judgment. The decree which it must render upon the law and the facts must proceed from its own judgment respecting them, and not from the judgment of others." The court may hear the case and dispose of the issues without the intervention of a jury. But, it having called a jury, the trial was conducted in the same manner as a trial of an issue at law. Such is the practice under the system of procedure in the territory. Ely *v.* New Mexico, etc., R. Co., 129 U. S. 291, 32 L. Ed. 688; Parley's Park Silver Min. Co. *v.* Kerr, 130 U. S. 256, 32 L. Ed. 906.

The finding of the jury being accepted as satisfactory, must be treated as if made by the court, and being general, as covering all the issues. The only questions, therefore, we can consider on this writ of error are those arising from the rulings in the admission and rejection of evidence, and those respecting the inferences deducible from the proofs made. Hammer *v.* Garfield Min. Co., 130 U. S. 291, 295, 32 L. Ed. 964.

court's findings of fact support its judgment or decree, and whether there is any error in rulings, duly excepted to, on the admission or rejection of evidence; and does not extend to a consideration of the weight of evidence, or its sufficiency to support the conclusions of the court.[7]

In the language of Mr. Justice Brown, since the territorial practice act of April 7, 1874, 18 Stat. 27, was passed, we have always held, that the jurisdiction of this court on an appeal from the supreme court of a territory did not extend to a re-examination of the facts, but was limited to determining whether the findings of fact supported the judgment, and to reviewing errors in the admission or rejection of testimony, when exceptions have been duly taken to the action of the court in this particular.[8]

Weight and Sufficiency of Evidence.—So, too, in cases brought here by appeal from the supreme courts of the territories, we have several times held that we cannot consider the weight or the sufficiency of the evidence, but only whether the facts found by the court below support the judgment, and whether there was any error in rulings, duly excepted to, upon the admission or rejection of evidence.[9]

7. Stringfellow *v.* Cain, 99 U. S. 610, 25 L. Ed. 421; Cannon *v.* Pratt, 99 U. S. 619, 25 L. Ed. 446; Neslin *v.* Wells, etc., Co., 104 U. S. 428, 26 L. Ed. 802; Hecht *v.* Boughton, 105 U. S. 235, 236, 26 L. Ed. 1018; Gray *v.* Howe, 108 U. S. 12, 27 L. Ed. 634; Eilers *v.* Boatman, 111 U. S. 356, 28 L. Ed. 454; Zeckendorf *v.* Johnson, 123 U. S. 617, 31 L. Ed. 277; Idaho, etc., Land Co. *v.* Bradbury, 132 U. S. 509, 514, 33 L. Ed. 433.

Congress has prescribed that the appellate jurisdiction of this court over "judgments and decrees" of the territorial courts "in cases of trial by jury, shall be exercised by writ of error, and in all other cases by appeal;" and "on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below," and transmitted to this court with the transcript of the record. Act of April 7, 1874, c. 80, § 2, 18 Stat. 27, 28. The necessary effect of this enactment is that no judgment or decree of the highest court of a territory can be reviewed by this court in matter of fact, but only in matter of law. As observed by Chief Justice Waite, "We are not to consider the testimony in any case. Upon a writ of error, we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and upon an appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us." Hecht *v.* Boughton, 105 U. S. 235, 236, 26 L. Ed. 1018; Idaho, etc., Land Co. *v.* Bradbury, 132 U. S. 509, 513, 33 L. Ed. 433.

The action of the district court of the territory of Idaho, in setting aside the general verdict, and substituting its own findings of fact for the special findings of the jury, was a lawful exercise of its equitable jurisdiction, the propriety of which cannot be reviewed by this court; and it is quite immaterial whether the general verdict was consistent with the findings of the jury, or with the evidence introduced at the trial. Idaho, etc., Land Co. *v.* Bradbury, 132 U. S. 509, 516, 33 L. Ed. 433.

8. Stringfellow *v.* Cain, 99 U. S. 610, 25 L. Ed. 421; Eilers *v.* Boatman, 111 U. S. 356, 28 L. Ed. 454; Idaho, etc., Land Co. *v.* Bradbury, 132 U. S. 509, 33 L. Ed. 433; Mammoth Min. Co. *v.* Salt Lake Machine Co., 151 U. S. 447, 38 L. Ed. 229; Young *v.* Amy, 171 U. S. 179, 43 L. Ed. 127; De La Rama *v.* De La Rama, 201 U. S. 303, 309, 50 L. Ed. 765.

9. Weight and sufficiency of evidence.—Idaho, etc., Land Co. *v.* Bradbury, 132 U. S. 509, 33 L. Ed. 433; San Pedro, etc., Co. *v.* United States, 146 U. S. 120, 36 L. Ed. 911; Smith *v.* Gale, 144 U. S. 509, 36 L. Ed. 521; Mammoth Min. Co. *v.* Salt Lake Machine Co., 151 U. S. 447, 38 L. Ed. 229; Grayson *v.* Lynch, 163 U. S. 468, 473, 41 L. Ed. 230; Young *v.* Amy, 171 U. S. 179, 43 L. Ed. 127; Harrison *v.* Perea, 168 U. S. 311, 42 L. Ed. 478; Holloway *v.* Dunham, 170 U. S. 615, 617, 42 L. Ed. 1165.

Under the act of April 7, 1874, c. 80, 18 Stat. 27, our jurisdiction on appeal from the judgment of a territorial supreme court is limited to determining whether the facts found are sufficient to sustain the judgment rendered, and to reviewing the rulings of the court on the admission or rejection of testimony, when exceptions have been duly taken to such rulings. We cannot, therefore, enter into an investigation of the preponderance of proof, but confine ourselves to the findings and their sufficiency to support the legal conclusions which the court below has rested on them. Stringfellow *v.* Cain, 99 U. S. 610, 613, 25 L. Ed. 421; Idaho, etc., Land Co. *v.* Bradbury, 132 U. S. 509, 33 L. Ed. 433; Mammoth Min. Co. *v.* Salt Lake Machine Co., 151 U. S. 447, 38 L.

The authority of this court upon appeal from the supreme court of a territory, is limited to the question whether the facts found by that court support its judgment. Conflicting evidence is not open to examination.[10] But if specific findings of each item of evidence and the conclusions deduced from the separate items have been made, the alleged errors may be considered.[11]

Sufficiency of Findings.—This court, in passing upon the sufficiency of finding of facts in the territorial court, to warrant their review in this court, used the following language: "Facts and conclusions of law are sometimes mingled together contrary to the direction of the statute, creating the impression that the findings were prepared under the pressure of other duties, and did not receive the necessary care and attention. But findings are to be construed with the strictness of special pleadings. It is sufficient if, from them all, taken together with the pleadings, we can see enough upon a fair construction to justify the judgment of the court, notwithstanding their want of precision and the occasional intermixture of matters of fact and conclusions of law. Defects of form should be called to the attention of the trial court by the objecting party, and the requisite correction of the findings would seldom be denied."[12]

Philippine Islands.—But the territorial practice act of April 7, 1874, 18 Stat. 27, has no application to the Philippine Islands.[13]

Cases from New Mexico.—Since the supreme court of the territory of New Mexico, under the compiled laws, can only review cases tried without a jury, as it would review cases tried by a jury, it can only review for errors apparent upon the record, or incorporated in a bill of exceptions. In other words, since this power is limited to a review in the same manner and to the same extent as if the case had been tried by a jury, its power is only such as could be exercised upon a writ of error.[14] There is nothing in § 2060 of the compiled laws of the territory of New Mexico allowing a trial by jury to be waived by the several parties to any issue of fact in certain cases to take such cases out of the general rule, "so frequently announced, that in cases where a jury is waived, the findings of fact by the court have the same force and effect as the verdict of a jury, and that the appellate court will not set aside the findings and order a new trial for the admission of incompetent evidence, if there be other competent evidence to support the conclusion. The evident purpose of Compiled Laws, § 2060, was to give to litigants the option of having their causes tried by a jury or by the court, and we think there is nothing in these statutes to indicate that the findings of the

Ed. 229; Kelsey *v.* Crowther, 162 U. S. 404, 40 L. Ed. 1017; Haws *v.* Victoria Copper Min. Co., 160 U. S. 303, 312, 40 L. Ed. 436.

Hence, notwithstanding the large volume of testimony taken and used in the court below has been incorporated into the record sent to us, we are not at liberty to review that testimony for the purpose of ascertaining whether the findings in the statement of facts are or are not in accordance with the weight of the evidence. San Pedro, etc., Co. *v.* United States, 146 U. S. 120, 131, 36 L. Ed. 911.

The finding of possession in a suit to quiet title is, under the case of Mining Co. *v.* Taylor, 100 U. S. 37, 25 L. Ed. 541, the finding of an ultimate fact and has the same legal effect as the finding of a jury in a special verdict, and the sufficiency of the evidence to support the findings cannot be considered upon this appeal. Idaho, etc., Land Co. *v.* Bradbury, 132 U. S. 509, 514, 33 L. Ed. 433; Smith *v.* Gale, 144 U. S. 509, 525, 36 L. Ed. 521.

10. Karrick *v.* Hannaman, 168 U. S. 328, 42 L. Ed. 484, citing Haws *v.* Victoria Copper Min. Co., 160 U. S. 303, 40 L. Ed. 436; Harrison *v.* Perea, 168 U. S. 311, 42 L. Ed. 478.

Where a territorial court of first instance saw the witnesses, the full court will deal with its findings as it would with the verdict of a jury, and will not go beyond the questions of the admissibility of evidence and whether there was any evidence to sustain the conclusion reached, and upon appeal to the supreme court of the United States that court will go no further, unless in an unusual case. Halsell *v.* Renfrow, 202 U. S. 287, 50 L. Ed. 1032.

11. Young *v.* Amy, 171 U. S. 179, 43 L. Ed. 127. See Cheely *v.* Clayton, 110 U. S. 701, 28 L. Ed. 298, for illustration.

12. O'Reilly *v.* Campbell, 116 U. S. 418, 420, 29 L. Ed. 669.

13. De La Rama *v.* De La Rama, 201 U. S. 303, 309, 50 L. Ed. 765.

14. Grayson *v.* Lynch, 163 U. S. 468, 41 L. Ed. 230.

court were not intended to have the same force and effect as a special verdict of a jury, and that, where there is any testimony to support such findings, the power of the appellate court is limited to determine whether the facts so found are sufficient to support the judgment."[15]

(4) *Review of Discretionary Matters.*—This court has no more power to review matters of discretion on writs of error and appeals to the supreme court of the territory, than in other cases.[16] Therefore this court has no power to re-examine the action of a territorial court in refusing to set aside a judgment by default.[17] This court will not review the action of the district court of a territory in denying a motion on the part of the defendant to have included in the statement of the facts of the case the ruling of the court in the admission and rejection of evidence.[18]

(5) *Questions of Practice.*—A ruling of the supreme court of the territory does not, even in a question of practice arising under the local law, preclude this court from reviewing it, as would a decision of a state supreme court in similar circumstances; but unless a manifest error be disclosed, we should not feel disposed to disturb a decision of the supreme court of a territory construing a local statute.[19] But, in a later case, it was said: It is a matter of very great doubt whether this court has authority to reverse a final decree of the supreme court of a territory, in an equity case, on a question of practice. As for example, the action of the supreme court in modifying a decree of a territorial district court.[20]

j. *The Statement of the Facts.*—**In General.**—The act of April 7, 1874, 18 Stat. 27, providing for the exercise of the appellate jurisdiction of this court over the judgments and decrees of territorial courts, reads: "That, on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below and transmitted to the supreme court, together with the transcript of the proceedings and judgment or decree."[21] Of course, if there are no findings or statement of facts and no exceptions in respect to the introduction or rejection of testimony, the decree will be affirmed, if responsive to the allegations of the pleadings.[22]

15. Grayson *v.* Lynch, 163 U. S. 468, 476, 41 L. Ed. 230.

16. Railway Co. *v.* Twombly, 100 U. S. 78, 25 L. Ed. 550. (New trial.)

17. McAllister *v.* Kuhn, 96 U. S. 87, 24 L. Ed. 615.

18. San Pedro, etc., Co. *v.* United States, 146 U. S. 120, 36 L. Ed. 911.

19. Fox *v.* Haarstick, 156 U. S. 674, 679, 39 L. Ed. 576.

20. Salina Stock Co. *v.* Salina Creek Irrigation Co., 163 U. S. 109, 41 L. Ed. 90, reaffirmed in Zeckendorf *v.* Zeckendorf, 171 U. S. 686, 43 L. Ed. 1179.

Without denying the authority of this court to find error in the judgment of the supreme court of a territory, even in passing on a question of practice, we certainly should not feel inclined to exercise such authority, unless we were able to perceive that injustice had been done; and as this record presents us with no statement of the facts to enable us to determine whether the facts found were sufficient to sustain the judgment rendered, and with no exceptions taken to rulings in the admission or rejection of evidence, there is nothing here which we can examine. Salina Stock Co. *v.* Salina Creek Irrigation Co., 163 U. S. 109, 118, 41 L. Ed. 90.

The supreme court (of the territory of New Mexico) decided that in order to bring before it the facts in a case before a court or referee it was necessary that a motion for a new trial should be made in the court below, and if such motion were not made, the facts in the case were not brought before the appellate court on the writ of error or appeal. This matter of practice in the courts of the territory is based upon local statutes and procedure, and we are not disposed to review the decision of the supreme court in such case. Sweeney *v.* Lomme, 22 Wall. 208, 22 L. Ed. 727; Armijo *v.* Armijo, 181 U. S. 558, 561, 45 L. Ed. 1000.

21. San Pedro, etc., Co. *v.* United States, 146 U. S. 120, 130, 36 L. Ed. 911; Stringfellow *v.* Cain, 99 U. S. 610, 25 L. Ed. 421; Idaho, etc., Land Co. *v.* Bradbury, 132 U. S. 509, 33 L. Ed. 433; United States Trust Co. *v.* New Mexico, 183 U. S. 535, 540, 46 L. Ed. 315; Salina Stock Co. *v.* Salina Creek Irrigation Co., 163 U. S. 109, 116, 41 L. Ed. 90.

22. Gila Bend Reservoir, etc., Co. *v.* Gila Water Co., 205 U. S. 279, 282, 51 L. Ed. 801.

Error to Supreme Court of Arizona.—A statement of the case, according to the law regulating civil proceedings in the territory of Arizona, takes the place of a bill of exceptions, when the alleged errors of law are set forth with sufficient matter to show the relevancy of the points taken. It is not the less available on appeal from the judgment when, by stipulation, it is embodied in the record for that purpose, though used on the motion for a new trial.[23]

Sufficiency of Certified Statement of Facts.—The general rule is well settled that an agreed statement of facts may be the equivalent of a special verdict or a finding of facts upon which a reviewing court may declare the applicable law if such agreed statement is of the ultimate facts, but if it be merely a recital of testimony or evidential facts, it brings nothing before an appellate court for consideration. The same rule applies in cases of appeals from territorial courts under the act of 1874.[24] Under this act, on an appeal from the district court of a territory to the supreme court of the territory, if the findings of the district court are sustained by the supreme court, and a general judgment of affirmance rendered, the findings of the district court, thus approved by the supreme court, will furnish a sufficient "statement of the facts of the case" for the purposes of an appeal to this court. The same will be true if there is a reversal, for the reason that the facts as found are not sufficient to support the judgment.[25] Although the

23. Head *v.* Hargrave, 105 U. S. 45, 47, 26 L. Ed. 1028, citing Kerr *v.* Clampitt, 95 U. S. 188, 24 L. Ed. 493.

24. United States Trust Co. *v.* New Mexico, 183 U. S. 535, 540, 46 L. Ed. 315, approving Wilson *v.* Merchants' Loan, etc., Co., 183 U. S. 121, 46 L. Ed. 113.

25. Stringfellow *v.* Cain, 99 U. S. 610, 613, 25 L. Ed. 421, reaffirmed in Cannon *v.* Pratt, 99 U. S. 619, 25 L. Ed. 446.

Under the act entitled "An act concerning the practice in territorial courts and appeals therefrom," approved April 7, 1874 (18 Stat. p. 27), if the findings of the district court are sustained by the supreme court, such findings furnish a sufficient statement of the facts for the purposes of an appeal to this court, and our inquiry is whether, upon such facts the judgment appealed from was right. Wasatch Min. Co. *v.* Crescent Min. Co., 148 U. S. 293, 296, 37 L. Ed. 454.

The statement of facts contemplated by the statute is one to be made by the supreme court from whose judgment the appeal is taken. But where that court affirms the findings of the trial court, being thus adopted by the supreme court of the territory, they subserve the purpose of a finding of fact on the appeal to this court. Stringfellow *v.* Cain, 99 U. S. 610, 613, 25 L. Ed. 421; Haws *v.* Victoria Copper Min. Co., 160 U. S. 303, 313, 40 L. Ed. 436.

Where the record of a suit is duly certified upon an appeal to a district court in Utah, and the latter states its findings of fact and its conclusions of law separately, and appeals from its order refusing a new trial and from its judgment are taken to the supreme court of that territory, the statute whereof requires a statement, to be settled by the judge who heard the cause, specifically setting forth the "particular errors or grounds" relied on, and containing "so much of the evidence as may be necessary to explain them and no more;" and where a statement settled and signed by him, and annexed to the copy of the order refusing a new trial, contains all the testimony and written proofs and allegations of the parties certified up to the district court, upon which the trial was had, and it was stipulated that the statement might be used on an appeal from the judgment to the said supreme court; held: 1. That the proceeding was thus made to conform to the requirements of the practice act of Utah, and that the latter court was called upon to decide whether the evidence was sufficient to sustain the findings of fact, and, if it was, whether they would support the judgment. 2. That if that court reverses the judgment because the evidence does not sustain the findings, other findings must be made before the case can be put in a condition for hearing here; but if it has all the evidence which could be considered below, should the case be remanded, it may state the facts established by the evidence and render judgment. On an appeal to this court, the case if otherwise properly here, will be determined upon the facts so stated. 3. That if the findings of the district court be sustained, and its judgment affirmed, or if its judgment be reversed for the reason that the findings are not sufficient to support the judgment, such findings are, in effect, adopted by the said supreme court, and they, for the purpose of an appeal here, furnish a sufficient statement of the facts of the case, within the meaning of the act "concerning the practice in territorial courts and appeals therefrom," approved April 7, 1874. Stringfellow *v.* Cain, 99 U. S. 610, 25 L. Ed. 421, reaffirmed in Cannon *v.* Pratt, 99 U. S. 619, 25 L. Ed. 446.

statement of facts required by the statute should present clearly and precisely the ultimate facts, and although the statement that is confused and gives a mass of unnecessary details does not properly comply with that rule, yet imperfections in that regard should not be held fatal if a sufficient statement finally emerges.[26] Moreover, although the statement of facts prepared by the supreme court of the territory, standing by itself, is incomplete, yet it may be helped by a reference to the bill of exceptions in the trial court, by adopting it and making it a part of the statement.[27]

Time of Filing Statement.—If the statement of facts was not on file at the time of the settlement of the bill of exceptions or did not afterward become a part of the record, it is not filed in time to become a part of the bill of exceptions under the Revised Statutes of Arizona.[28]

Dismissal or Affirmance.—A statement of facts such as the statute requires is necessary to enable us to re-examine the case. And if there is no such statement of facts in the record as the law requires, the writ of error or appeal will be dismissed.[29] Where the record presents us with no statement of the facts to enable us to determine whether the facts found were sufficient to sustain the judgment, and no exceptions are taken to the ruling in the admission or rejection of evidence, the judgment of the territorial court will be affirmed.[30]

Remand.—Where the facts found by the trial court are taken to be true by the supreme court of the territory, except so far as they depend upon rulings of law, and the questions for decision here are definite and plain, there will be no need to send the case back for a statement of facts by the supreme court of the territory, although one should have been made.[31]

Presumptions on Appeal.—This court will assume that the evidence supports the judgment where there is not a statement of the facts in the nature of a special verdict made and certified by the court below under the act of April 7, 1874, c. 80, 18 Stat. 27.[32] Moreover, although the statement of facts prefixed to the opin-

26. Crowe *v.* Trickey, 204 U. S. 228, 51 L. Ed. 454, followed in Crowe *v.* Harmon, 204 U. S. 241, 51 L. Ed. 461.

27. Gila Bend Reservoir, etc., Co. *v.* Gila Water Co., 205 U. S. 279, 51 L. Ed. 801.

28. Cohn *v.* Daley, 174 U. S. 539, 43 L. Ed. 1077.

29. Bonnefield *v.* Price, 154 U. S., appx. 672, 26 L. Ed. 1022.

In order to bring a case to this court by appeal from the supreme court of the territory of Wyoming in a case where the trial was not by jury, the record must contain such a statement of facts as the law requires. Bonnefield *v.* Price, 154 U. S., appx. 672, 26 L. Ed. 1022.

30. Salina Stock Co. *v.* Salina Creek Irrigation Co., 163 U. S. 109, 41 L. Ed. 90.

Where an appeal was taken from the district court of the territory to the supreme court of the territory, and the supreme court heard the case, reversed the judgment of the district court, and remanded the cause, but the supreme court made no "statement of the facts of the case in the nature of a special verdict," as required by the act of April 7th, 1874, ch. 80, 1 Sup. Rev. St. 13; and as that court must have set aside the findings of the district court in order to render the judgment it gave, there is nothing here which this court can re-examine, and the judgment of the supreme court of the territory must be affirmed. "Since the act of 1878, supra, the evidence at large is not to be transmitted here from the courts of the territories, but in lieu of the evidence 'a statement of the facts of the case in the nature of a special verdict.'" Gray *v.* Howe, 108 U. S. 12, 27 L. Ed. 634, citing Stringfellow *v.* Cain, 99 U. S. 610, 25 L. Ed. 421.

In the absence of any findings by the supreme court of a territory and anything in the nature of a bill of exceptions, the supreme court of the United States has nothing on which to base a reversal of the judgment in the case on an appeal, and, therefore, the judgment must be affirmed. Armijo *v.* Armijo, 181 U. S. 558, 45 L. Ed. 1000.

31. Bierce *v.* Hutchins, 205 U. S. 340, 51 L. Ed. 828, citing Stringfellow *v.* Cain, 99 U. S. 610, 25 L. Ed. 421; Harrison *v.* Perea, 168 U. S. 311, 42 L. Ed. 478.

32. Cohn *v.* Daley, 174 U. S. 539, 43 L. Ed. 1077, citing Marshall *v.* Burtis, 172 U. S. 630, 43 L. Ed. 579.

Where there is no finding of facts by the district court or by the supreme court of the territory, and hence no "statement of facts in the nature of a special verdict," this court will assume that the judgment of the district court was justified by the evidence, and the judgment of the territorial supreme court sustaining it will be

ion in the record is not the finding required by the act of April 7, 1874, c. 80, § 2, 18 Stat., part 3, 27, this court may assume for purposes of decision that under the act of May 2, 1890, c. 182, § 9, 26 Stat. 86, no such finding of facts was necessary.[33]

k. *Exceptions and Objections.*—**In General.**—In reviewing the judgment of a supreme court of a territory, the rule in this court is not to consider questions other than those of jurisdiction, which were not presented to the court whose judgment we are asked to examine.[34] Rule 13 of this court providing: "In all cases of equity * * * heard in this court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant or other exhibit found in the record as evidence, unless objection was taken thereto in the court below and entered of record; but the same shall otherwise be deemed to have been admitted by consent," is applicable to appeals to this court from the territorial courts. Accordingly, where no motion is made in the territorial supreme court before decision to exclude depositions, and it does not appear in the record that the supreme court, in giving its decision, passed upon the question of its admissibility, the action of the court below in this regard will not be noticed on appeal. Our inquiry is limited to the ruling of the supreme court of the territory; and it is its judgment which we are reviewing.[35] The act of March 18, 1897, of the territory of Arizona, can give to the supreme court of the United States no jurisdiction to review an objection to evidence taken upon the trial, if no exception were taken, for the act of congress of 1874 provides for a review in the supreme court only upon the decisions of the court which were excepted to, and the jurisdiction of the supreme court is regulated by that act.[36]

That section of the Montana Code of Civil Procedure which defines an exception as being an objection taken at the trial to a decision upon a matter of law at any time from the calling of the action for trial to the rendering of the verdict or decision, means that the exception must be to some decision or ruling of the court, occurring before final judgment is rendered, and not that the exception must be taken before the decision excepted to has been made. Within this rule set forth, an exception may be taken to the ruling of the court sustaining a motion for a nonsuit and directing judgment to be entered in favor of the defendants, because the granting of a motion for a nonsuit, which is the ruling or decision excepted to, takes place before the final judgment is in fact made and entered.[37]

affirmed. Marshall *v.* Burtis, 172 U. S. 630, 43 L. Ed. 579.

The opinion of the trial court sets forth facts on which it proceeds, but there are no specific findings as such. The supreme court of the territory sets forth in its opinion the facts upon which it proceeded and found that the judgment of the district court should be affirmed. It was held, that on appeal to the supreme court of the United States, it must be assumed that the evidence sustains the judgment and the judgment affirmed, the so-called statement of facts not being in compliance with the statute. Thompson *v.* Ferry, 180 U. S. 484, 45 L. Ed. 633.

33. Halsell *v.* Renfrow, 202 U. S. 287, 50 L. Ed. 1032, citing Oklahoma City *v.* McMaster, 196 U. S. 529, 49 L. Ed. 587; De La Rama *v.* De La Rama, 201 U. S. 303, 50 L. Ed. 765.

34. Bassett *v.* United States, 137 U. S. 496, 501, 34 L. Ed. 762, citing Clarke *v.* Fredericks, 105 U. S. 4, 26 L. Ed. 938.

35. San Pedro, etc., Co. *v.* United States, 146 U. S. 120, 36 L. Ed. 911.

36. Apache County *v.* Barth, 177 U. S. 538, 541, 44 L. Ed. 878, approving Grayson *v.* Lynch, 163 U. S. 468, 41 L. Ed. 230; Bear Lake, etc., Co. *v.* Garland, 164 U. S. 1, 18, 41 L. Ed. 327; Harrison *v.* Perea, 168 U. S. 311, 323, 42 L. Ed. 478; Young *v.* Amy, 171 U. S. 179, 183, 43 L. Ed. 127.

37. Kleinschmidt *v.* McAndrews, 117 U. S. 282, 29 L. Ed. 905.

It is further objected here, however, in argument, that the exception in the present case must be disregarded, because the appeal from the district court to the supreme court was not taken in time under the provisions of § 408, Montana Statutes, 1879, as follows: "An exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed on an appeal from the judgment unless the appeal is taken within sixty days after the rendition of the judgment." In the present case, the judgment was rendered March 22, and the appeal taken July 13, 1880, more than sixty days after the rendition of the judgment. But the exception taken and to be considered is

Bill of Exceptions.—Where, upon an appeal from the supreme court of the territory, a statement of the errors alleged, upon which a motion for a new trial is based, is prepared and filed, and there is a stipulation that the statement should be treated as a bill of exceptions, and it is authenticated by the trial judge as a correct statement of the proceedings, and further than that, at the trial a bill of exceptions was prepared in respect to the rulings of the court on instructions, signed by the trial judge and filed at the time, which bill of exceptions was incorporated in the statement, this proceeding is authorized by the statute of the territory and must be adjudged as sufficient for the purposes of review here.[38]

1. *Mandate.*—**Admission of Territory Pending Appeal.**—Where an appeal is taken to this court from the territorial court, and the territory is admitted as a state pending appeal, this court will reverse and remand the cause to the state supreme court and not to the territorial court.[39] But the statute provides that where an appeal is taken from a supreme court of the territory, and that territory becomes a state pending the appeal, the case will be remanded to the United States circuit court for the proper district, for further proceedings according to law in accordance with the act of February 22, c. 180, 25 Stat. 676, 682, 683, §§ 22, 23.[40]

Rendering and Ordering Final Judgment.—Although the Code of Civil Procedure of California may be in similar terms to that of a territory, it does not follow that the courts of the latter will be regulated by the decisions of the former courts in construing the provisions of their Code, and hold that when the findings are erroneous, it is not competent for the supreme court, on trial, to look into the evidence with a view to reforming the findings and then to enter a judgment in accordance to what the findings ought to have been, but that, in such case, the supreme court will reverse the judgment, and remand the case for a new trial. Therefore, the supreme court of the territory may modify the findings of fact of the court below and enter judgment on the facts as thus modified.[41] Section 428 of the Code of Civil Procedure of Montana, which provides that "upon an appeal from a judgment or order, the appellate court may reverse, affirm or modify the

not within the description of the class mentioned in this section of the statute. Here there was no verdict or decision upon the facts in favor of either party, which it is alleged was erroneous because not supported by the evidence. The ruling excepted to was, that, upon the evidence submitted by the plaintiffs, it was matter of law that they could not recover. The verdict or decision referred to in the above-quoted section of the statute relates exclusively to findings alleged to be erroneous for want of sufficient support in the evidence. Here the matter of the exception is purely matter of law. Kleinschmidt *v.* McAndrews, 117 U. S. 282, 287, 29 L. Ed. 905.

38. Montana R. Co. *v.* Warren, 137 U. S. 348, 34 L. Ed. 681, distinguishing Kerr *v.* Clampitt, 95 U. S. 188, 24 L. Ed. 493.

39. Rader *v.* Maddox, 150 U. S. 128, 37 L. Ed. 1025; Elliott *v.* Chicago, etc., R. Co., 150 U. S. 245, 37 L. Ed. 1068.

Where, since a case is brought to this court from a territorial court, the territory is admitted as a state, if no question of a federal nature is presented, the case will be remanded to the state court. Rader *v.* Maddox, 150 U. S. 128, 37 L. Ed. 1025.

40. The Blue Jacket, 144 U. S. 371, 36 L. Ed. 469.

41. Salina Stock Co. *v.* Salina Creek Irrigation Co., 163 U. S. 109, 41 L. Ed. 90.

A somewhat similar question was raised in the case of Stringfellow *v.* Cain, 99 U. S. 610, 25 L. Ed. 421, which was likewise an appeal from the supreme court of Utah. There the supreme court of the territory set aside the findings of the trial court, and directed a decree on the evidence, at the same time making its own findings from the evidence; and this court refused to disturb the decree of the supreme court, saying: "Without undertaking to decide what would be the proper practice in an ordinary civil case when the judgment is reversed, and a new trial was refused in the district court, we are clearly of the opinion that in a suit like this, when all the evidence is before the supreme court that could be considered by the district court if the case should be sent back, it is proper for the supreme court itself to state the facts established by the evidence, and render the judgment which ought to have been rendered by the district court." Salina Stock Co. *v.* Salina Creek Co., 163 U. S. 109, 117, 41 L. Ed. 90.

Gray *v.* Howe, 108 U. S. 12, 27 L. Ed. 634, was likewise an appeal from the supreme court of the territory of Utah. There the supreme court on appeal had reversed the judgment of a district court,

judgment or order appealed from," does not authorize the appellate court to render a judgment which the lower court could not have rendered.[42]

7. Over State Courts—a. *In General.*—This court has no general power to review or correct the decisions of the highest state court, and in cases of this character exercises a statutory jurisdiction to protect alleged violations, in state decisions, of certain rights arising under federal authority.[43] The jurisdiction of this court to review the final judgments and decrees of a state court rests on § 709 of the Revised Statutes.[44] Appellate jurisdiction was conferred on this court by the twenty-fifth section of the judiciary act of 1789, over final judgments and decrees in any suit in the highest court of law or equity of a state in which a decision in the suit could be had, in three classes of cases: The first class was where the validity of a treaty or statute of, or an authority exercised under, the United States, was drawn in question, and the decision was against their validity; the second was where the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, was drawn in question, and the decision was in favor of their validity; and the third was "or where is drawn in question the construction of any clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption specially set up or claimed by either party, under such clause of the said constitution, treaty, statute or commission."[45]

set aside the findings of that court, and without itself making a new statement of facts in the nature of a special verdict entered a final judgment; and this court held, that such record presented nothing for our examination, and that consequently the judgment of the supreme court of the territory must be affirmed on appeal. Salina Stock Co. *v.* Salina Creek Co., 163 U. S. 109, 117, 41 L. Ed. 90.

42. Kennon *v.* Gilmer, 131 U. S. 22, 33 L. Ed. 110, citing Hopkins *v.* Orr, 124 U. S. 510, 31 L. Ed. 523. Arkansas, etc., Cattle Co. *v.* Mann, 130 U. S. 69, 32 L. Ed. 854.

43. Central Land Co. *v.* Laidley, 159 U. S. 103, 40 L. Ed. 91; Marchant *v.* Pennsylvania R. Co., 153 U. S. 380, 38 L. Ed. 751; Harding *v.* Illinois, 196 U. S. 78, 83, 49 L. Ed. 394, reaffirmed in Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171; Seale *v.* Georgia, 201 U. S. 642, 50 L. Ed. 902.

A jurisdiction to be exercised sparingly.—As remarked by Chief Justice Taney in Luther *v.* Borden, 7 How. 1, 12 L. Ed. 581: "The high power has been conferred on this court of passing judgment upon the acts of the state sovereignties, and of the legislative and executive branches of the federal government, and of determining whether they are beyond the limits of power marked out for them respectively by the constitution of the United States. This tribunal, therefore, should be the last to overstep the boundaries which limit its own jurisdiction. And while it should always be ready to meet the 5th of February, 1867, after the late rebellion had been suppressed—and just any question confided to it by the constitution, it is equally its duty not to pass beyond its appropriate sphere of action, and to take care not to involve itself in discussions which properly belong to other forums." Taylor *v.* Beckham, 178 U. S. 548, 580, 44 L. Ed. 1187.

44. Smalley *v.* Laugenour, 196 U. S. 93, 96, 49 L. Ed. 400, reaffirmed in Delahanty *v.* Pitkin, 199 U. S. 602, 50 L. Ed. 328.

45. 1 Stat. 73, 85, c. 20, § 25; Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 307, 47 L. Ed. 480, reaffirmed in Huber *v.* Jennings-Heywood Oil Syndicate, 201 U. S. 641, 50 L. Ed. 901; Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

On the 24th of September, 1789, at the first congress of the United States, after the adoption of the constitution, congress passed the "act to establish the judicial courts of the United States," 1 Stat. at Large 25; the great act commonly called the judiciary act. The twenty-fifth section of it gave to this court whatever power was given in the act at all to reexamine, reverse, or affirm the final judgments or decrees in suits in the highest courts of law or equity of the states. On the 5th of February, 1867, after the late rebellion had been suppressed—and just before the adoption of the fourteenth amendment to the constitution, which declares that "no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States"—but while more or less disorganization of things remained in the southern states, congress passed an act entitled "an act to amend an act to establish the judicial courts of the United States." 14 Stat. at Large 485. This act was in two sections. The first section gives to the courts of the United States, and the sev-

The amendatory judiciary act of 1867, 14 Stat. at Large 386, provides that a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege (or immunity), specially set up or claimed by either party under such constitution, treaty, statute, commission (or authority), may be re-examined and reversed or affirmed in the supreme court of the United States upon a writ of error, * * * in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court (of the United States); and the proceeding upon the reversal shall also be the same, except that the supreme court may, at their discretion, proceed to a final decision of the same, and award execution (or remand the same to an inferior court).[46]

Effect of Act of 1867.—In one case it was said, that the act of 1867 in some particulars supersedes and replaces the 25th section of the judiciary act of 1789.[47] But later it was settled that the second section of the act of February 5, 1867 (14 Stat. at Large 385), "to amend" the judiciary act of 1789, operates as a repeal of the twenty-fifth section of that act; and the act of 1867, as it is now found in the Revised Statutes of the United States, § 709, is the sole law governing the removal of causes from state courts to this court for review, and has been since its enactment in 1867.[48]

eral judges thereof, within their respective jurisdictions, in addition to the authority already conferred by law, power to grant writs of habeas corpus in all cases where any person may be restrained of liberty in violation of the constitution, or of any treaty or law of the United States. Murdock *v.* Memphis, 20 Wall. 590, 592, 22 L. Ed. 429.

Judiciary act of 1789, 1 stat. at large 86.—"Sec. 25. And be it further enacted, that a final judgment or decree in any suit, in the highest court (of law or equity) of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity, or where is drawn in question the validity of a statute of or an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of such their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege (or exemption), specially set up or claimed by either party, under such (clause of the said) constitution, treaty, statute (or), commission, may be re-examined, and reversed or affirmed in the supreme court of the United States upon a writ of error, * * * in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a (circuit) court, and the proceeding upon the reversal shall also be the same, except that the supreme court (instead of remanding the cause for a final decision, as before provided), may at their discretion (if the cause shall have been once remanded before), proceed to a final decision of the same, and award execution (but no other error shall be assigned or regarded as a ground of reversal in any case as aforesaid than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute)." Trebilock *v.* Wilson, 12 Wall. 687, 689, 20 L. Ed. 460.

46. Trebilcock *v.* Wilson, 12 Wall. 687, 689, 20 L. Ed. 460.

47. Twitchell *v.* Pennsylvania, 7 Wall. 321, 19 L. Ed. 223.

48. Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429; Johnson *v.* Towsley, 13 Wall. 72, 80, 20 L. Ed. 485.

In the leading case of Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429, which was the first case in which the court felt called upon to decide whether the act of February 5th, 1867 (14 Stat. at L., 385), was a repeal of § 25 of the judiciary act of 1789, and to construe the

Subsection 7 of § 5 of the act of March 3, 1891, allowing appeals or writs of error to be taken from the district courts or from the existing circuit courts direct to the supreme court in certain cases, provides that nothing contained therein shall affect the jurisdiction of the supreme court in cases of appeals from the highest courts of the state, nor the construction of the statutes providing for review of such cases.[49]

Binding Effect of Decisions of Respective Courts.—State decisions involving questions re-examinable here under the twenty-fifth section of the judiciary act can have no authoritative influence in this court, because the state courts in deciding those few questions act in a subordinate relation to the paramount jurisdiction of this court as conferred under the federal constitution. Federal courts and state courts, it may also be remarked, exercise concurrent jurisdiction in a large class of cases, but the decisions of the state courts in such cases, where the question is one of a general character, and not one arising under the local law, are not regarded as authorities in this court, nor are the decisions of this court in such cases obligatory upon the tribunals of the states. But the decisions of this court in cases involving federal questions are conclusive authorities in the state courts, and their decisions upon the construction of their own constitution and local laws are equally so in this court, unless the case be one which presents some question arising under the twenty-fifth section of the judiciary act.[50]

b. *Construction of Statute*—(1) *In General.*—The twenty-fifth section of the judiciary act is limited by the constitution, and must be construed so as to be confined within these limits. But to construe this section so that a case can arise under the constitution or a treaty only when the right is created by the constitution or a treaty, would defeat the obvious purpose of the constitution, as well as the act of congress. The language of both instruments extends the jurisdiction of this court to rights protected by the constitution, treaties or laws of the United States, from whatever source these rights may spring.[51]

(2) *Words "Statute of a State" Defined.*—Any enactment, from whatever source originating, to which a state gives the force of law, is a statute of the state, within the meaning of the act regulating the appellate jurisdiction of this court over the judgments and decrees of the state courts.[52]

(3) *Meaning of Term "Suit" in Statute.*—**In General.**—The word "suit" as used in the judiciary act of 1789 is a very comprehensive term and is understood to apply to a proceeding in a court of justice, by which an individual pursues that remedy in a court of justice which the law affords him. The modes of proceeding may be various, but if a right is litigated between the parties in a court of jus-

later enactment, it was held, that the act of 1867 as it is now found in Rev. Stat., § 709, did repeal § 25 of the judiciary act. Maney *v.* Porter, 4 How. 55, 11 L. Ed. 873.

49. Osborne *v.* Florida, 164 U. S. 650, 656, 41 L. Ed. 586.

50. Provident Institution *v.* Massachusetts, 6 Wall. 611, 628, 18 L. Ed. 907.

51. New Orleans *v.* De Armas, 9 Pet. 224, 9 L. Ed. 109.

52. William *v.* Bruffy, 96 U. S. 176, 24 L. Ed. 716.

An enactment of the confederate states, enforced as a law of one of the states composing that confederation, is a statute of such state, within the meaning of the act regulating the appellate jurisdiction of this court over the judgments and decrees of the state courts. Ford *v.* Surget, 97 U. S. 594, 24 L. Ed. 1018, reaffirming Williams *v.* Bruffy, 96 U. S. 176, 24 L. Ed. 716.

The legislature of Louisiana in 1877 having granted to a corporation the exclusive right of constructing waterworks to supply the city of New Orleans and its inhabitants with water, provided that nothing in this charter should prevent the city council from granting to any person, contiguous to the Mississippi river, permission to lay water pipes exclusively for its own use, an ordinance of the city council in 1883, granting such permission to a corporation whose property is separated from the river by a street and a broad quay or levee owned by the city, is but a license from the city council exercising an administrative power, and not a law of the state; and if the highest court of the state, in a suit between the waterworks company and the licensee, gives judgment for the latter, upon the construction and effect of the charter and the license, and not because of the provision of the state constitution of 1879

tice, the proceeding by which the decision of the court is sought is a suit.[53] Writs of prohibition, mandamus, and habeas corpus, prosecuted for the attainment of the parties' rights, are suits within the meaning of the law, the judgments upon which, in proper cases, may be removed into this court by writ of error to a state court.[54]

A writ of prohibition is a "suit" within the meaning of that term as used in the twenty-fifth section of the judiciary act.[55]

A writ of habeas corpus is a suit within the meaning of the twenty-fifth section of the judiciary act.[56]

A proceeding for a mandamus is a "suit" within the meaning of that term as employed in § 709 of the Revised Statutes.[57]

abolishing monopolies, this court has no jurisdiction on writ of error, although the question whether the licensee's property was contiguous to the river was in controversy. New Orleans, etc., Co. *v.* Louisiana Sugar Refining Co., 125 U. S. 18, 31 L. Ed. 607.

53. Holmes *v.* Jennison, 14 Pet. 540, 566, 10 L. Ed. 579, citing Mr. Chief Justice Marshall in Weston *v.* Charleston, 2 Pet. 449, 7 L. Ed. 481.

Criminal cases.—"By the twenty-fifth section of the judiciary act of 1789, it is provided 'that a final judgment or decree in any suit in the highest court of law or equity of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under, the United States, and the decision is against their validity; or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision is in favor of their validity; or where is drawn in question the construction of any clause of the constitution, or of a treaty or statute of, or commission held under, the United States, and the decision is against the title, right, privilege, or exemption, specially set up or claimed by either party under such clause of the said constitution, treaty, statute, or commission, may be re-examined, and reversed or affirmed, in the supreme court of the United States.' Doubts have been expressed whether a writ of error to a state court is not limited to civil cases. These doubts could not have arisen from reading the above section. Is not a criminal case as much a suit as a civil case? What is a suit but a prosecution; and can anyone suppose that it was the intention of congress, in using the word "suit," to make a distinction between a civil prosecution and a criminal one? It is more important that jurisdiction should be given to this court in criminal than in civil cases, under the twenty-fifth section of the judiciary act. Would it not be inconsistent both with the spirit and letter of this law, to revise the judgment of a state court, in a matter of controversey respecting damages, where the decision is against a right asserted under the constitution or a law of the United States; but to deny the jurisdiction, in a case where the property, character, the liberty and life of a citizen may be destroyed, though protected by the solemn guarantees of the constitution? But this is not an open question; it has long since been settled by the solemn adjudications of this court. The above construction, therefore, is sustained both on principle and authority. The provisions of the section apply as well to criminal as to civil cases, where the constitution, treaties, or laws of the United States come in conflict with the laws of a state, and the latter is sustained by the decision of the court." Worcester *v.* Georgia, 6 Pet. 515, 566, 8 L. Ed. 483, 503.

54. Weston *v.* Charleston, 2 Pet. 449, 7 L. Ed. 481; Kendall *v.* United States, 12 Pet. 524, 9 L. Ed. 1181; Holmes *v.* Jennison, 14 Pet. 540, 10 L. Ed. 579; Ex parte Milligan, 4 Wall. 2, 18 L. Ed. 281; Upshur County *v.* Rich, 135 U. S. 467, 34 L. Ed. 196.

55. Weston *v.* Charleston, 2 Pet. 449, 7 L. Ed. 481.

A writ of error to this court may be prosecuted, where by the judgment of the highest court of the state of South Carolina, a prohibition, issued in a state court, to prevent the levying of a tax which was imposed by a law repugnant to the constitution of the United States, was refused on the ground that the law was not so repugnant to the constitution. Weston *v.* Charleston, 2 Pet. 449, 7 L. Ed. 481.

56. Holmes *v.* Jennison, 14 Pet. 540, 564, 10 L. Ed. 579; Ex parte McCardle, 6 Wall. 318, 18 L. Ed. 816.

It is said in Holmes *v.* Jennison, 14 Pet. 540, 566, 10 L. Ed. 579, in deciding that a proceeding by habeas corpus was a suit within the meaning of the judiciary act, that the authorities were stronger in favor of the writ of error in the case of habeas corpus, than in the case of mandamus as cited in Columbia Ins. Co. *v.* Wheelright, 7 Wheat. 534, 5 L. Ed. 516, both of which were writs of error from orders or judgments of the court awarding a peremptory mandamus.

57. American Express Co. *v.* Michigan,

Judgment Rendered on Voluntary Submission of Case.—A judgment in the highest court of law or equity of a state, if otherwise a proper subject for review here, under the twenty-fifth section of the judiciary act, is not rendered incapable of being reviewed by the fact that judgment was rendered on a voluntary submission of a case agreed on for judgment, under the provisions of the Code of the state.[58]

(4) *The Words "Authority Exercised under Any State" Defined.*—The authority conferred by a state on its supreme court to hear and determine cases, is not the kind of authority referred to in the 25th section of the judiciary act, which gives this court a right to review the decisions of the highest state court, where is drawn in question the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the constitution, etc., and the decision is in favor of such validity.[59] But the decision of the highest court of a state that the United States is not an innocent purchaser for valuable consideration of a certain parcel of land claimed by it, and therefore has no title to the land, is a decision upon a matter of law against the validity of an authority, and as such is reviewable by this court.[60]

(5) *Validity of Statute or "Authority Exercised under the United States."*—**Validity of Authority.**—Under the first clause of § 709 of the Revised Statutes giving this court jurisdiction where there is drawn in question the validity of an authority exercised under the United States, something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence, derived from competent governmental power. In many respects "authority" stands upon the same footing with "treaty" or "statute." And in many cases the question of the existence of an authority is so closely connected with the question of its validity that the court will not undertake to separate them, and in such cases the question of jurisdiction will not be considered apart from the question upon the merits, or except upon hearing in regular order. But where the single question is not of the validity but of the exercise of an authority, and this court is fully satisfied that there was, and could have been, no decision of the state court against any authority under the United States existing in fact, this court has no jurisdiction of the cause brought here by writ of error.[61]

177 U. S. 404, 44 L. Ed. 823, citing and approving McPherson *v.* Blacker, 146 U. S. 1, 24, 36 L. Ed. 869; Hartman *v.* Greenhow, 102 U. S. 672, 26 L. Ed. 271, reaffirmed in Crawford *v.* Hubbell, 177 U. S. 419, 44 L. Ed. 829.

58. Aldrich *v.* Ætna Ins. Co., 8 Wall. 491, 19 L. Ed. 473.

59. Bethell *v.* Demaret, 10 Wall. 537, 19 L. Ed. 1007.

The power of this court to revise the judgments of state tribunals, depends on the 25th section of the judiciary act. That section enacts "that a final judgment or decree in any suit in the highest court of law or equity of a state, in which a decision in the suit could be had," where is drawn in question the validity of a statute, or of an authority exercised under any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision in favor of their validity, "may be re-examined, and reversed or affirmed in the supreme court of the United States." The city council of Charleston, exercising an authority under the state of South Carolina, enacted an ordinance, by which a tax was imposed on the six and seven per cent. stock of the United States; and in the court of common pleas of the Charleston district, an application was made for a prohibition to restrain them from levying the tax, on the ground, that the ordinance violated the constitution of the United States. The prohibition was granted, and the proceedings in the case were removed to the constitutional court, the highest court of law of the state; and in that court, it was held, that the ordinance did not violate the constitution of the United States, and a writ of error was prosecuted on this decision of this court. Held, that the question decided by the constitutional court was the very question on which the revising power of this court is to be exercised. Weston *v.* Charleston, 2 Pet. 449, 7 L. Ed. 481.

60. Stanley *v.* Schwalby, 162 U. S. 255, 40 L. Ed. 960.

61. Millingar *v.* Hartupee, 6 Wall. 258, 18 L. Ed. 829; Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 224, 32 L. Ed. 908; New Orleans *v.* New Orleans Water Works Co., 142 U. S. 86, 87, 35 L. Ed. 946; Hamblin *v.* Western Land Co., 147

Claim of Title under Patents.—The decision by a state court that a patent from the United States for land does not extend to a certain river bank is not a denial of any authority claimed, but is only a decision that the grant does not in fact extend to the river, or, in other words, that the authority was not exercised. It is a mere interpretation of the authority really exercised and not any denial of authority. The issue thus made is not one of "validity" but one of fact.[62]

Validity Must Be Denied Directly.—To enable this court to entertain jurisdiction under a writ of error upon the ground that the validity of an authority

U. S. 531, 532, 37 L. Ed. 267; Douglas *v.* Wallace, 161 U. S. 346, 348, 40 L. Ed. 727; Wilson *v.* North Carolina, 169 U. S. 586, 595, 42 L. Ed. 865; Telluride, etc., Co. *v.* Rio Grande, etc., R. Co., 175 U. S. 639, 643, 44 L. Ed. 305; Illinois Central R. Co. *v.* Chicago, 176 U. S. 646, 656, 44 L. Ed. 622; Connecticut *v.* Woodruff, 153 U. S. 689, 38 L. Ed. 869.

The twenty-fifth section of the judiciary act does not give jurisdiction to this court in cases of decisions by the courts of a state against mere assertions of an exercise of authority under the United States. Hence, where a party claims authority under an order of a court of the United States, which, when rightly viewed, does not purport to confer any authority upon him, the writ will be dismissed, on motion, and apart from a consideration of merits, when the single question is, not the validity of the authority, but its existence, and the court is fully satisfied that there was and could have been no decision by the state court against any authority under the United States existing in fact. Millingar *v.* Hartupee, 6 Wall. 258, 18 L. Ed. 829.

62. Sweringen *v.* St. Louis, 185 U. S. 38, 46 L. Ed. 795.

A patent was granted to a pre-emptor in 1841 for a tract of land which had been previously assigned, by the direction of the president, to a Pottawatomie Indian, under the terms of the treaty with that tribe. The patent was adjudged to be a valid grant of land by the supreme court of Indiana. Held, that this case is not within the clause of the 25th section of the judiciary act, which confers jurisdiction upon this court to re-examine judgments or decrees of state courts adverse to "an authority exercised under the United States." Verden *v.* Coleman, 1 Black 472, 17 L. Ed. 161.

Jurisdiction of a federal court.—The decision by the highest state court that a circuit court of the United States has jurisdiction to entertain an action by a National Bank, does not bring the case within the clause of the statute giving this court jurisdiction to re-examine a final judgment or decree in the highest court of the state "where is drawn in question the validity of a treaty or statute of, or authority exercised under, the United States, and the decision is against their validity." Rev. Stat., § 709. The circuit court of the United States had authority to judicially determine in the case and for the parties before it whether the action brought by the bank was one arising under the laws of the United States. Its authority in that regard was not and could not have been disputed. But to deny that the bank could bring its action in the federal court—the bank being located in Washington and the persons sued by it being citizens of that state—was not, within the meaning of § 709, to draw in question "an authority exercised under the United States." Nor can we sustain the contention that our jurisdiction may rest on the clause of § 709, "or where is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity." The authority of the state court to consider and pass upon the question, directly raised in the case before it, as to the jurisdiction of the circuit court of the United States on the bank's suit, was not drawn in question. The contention is only that its decision was erroneous. Abbott *v.* Tacoma Bank of Commerce, 175 U. S. 409, 412, 44 L. Ed. 217.

Rights from priority of possession of mining claims.—"It is insisted that the case falls within the first category of cases specified in Rev. Stat., § 709, 'Where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity.' But the cases in which this clause has been applied are those wherein the validity of a statute, or of an authority exercised by a public official of the United States has been called in question, and not those where a general right is set up under a statute. McGuire *v.* The Commonwealth, 3 Wall. 382, 387, 17 L. Ed. 165; Millingar *v.* Hartupee, 6 Wall. 258, 18 L. Ed. 829; Daniels *v.* Tearney, 102 U. S. 415, 26 L. Ed. 187; Sharpe *v.* Doyle, 102 U. S. 686, 26 L. Ed. 277; Buck *v.* Colbath, 3 Wall. 334, 18 L. Ed. 257. The use of the word 'authority' in the third clause in connection with the word 'commission' favors the theory that a personal authority was intended, and not the assertion of an abstract right created by a statute." Telluride, etc. Co. *v.* Rio Grande, etc., R. Co., 175 U. S. 639, 643, 44 L. Ed. 305.

exercised under the United States was drawn in question, the validity of such authority must have been denied directly and not incidentally.[63] The validity of an authority exercised under the United States is drawn in question only when it is primarily denied, and the denial made the subject of direct inquiry.[64]

But the test as to whether there exists a claim of immunity arising from an "authority exercised under the United States" is not the particular source or form by which the authority of the United States has been conferred or is exerted, but whether such authority existed and was exercised and an immunity is claimed under it.[65]

Validity of Statute.—The distinction between the construction of a statute and the validity of a statute has frequently been adverted to by this court.[66] In several cases this court has held, that the construction of a statute of another state, and its operation elsewhere, does not necessarily involve a federal question.[67] It has often been held, that the validity of a statute or treaty of the United States is not "drawn in question" within the meaning of § 709, every time rights claimed under a statute or treaty are controverted, nor is the validity of an authority every time an act done by such authority is disputed.[68]

Where there has been no decision of the state court against the validity of

63. Sweringen *v.* St. Louis, 185 U. S. 38, 44, 46 L. Ed. 795, following United States *v.* Lynch, 137 U. S. 280, 34 L. Ed. 700.

64. Cook County *v.* Calumet, etc., Canal Co., 138 U. S. 635, 34 L. Ed. 1110, citing United States *v.* Lynch, 137 U. S. 280, 34 L. Ed. 700; Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 32 L. Ed. 908; Connecticut *v.* Woodruff, 153 U. S. 689, 38 L. Ed. 869; Borgmeyer *v.* Idler, 159 U. S. 408, 40 L. Ed. 199; Sweringen *v.* St. Louis, 185 U. S. 38, 44, 46 L. Ed. 795.

A decision by the state court that the land commissioner had no authority to vacate an entry, and that any order that he might make did not affect the rights of the person making the entry, is not a decision against a title specially set up against the plaintiff under an authority exercised under the United States, nor against the validity of such an authority, where this view was expressed in construing the language of the state statute. Cook County *v.* Calumet, etc., Canal Co., 138 U. S. 635, 34 L. Ed. 1110.

Where in a case involving construction of an act of the state of Illinois granting swamps and overflowed lands to the county, which lands had been granted to the state by an act of congress, it is assigned for error that the supreme court sustained the trial court in the admission of improper testimony, to wit, the register and receiver's certificate for the land, and therefore the validity of an authority exercised under the United States, namely, the action of the land department, was drawn in question, and the decision was against its validity, the writ of error will be dismissed, because it does not draw in question the validity of the authority of the land department within § 709 of the revised statute upon which section our jurisdiction rests. Cook County *v.* Calumet, etc., Canal Co., 138 U. S. 635, 34 L. Ed. 1110.

65. Tullock *v.* Mulvane, 184 U. S. 497, 46 L. Ed. 657.

66. Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 32 L. Ed. 908; Glenn *v.* Garth, 147 U. S. 360, 369, 37 L. Ed. 203; Johnson *v.* New York Life Ins. Co., 187 U. S. 491, 47 L. Ed. 273; Easton Building, etc., Ass'n *v.* Williamson, 189 U. S. 122, 47 L. Ed. 735.

"In Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 32 L. Ed. 908, the distinction between the denial of validity and the denial of a title, right, privilege or immunity specially set up or claimed, is pointed out, as well as the distinction between the construction of a statute or the extent of an authority and the validity of a statute or of an authority." Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 308, 47 L. Ed. 480, reaffirmed in Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

67. Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615, 30 L. Ed. 519; Allen *v.* Alleghany Co., 196 U. S. 458, 463, 49 L. Ed. 551.

68. Kennard *v.* Nebraska, 186 U. S. 304, 308, 46 L. Ed. 1175; Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 32 L. Ed. 908; Cook County *v.* Calumet, etc., Canal Co., 138 U. S. 635, 653, 34 L. Ed. 1110; Borgmeyer *v.* Idler, 159 U. S. 408, 40 L. Ed. 199; Blackburn *v.* Portland Gold Min. Co., 175 U. S. 571, 44 L. Ed. 276; Florida, etc., R. Co. *v.* Bell, 176 U. S. 321, 328, 44 L. Ed. 486; Columbia Water Power Co. *v.* Columbia Street Railway Co., 172 U. S. 475, 488, 43 L. Ed. 521; United States *v.* Lynch, 137 U. S. 280, 34 L. Ed. 700; Telluride, etc., Co. *v.* Rio Grande, etc., R. Co., 175 U. S 639, 643, 44 L. Ed. 305; Bushnell *v.* Crooke Min., etc., Co., 148 U. S. 682, 37

any statute of the United States, but the judgment only denied the existence of the facts necessary to bring the case within its operation, the writ of error will be dismissed.[70] A case may be said to involve the construction or application of the constitution of the United States, or the validity or construction of a treaty made under the authority of the United States when a title, right, privilege or immunity is claimed under that instrument, but a definite issue in respect to the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. "The general doctrine has been frequently announced in cases involving the jurisdiction of this court under the twenty-fifth section of the judiciary act of September 24, 1789; § 709 of the Revised Statutes; and acts relating to the revision of judgments of the supreme court and court of appeals of the District of Columbia and the supreme courts of the territories, as well as in cases involving the jurisdiction of the circuit courts."[71] Where the constitution, laws or treaties of the United States are not before the court for construction, but merely as a fact, this

L. Ed. 610; Doe *v.* Mobile, 9 How. 451, 13 L. Ed. 212.

It was said by the chief justice, in Cook County *v.* Calumet, etc., Canal Co., 138 U. S. 635, 653, 34 L. Ed. 1110: "The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed." Bushnell *v.* Crooke Min. etc., Co., 148 U. S. 682, 689.

We have repeatedly held, that the validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority every time an act done by such authority is disputed. Snow *v.* United States, 118 U. S. 346, 352, 30 L. Ed. 207; Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 32 L. Ed. 908; Cook County *v.* Calumet, etc., Canal Co., 138 U. S. 635, 34 L. Ed. 1110; Ferry *v.* King County, 141 U. S. 668, 673, 35 L. Ed. 895.

What are public lands.—Where the plaintiff in error specially set up and claimed a federal right in the state court, a decision by the supreme court of the state, that the Pawnee reservation lands in Nebraska were public lands within the meaning of the 12th section of the enabling act, which did not bring into question the validity of that section—much less was a decision against its validity—does not present a question on which to rest a right to review that judgment, on writ of error from the supreme court of the United States. Kennard *v.* Nebraska, 186 U. S. 304, 308, 46 L. Ed. 1175.

The decision by a state court in an action against a county treasurer and sureties on his bond, that the settlements of the treasurer with the board of county commissioners were not conclusive; that the board exercised no judicial power in making them, but acted merely ministerially; that there was no law authorizing the board to absolve the treasurer from the performance of the duty to account and pay over; that the settlements were only prima facie evidence and could not be pleaded as an estoppel; and that the denial by the trial court of an order for a bill of particulars, was a matter largely discretionary with the trial court and its ruling would not be disturbed in the absence of anything indicating that the defendants were prejudiced thereby, shows no denial of the validity of an authority exercised under the United States, nor was the validity of a statute or authority primarily denied here, and the denial made the subject of direct inquiry, nor was any decision against the validity of statute or authority. Ferry *v.* King County, 141 U. S. 668, 35 L. Ed. 895.

70. Crary *v.* Devlin, 154 U. S. 619, appx., 23 L. Ed. 510, citing Mining Co. *v.* Boggs, 3 Wall. 304, 17 L. Ed. 245.

A motion to dismiss a writ of error to a state court will be granted, where there could have been no decision of the court of appeals against the validity of any statute of the United States, because it was found that the facts upon which the defendants below relied to bring their case within the statutes in question did not exist. In such case, the judgment does not deny the validity of the statute, but the existence of the facts necessary to bring the case within its operation. Crary *v.* Devlin, 154 U. S. 619, appx., 23 L. Ed. 510, following Mining Co. *v.* Boggs, 3 Wall. 304, 17 L. Ed. 245.

71. Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 32 L. Ed. 908; United States *v.* Lynch, 137 U. S. 280, 34 L. Ed. 700; South Carolina *v.* Seymour, 153 U. S. 353, 38 L. Ed. 742; New Orleans *v.* Benjamin, 153 U. S. 411, 38 L. Ed. 764; Linford *v.* Ellison, 155 U. S. 503, 39 L. Ed. 239; Durham *v.* Seymour, 161 U. S. 235, 40 L. Ed. 682; Hanford *v.* Davies, 163 U. S. 273, 41 L. Ed. 157; Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 41 L. Ed. 1149; Muse *v.* Arlington Hotel Co., 168 U. S. 430, 435, 42 L. Ed. 531.

court has no jurisdiction.[72] It was said hypothetically, if A hold land under a patent from the United States or a Spanish grant ratified by treaty, and his heirs, devisees, or assignees dispute as to which has the best title under him; this does not make a case for the jurisdiction of this court under the twenty-fifth section of the judiciary act. If neither the validity nor construction of the patent or title under the treaty is contested, if both parties claim under it and the contest arises from some question without or dehors the patent or the treaty, it is plainly no case for our interference under this section.[73]

Power to Enact.—The validity of a statute is drawn in question whenever the power to enact it, as it is by its terms, or is made to read by construction, is fairly open to denial, and is denied.[74]

c. *Constitutionality of Statute.*—The twenty-fifth section of the judiciary act of 1789, re-enacted in § 709 of the Revised Statutes, is constitutional.[75]

d. *Effect of Ordinance of Secession.*—The ordinance of secession by the state of Louisiana, on the 26th of January, 1861, was a nullity, and did not affect the previous jurisdiction of the supreme court of that state, or its relation to the appellate power of the supreme court of the United States, under the twenty-fifth section of the judiciary act.[76]

72. In 1839 a treaty was made between the United States and Mexico, providing for the "adjustment of claims of citizens of the United States on the Mexican Republic." Under this treaty a sum of money was awarded to be paid to the members of the Baltimore Mexican Company, who had subscribed money to fit out an expedition against Mexico under General Mina, in 1816. The proceeds of one of the shares of this company were claimed by two parties, one as being the permanent trustee of the insolvent owner of the share, and the other as being the assignee of the provisional trustee and afterwards the assignee of the insolvent himself. The judgment of the court of appeals of Maryland, that the latter claimant is entitled to the money, is not reviewable by this court under the twenty-fifth section of the judiciary act. "Both parties claim certain moneys in court as assignees of Lyde Goodwin, who was a member of the "Baltimore Mexican Company," and entitled to a certain proportion of the money awarded to said company, as a just claim on the Mexican government. The validity of the award, or the treaty under which it was made, is not called in question by either party, as both claim under them. In order to ascertain the effect of certain previous assignments made by Lyde Goodwin, the history of the origin of his claim necessarily makes a part of the case. The treaty and award are introduced as a part of this history, as facts are disputed by either party. The money being in court, both the treaty and award were functi officio, and no decision of the rights of the claimants inter se can, in the nature of the case, involve the validity of either." Gill *v.* Oliver, 11 How. 529, 13 L. Ed. 799.

73. Gill *v.* Oliver, 11 How. 529, 13 L. Ed. 799.

74. Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 224, 32 L. Ed. 908; Miller *v.* Cornwall R. Co., 168 U. S. 131, 133, 42 L. Ed. 409, reaffirmed in Charleston, etc., Bridge Co. *v.* West Virginia, 168 U. S. 704, 42 L. Ed. 1212.

In the Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 32 L. Ed. 908, it was held, that the validity of a statute is drawn in question when the power to enact it is fairly open to denial and is denied, but not otherwise. Cited in Sweringen *v.* St. Louis, 185 U. S. 38, 44, 46 L. Ed. 795.

75. Williams *v.* Bruffy, 102 U. S. 248, 26 L. Ed. 135; Martin *v.* Hunter, 1 Wheat. 304, 350, 4 L. Ed. 97.

It has been uniformly held that the 25th section of the judiciary act of 1789 is constitutional. The Mayor *v.* Cooper, 6 Wall. 247, 18 L. Ed. 851.

"On the whole, the court are of opinion that the appellate power of the United States does extend to cases pending in the state courts; and that the 25th section of the judiciary act, which authorizes the exercise of this jurisdiction in the specified cases, by a writ of error, is supported by the letter and spirit of the constitution. We find no clause in that instrument which limits this power; and we dare not interpose a limitation where the people have not been disposed to create one. * * * It is an historical fact that the supreme court of the United States have, from time to time, sustained this appellate jurisdiction in a great variety of cases, brought from the tribunals of many of the most important states in the Union, and that no state tribunal has ever breathed a judicial doubt on the subject, or declined to obey the mandate of the supreme court, until the present occasion." Martin *v.* Hunter, 1 Wheat. 304, 352, 4 L. Ed. 97, 109.

76. White *v.* Cannon, 6 Wall. 443, 18 L. Ed. 923.

e. *Consent as Conferring Jurisdiction.*—Consent will not give this court jurisdiction over a state court.[77]

f. *Laws Drawn in Question Must Be Those of "State"*—(1) *In General.*—In order to give this court jurisdiction to review the decisions of state courts under the twenty-fifth section of the judiciary act of 1789, the statute, the validity of which is drawn in question, must be passed by a state, a member of the Union, and a public body owing obedience and conformity to its constitution and laws. This has been settled by this court as to the meaning of the word "state." It is not enough for it to be an organized political body within the limits of the union. In short the revision must be of a "statute" and a statute of a "state," and not of a territory, or corporation, college or unacknowledged political body.[78] It has been settled also, that a law passed by Virginia, before the government of the Union took effect, cannot be examined and decided upon under this clause of the judiciary act.[79]

(2) *Decisions of Political Bodies.*—If public bodies, not duly organized or admitted into the Union, undertake as states, to pass laws which might encroach on the Union or its granted powers, such conduct would have to be reached, either by the power of the Union to put down insurrections, or by the ordinary penal laws of the states or territories within which these bodies are situated and acting. But their measures are not examinable by this court on a writ of error. They are not a state, and cannot pass statutes within the meaning of the judiciary act.[80] A statute, passed by a political body before its admission into the Union, seems either not to be one, under the cognizance of the Union or its judicial tribunals, by means of § 25 of the judiciary act, unless re-enacted or adopted after becoming a state; then it is treated like the statute of any state; or the admission of the state into the Union by congress, subsequently with the constitution and political organization under which the statute was passed, must bring it under our consideration as a statute passed by the state—a competent state—leaving, as in other cases, merely its subject matter to be examined in order to see if it violates, or not, any acts or provisions of the general government.[81]

(3) *Decisions of Territorial Courts.*—The jurisdiction of this court to review under the twenty-fifth section of the judiciary act does not extend to those laws passed by territorial legislatures.[82] Where an ordinance of the United States,

77. The supreme court will not, when requested by the counsel for plaintiffs and defendants in error, in a case in which it has not jurisdiction to affirm or reverse the judgment of the court from which the same has been brought by a writ of error to a state court, examine into the questions in the case and decide upon them. Consent will not give jurisdiction. When the act of congress has so carefully and cautiously restricted the jurisdiction conferred upon this court, over the judgments and decrees of the state tribunals, the court will not exercise jurisdiction in a different spirit. Mills *v.* Brown, 16 Pet. 525, 10 L. Ed. 1055.

78. Scott *v.* Jones, 5 How. 343, 12 L. Ed. 181, citing Cherokee Nation *v.* Georgia, 5 Pet. 1, 18, 8 L. Ed. 25; Hepburn *v.* Ellzey, 2 Cranch 445, 2 L. Ed. 332; New Orleans *v.* Winter, 1 Wheat. 91, 4 L. Ed. 44; Owings *v.* Speed, 5 Wheat. 420, 5 L. Ed. 124, for cases deciding the meaning of the word "state" in the judiciary act.

79. Scott *v.* Jones, 5 How. 343, 377, 12 L. Ed. 181, 197, citing Owings *v.* Speed, 5 Wheat. 420, 5 L. Ed. 124.

80. Scott *v.* Jones, 5 How. 343, 12 L. Ed. 181, 182.

An objection to the validity of a statute, founded upon the ground that the legislature which passed it were not competent or duly organized, under acts of congress and the constitution, so as to pass valid statutes, is not within the cases enumerated in the twenty-fifth section of the judiciary act, and therefore this court has no jurisdiction over the subject. Scott *v.* Jones, 5 How. 343, 12 L. Ed. 181.

81. Scott *v.* Jones, 5 How. 343, 378, 12 L. Ed. 181, 197.

82. Miner's Bank *v.* Iowa, 12 How. 1, 13 L. Ed. 867; Walker *v.* Taylor, 5 How. 64, 12 L. Ed. 52.

The 25th section of the judiciary act does not apply to the case where is drawn in question the validity of a statute of a territory. Messenger *v.* Mason, 10 Wall. 507, 19 L. Ed. 1028, citing Scott *v.* Jones, 5 How. 343, 375, 12 L. Ed. 181.

Where a bank was chartered and its charter repealed by the legislature of a territory, the question of the validity of the repealing act cannot be brought be-

then existing, has been incorporated as organic law into the system of laws of a new territory, with a provision, however, that the ordinance should be subject to be altered, modified, or repealed by its governor and legislature, the decision of the supreme court of the state (lately the territory) cannot be brought here under the 25th section, on the ground that in a suit before it there was drawn in question the validity of a statute of the territory as being repugnant to a law of the United States.[83]

g. Decision Must Be That of "Highest Court" in State.—**In General.**—This court has no power to review any other judgments of the courts of a state than those of the highest court "in which a decision in the suit could be had."[84]

Unless it affirmatively appears from the record that a decision could not have been had in the highest court of the state, a writ of error cannot be sustained.[86] A state court cannot be held to have decided against a federal right when it is the circuit court, and not the state court, which has denied its possession.[87]

Qualifications of General Rule.—But where the state court in which a judg-

fore this court under the twenty-fifth section of the judiciary act. The power of review is confined by that section to certain laws passed by states and does not extend to those passed by territorial legislatures. Miner's Bank *v.* Iowa, 12 How. 1, 13 L. Ed. 867, citing Scott *v.* Jones, 5 How. 343, 12 L. Ed. 181.

83. Messenger *v.* Mason, 10 Wall. 507, 19 L. Ed. 1028.

84. Great Western Telegraph Co. *v.* Burnham, 162 U. S. 339, 341, 40 L. Ed. 991.

To enable the supreme court to review a judgment of a state court, such judgment must be that of the highest state court in which a decision could be had. Mullen *v.* Western Union Beef Co., 173 U. S. 116, 43 L. Ed. 635.

It matters not that the judgment of the inferior court is in accordance with what was decided by the court of appeals on the former appeal. The judgment is still the judgment of the superior court, which is not the highest court of the state, and it might have been taken to the court of appeals for review if the grant of an appeal had been applied for and secured. McComb *v.* Commissioners of Knox County, 91 U. S. 1, 23 L. Ed. 185; Kimball *v.* Evans, 93 U. S. 320, 23 L. Ed. 920; Davis *v.* Crouch, 94 U. S. 514, 517, 24 L. Ed. 281; Fisher *v.* Perkins, 122 U. S. 522, 527, 30 L. Ed. 1192.

If the proceedings in the court of oyer and terminer could not, under the laws of New Jersey, be reviewed in a higher court of that state, except upon the allowance of a writ of error by such court or by some judge, and if such allowance was refused, then the judgment of the court of original jurisdiction was, within the meaning of the acts of congress, the judgment of the highest court of the state in which a determination of the case could be had, and such judgment could have been, upon writ of error, reexamined here, if it had denied any right, privilege, or immunity specially set up and claimed under the constitution of the United States. Gregory *v.* McVeigh, 23 Wall. 294, 306, 23 L. Ed. 156; Fisher *v.* Perkins, 122 U. S. 522, 526, 30 L. Ed. 1192; Bergemann *v.* Backer, 157 U. S. 655, 659, 39 L. Ed. 845.

Amount in controversy.—The court of appeals is the highest court of the state of Kentucky, and consequently, until it has been made to appear affirmatively on the face of the record that a decision in this suit could not have been had in that court, we are not authorized to review the judgment of the superior court. Although the value in controversy is less than $1,000, and the judgment of the inferior court was affirmed by the superior court without a dissenting vote, an appeal did lie to the court of appeals if two of the judges of the superior court certified that in their opinion, the question involved was novel and of sufficient importance.

Fisher *v.* Perkins, 122 U. S. 522, 525, 30 L. Ed. 1192, cited in Mullen *v.* Western Union Beef Co., 173 U. S. 116, 123, 43 L. Ed. 635. See Louisville, etc., R. Co. *v.* Eubank, 184 U. S. 27, 33, 46 L. Ed. 416.

For example, the act of the Virginia legislature of February 27th, 1867, by which it was enacted that appeals to the supreme court of appeals of the state from the state district courts should not be allowed when these last fully affirmed the judgments of the county courts, unless the matter in controversy exceeded $1,000, is not inconsistent with the provision in the constitution of 1864, which excluded appeals from the said district courts to the supreme court, except in certain cases specified, unless the matter in controversy amounted to $500. Downham *v.* Alexandria, 9 Wall. 659, 19 L. Ed. 807.

86. Fisher *v.* Perkins, 122 U. S. 522, 30 L. Ed. 1192; Mullen *v.* Western Union Beef Co., 173 U. S. 116, 123, 43 L. Ed. 635.

87. Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 582, 40 L. Ed. 536, reaffirmed in Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179; Nelson *v.* Moloney, 174 U. S. 164, 43 L. Ed. 934.

ment in a suit is given is the highest court of law or equity in the state in which a decision in that suit can be had, a right of review exists here under the 25th section of the judiciary act (if the case be otherwise one for review here under that section), although that court may not be actually the highest court of law or equity in the state.[88] In other words, this court has jurisdiction, upon writ of error, to re-examine the final judgment of a subordinate state court denying a federal right, specially set up or claimed, if, under the local law, that court is the highest court of the state entitled to pass upon such claim of federal right.[89] But it does not

88. Downham *v.* Alexandria, 9 Wall. 659, 19 L. Ed. 807.

A writ of error will lie from the supreme court of the United States to review the judgments or decrees of an inferior State court, if the judgment is of the highest court of the state in which a decision could be had, provided, of course, a federal question was raised for adjudication, or was adjudicated by the state court, and the decision of such inferior state court was against the right claimed. Gregory *v.* McVeigh, 23 Wall. 294, 23 L. Ed. 156.

Where it has been decided by the highest court of the state that the action of the trial court in refusing to quash the indictment or the panel of petit jurors cannot be reviewed by any appellate court under the laws of the state, although the motion to quash was based on federal grounds, then after the highest appellate court of the state has disposed of the matters of which it may take cognizance, a writ of error will run from this court to the highest court in the state in which the decision of the federal question may be had; and this court can review the judgment of the trial court upon such writ of error, and will exercise such jurisdiction as may be necessary, to vindicate any federal right, privilege or immunity, specially set up and denied. Kentucky *v.* Powers, 201 U. S. 1, 50 L. Ed. 633, citing Cohens *v.* Virginia, 6 Wheat. 264, 5 L. Ed. 257; Downham *v.* Alexandria, 9 Wall. 659, 19 L. Ed. 807; Gregory *v.* McVeigh, 23 Wall. 294, 306, 23 L. Ed. 156; Bergemann *v.* Backer, 157 U. S. 655, 659, 39 L. Ed. 845; Missouri, etc., R. Co. *v.* Elliott, 184 U. S. 530, 539, 46 L. Ed. 673.

Virginia.—"A final judgment or decree in any suit, in the highest court of a state in which a decision in the suit could be had," may, in a proper case, be re-examined in this court. Revised Statutes, § 709. The court of appeals is the highest court in the state of Virginia. If a decision of a suit could be had in that court, we must wait for such a decision before we can take jurisdiction, and then can only examine the judgment of that court. If, however, the suit is one of which that court cannot take jurisdiction, we may re-examine the judgment of the highest court which, under laws of the state, could decide it. Downham *v.* Alexandria, 9 Wall. 659, 19 L. Ed. 807; Gregory *v.* McVeigh, 23 Wall. 294, 305, 23 L. Ed. 156.

The superior court of New York being the highest court to which the case could be carried, a writ of error lies to examine its judgment, under the 25th section of the judiciary act. Kanouse *v.* Martin, 15 How. 198, 14 L. Ed. 660.

Rhode Island.—In Olney *v.* Arnold, 3 Dall. 308, 318, 1 L. Ed. 614, it was said: "The superior court of Rhode Island, on whose judgment this writ of error is brought, is the highest court of law of that state, within the meaning of the 25th section of the judicial act. The general assembly might set aside, but they could not make, a decision."

Louisiana.—This court cannot review a judgment of the parish court of New Orleans, for any irregularity or illegality in the proceedings of that court, if either existed, when there could have been an appeal to the supreme court of Louisiana for its correction. "This court has never done so in any case in which the subject matter of a suit, being within the jurisdiction of a state court, upon the allegation that its judgment had been given contrary to the law of a state. See the cases of Fouvergne *v.* New Orleans, 18 How. 470, 471, 15 L. Ed. 399; Gaines *v.* Chew, 2 How. 619, 644, 11 L. Ed. 402; and Tarver *v.* Tarver, 9 Pet. 174, 9 L. Ed. 91." Adams *v.* Preston, 22 How. 473, 16 L. Ed. 273.

Texas.—Where an application was made to the supreme court of the state of Texas for a writ of error to the court of civil appeals for the second district by the defendants in the court below after judgment in the latter court, for the purpose of reviewing the judgment of that court, but the supreme court denied the application and thus prevented by its action a review by it of the judgment of the court of civil appeals, the judgment of that court has, therefore, become the judgment of the highest court of the state in which a decision in the suit could be had, and this court may, so far as this point is concerned, re-examine the same on writ of error under the provisions of § 709, Revised Statutes of the United States. Gregory *v.* McVeigh, 23 Wall. 294, 23 L. Ed. 156; Fisher *v.* Perkins, 122 U. S. 522, 30 L. Ed. 1192; Stanley *v.* Schwalby, 162 U. S. 255, 40 L. Ed. 960; Bacon *v.* Texas, 163 U. S. 207, 215, 41 L. Ed. 132.

89. Kentucky *v.* Powers, 201 U. S. 1, 50 L. Ed. 633, citing Cohen *v.* Virginia, 6 Wheat. 264, 5 L. Ed. 257; Downham *v.* Alexandria, 9 Wall. 659, 19 L. Ed. 807;

matter that the judgment was rendered in an original proceeding in the state court, and not in a case pending before that court on appeal. "It is enough for our jurisdiction that the judgment is by the highest tribunal of the state in which a decision could be had in the suit. When such a judgment is brought before us for review, involving in its rendition a decision upon a federal question, we do not look beyond the action of that court. It is enough that we have its final judgment in the case, whether it be one of original jurisdiction or heard by it in the exercise of its own appellate power over the inferior courts of the state."[90]

h. *What Is the Assertion of "A Right or Immunity."*—Section 709 of the Revised Statutes authorizes this court to re-examine the final judgment of the highest court of a state, "where any title, right, privilege or immunity" is claimed under a statute of the United States, and the decision is against such title, right, privilege, or immunity specially set up or claimed.[91] A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held, within the meaning of § 709, to assert a right and immunity under such statutes, although the statutes may not give the party himself a personal or affirmative right that could be enforced by direct suit against his adversary.[92]

Gregory *v.* McVeigh, 23 Wall. 294, 306, 23 L. Ed. 156, 157; Bergemann *v.* Backer, 157 U. S. 655, 659, 39 L. Ed. 845, 848; Missouri, etc., R. Co. *v.* Elliott, 184 U. S. 530, 549, 46 L. Ed. 673, 678.

90. Hartman *v.* Greenhow, 102 U. S. 672, 676, 26 L. Ed. 271.

91. Rector *v.* City Deposit Bank Co., 200 U. S. 405, 50 L. Ed. 527; Nutt *v.* Knut, 200 U. S. 12, 19, 50 L. Ed. 348.

92. Logan County Nat. Bank *v.* Townsend, 139 U. S. 67, 72, 35 L. Ed. 107; Railroads *v.* Richmond, 15 Wall. 3, 21 L. Ed. 118; Swope *v.* Leffingwell, 105 U. S. 3, 26 L. Ed. 939; Anderson *v.* Carkins, 135 U. S. 483, 486, 34 L. Ed. 272; McNulta *v.* Lochridge, 141 U. S. 327, 35 L. Ed. 796; Metropolitan Bank *v.* Claggett, 141 U. S. 520, 35 L. Ed. 841; McCormick *v.* Market Bank, 165 U. S. 538, 546, 41 L. Ed. 817; California Bank *v.* Kennedy, 167 U. S. 362, 42 L. Ed. 198; Nutt *v.* Knut, 200 U. S. 12, 19, 50 L. Ed. 348; Illinois Central R. Co. *v.* McKendree, 203 U. S. 514, 526, 51 L. Ed. 298, reaffirmed in Illinois Central R. Co. *v.* Edwards, 203 U. S. 531, 51 L. Ed. 305; Eau Claire National Bank *v.* Jackman, 204 U. S. 522, 532, 51 L. Ed. 596; Rector *v.* City Deposit Bank Co., 200 U. S. 405, 50 L. Ed. 527.

Denial of right under bankrupt act.—A motion is made to dismiss on the ground that the record presents nothing but questions of fact. It is contended that neither in the pleadings of the bank nor in any way was any right, privilege or immunity under a federal statute specifically set up or claimed in the state courts. The only questions presented by the pleadings, it is urged, were, did the bankrupt give the bank a preference, and did the bank accept it with reasonable grounds to believe that a preference was intended? The supreme court, however, considered the pleadings to have broader meaning, and answered some of the contentions of the bank by the construction it gave to the bankrupt act. The case, therefore, comes within the ruling in Nut *v.* Knut, 200 U. S. 12, 50 L. Ed. 348; Eau Claire National Bank *v.* Jackman, 204 U. S. 522, 531, 51 L. Ed. 596.

Claim of right under order of secretary of agriculture.—An inspection of the record shows that the case as made by the plaintiff below upon the amended petition was to recover damages for the infection of his cattle, because of coming in contact with cattle transported by the railroad company from a point south to a point north of the quarantine line established by the secretary of agriculture, in a manner violative of regulations for the transportation and keeping of cattle established by the secretary's order. It was not an action to recover for negligence upon common-law principles. The complaint was amended in such form as to count upon the supposed right of action accruing to the plaintiff because of the violation of the department's order. The demurrer of the plaintiff to the answer of the railroad company, setting forth the unconstitutionality of the law and the action of the secretary thereunder, was sustained. The certificate of the court below is given as to the extent and character of the federal rights and immunities claimed by the defendant, and clearly states that the defendant alleged the unconstitutionality of the statute and order, that the order was in excess of the power given the secretary, and that the statute gave no remedy in damages. "Upon this record, read in the light of the certificate, the defendant raised federal questions as to the constitutionality of the law, and, if constitutional, whether the secretary's order was with the power therein conferred, and the right to a personal action for damages in such manner as to give this court jurisdiction of them under § 709, Rev. Stat." Illinois Central R. Co. *v.* McKendree, 203 U. S. 514, 525, 51 L. Ed.

i. *Decisions Reviewable*—(1) *In General.*—"There is no material difference between the language of the law giving the writ of error from the judgment of the circuit court for the District of Columbia, and the language used in the 22d and 25th sections of the act of 1789, so far as relates to the form of proceedings, and the nature of the judgment. Undoubtedly, there are a multitude of cases in which a writ of error will lie from the judgment of a circuit court, where it would not lie to this court from a judgment rendered in a similar controversy in a state court. But our present inquiry has nothing to do with that distinction. We are speaking merely of the nature of the proceeding in this case, and examining whether it is of that description that, under the 25th section of the act of 1789, will authorize a writ of error. The writ in that section is given from any 'final judgment' 'in a suit.' In the act relating to the District of Columbia, it is given from any 'final judgment.' In the 22d section of the act of 1789, it is given from 'final judgment' 'in civil actions.' These different forms of expression have always been held to mean the same thing; and consequently, the decision of this court upon one of them is equally applicable to the others."[93]

(2) *Necessity for Finality of Judgment or Decree.*[94]—Final judgments and decrees only of a state court are re-examinable in this court.[95] But where the defend-

298, reaffirmed in Illinois Central R. Co. *v.* Edwards, 203 U. S. 531, 51 L. Ed. 305, following Nutt *v.* Knut, 200 U. S. 12, 50 L. Ed. 348.

93. Holmes *v.* Jennison, 14 Pet. 540, 565, 10 L. Ed. 579.

94. As there is in the main nothing peculiar about the rules governing the finality of judgments and decrees within the meaning of this statute, reference is made to "Decisions Reviewable," IV, for a complete treatment.

95. Steines *v.* Franklin County, 14 Wall. 15, 20, 20 L. Ed. 846; Rev. Stat., § 709; Davis *v.* Crouch, 94 U. S. 514, 517, 24 L. Ed. 281; McCulloch *v.* Maryland, 4 Wheat. 316, 4 L. Ed. 579; Houston *v.* Moore, 3 Wheat. 433, 4 L. Ed. 428; Kimball *v.* Evans, 93 U. S. 320, 23 L. Ed. 920; Drake *v.* Kochersperger, 170 U. S. 303, 42 L. Ed. 1046; Hammon *v.* Whittredge, 204 U. S. 538, 51 L. Ed. 606; Goodenough Horseshoe Co. *v.* Rhode Island Horseshoe Co., 154 U. S. 635, 24 L. Ed. 368.

A writ of error can only issue from this court to the highest court of a state for a review of the final judgment or decree of that court in a suit. In other words, it is only the last judgment or the last decree which the state courts can give in a suit, until that judgment or decree is set aside or reversed, that this court can, even in the prescribed cases, bring here for re-examination. Parcels *v.* Johnson, 20 Wall. 653, 654, 22 L. Ed. 410.

Both the judiciary act of 1789, § 25, 1 Stat. at L. 85, and the amendatory act of 1867, Brown *v.* Union Bank of Florida, 4 How. 465, 11 L. Ed. 1058; Pepper *v.* Dunlap, 5 How. 51, 12 L. Ed. 46; Tracy *v.* Holcombe, 24 How. 426, 16 L. Ed. 742, limit the jurisdiction of this court in this class of cases to final judgments and decrees. Moore *v.* Robbins, 18 Wall. 588, 21 L. Ed. 758.

Under the 25th section of the judiciary act, a judgment cannot be regarded as final, in the sense of that act, until entered in the court from which execution can issue. Green *v.* Van Buskirk, 3 Wall. 448, 18 L. Ed. 245.

The words "final judgment," in the 25th section of the judiciary act, must be understood in the section under consideration as applying to all judgments and decrees which determine the particular cause; and it is not required that such judgments shall finally decide upon the rights which are litigated, that the same shall be within purview of the section. Weston *v.* Charleston, 2 Pet. 449, 7 L. Ed. 481.

In the case of Weston *v.* Charleston, 2 Pet. 449, 464, 7 L. Ed. 481, this court, speaking of the meaning of the word final, in the section in question, say: "If it (the word final) were applicable to those judgments and decrees only in which the right was finally decided, and could never again be litigated between the parties, the provisions of the section would be confined within much narrower limits than the words import, or than congress could have intended. Judgments and actions of ejectment, and decrees in chancery, dismissing a bill without prejudice, however deeply they might affect rights protected by the constitution, laws or treaties of the United States, would not be subject to the revision of this court. A prohibition might issue, restraining a collector from collecting duties; and this court would not revise and correct the judgment. The word 'final' must be understood in the section under consideration, as applying to all judgments and decrees which determine the particular cause." Cited in Holmes *v.* Jennison, 14 Pet. 540, 563, 10 L. Ed. 579.

Order remanding cause to state court.—"In Missouri Pac. R. Co. *v.* Fitzgerald (1896), 160 U. S. 556, 583, 40 L. Ed. 536;

ant in error moves to dismiss an appeal from the state court on the ground that the judgment recovered is not final, the motion to dismiss will be denied if the judgment appears to have been considered by the state court as so far final as to justify an appeal from it; in other words, if the supreme court of a state holds a judgment of an inferior court of the state to be final, this court can hardly consider it in any other light, in exercising its appellate jurisdiction.[96]

Judgments of Affirmance.—It has long been settled, that if a cause cannot be taken to the highest court of a state, except by leave of the court itself, a refusal of the court upon proper application made to grant the leave, is equivalent to a judgment of affirmance, and is such a final judgment as may be made the basis of proceedings under the appellate jurisdiction of this court.[97] Where the highest court of a state affirmed the judgment of the court below, in consequence of an equal division between the judges thereof, such judgment of affirmance is considered, when the case is brought here under the twenty-fifth section of the judiciary act, as an affirmance of the rulings of the court below.[98]

(3) *Orders at Chambers.*—Since under § 709 this court is given authority to review only the judgments or decrees of the highest court of the state, and, as a writ of error from this court can only go to the highest court of the state, it follows by analogy that it will not lie to review the order of a judge at chambers.[99]

j. *Plaintiff in Error Must Have Personal Interest in the Litigation*—**In General.**—The prime object of all litigation is to establish a right asserted by the plaintiff or to sustain a defense set up by the party pursued. Save in a few instances where, by statute or the settled practice of the courts, the plaintiff is permitted to sue for the benefit of another, he is bound to show an interest in the

in a careful opinion of the chief justice, reviewing the statutes and decisions, it was again stated, as well settled, that an order of the circuit court of the United States ordering a suit to be remanded to the state court was not a final judgment or decree; and that such an order could not be reviewed in this court by any direct proceeding for that purpose; and it was also held, that 'as under the statute a remanding order of the circuit court is not reviewable by this court on appeal or writ of error or to that court, so it would seem to follow that it cannot be reviewed on writ of error to a state court, the prohibition being that "no appeal or writ of error from the decision of the circuit court remanding such cause shall be allowed." And it is entirely clear that a writ of error cannot be maintained under § 709, in respect of such an order, where the state court has rendered no decision against a federal right, but simply accepted the conclusion of the circuit court.'" German Nat. Bank *v.* Speckert, 181 U. S. 405, 408, 45 L. Ed. 926.

Motion for new trial before entry of judgment on verdict.—A record in a state court which shows a verdict and motion for new trial overruled, but no judgment on the verdict, shows no final judgment to which a writ of error may be directed. Nat. Life Ins. Co. *v.* Scheffer, 131 U. S., appx. cciii, 26 L. Ed. 1110.

96. Wheeling, etc., Bridge Co. *v.* Wheeling Bridge Co., 138 U. S. 287, 34 L. Ed. 967.

97. Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. 71, 80, 14 L. Ed. 55; Gregory *v.* McVeigh, 23 Wall. 294, 306, 23 L. Ed. 156; Williams *v.* Bruffy, 102 U. S. 248, 254, 26 L. Ed. 135.

98. Lessieur *v.* Price, 12 How. 59, 60, 13 L. Ed. 893.

A judgment of the highest court of a state entered upon an equal division of opinion amongst the judges, is such a final adjudication of the state court as can be reviewed by this court. Nor does it matter that the judgment was rendered in an original proceeding in the state court, and not in a case pending before that court on appeal. It is enough for our jurisdiction that the judgment was by the highest tribunal of the state in which a decision could be had in the suit. It is enough that we have its final judgment in the case, whether it be of original jurisdiction or heard by it in the exercise of its own appellate power over the inferior courts of the state. Hartman *v.* Greenhow, 102 U. S. 672, 26 L. Ed. 271, citing Lessieur *v.* Price, 12 How. 59, 13 L. Ed. 893; Durant *v.* Essex County, 7 Wall. 107, 19 L. Ed. 154; S. C., 101 U. S. 555, 25 L. Ed. 961.

99. McKnight *v.* James, 155 U. S. 685, 39 L. Ed. 310.

As under § 709 of the Revised Statutes, a writ of error will go from this court only to the final judgment of the highest court of the state in which a decision in the suit can be had, this court has no jurisdiction to review an order of a judge at chambers remanding a prisoner in a habeas corpus proceeding, because this cannot be regarded as a judgment or decree of a court within the meaning of that section. McKnight *v.* James, 155 U. S. 685, 39 L. Ed. 310.

suit personal to himself, and even in a proceeding which he prosecutes for the benefit of the public, as, for example, in cases of nuisance, he must generally aver an injury peculiar to himself, as distinguished from the great body of his fellow citizens.[1] Actions instituted in the supreme court of the United States by writ of error to a state court are no exceptions to this rule.[2] Therefore, to give jurisdiction to this court over the decision of a state court under the 25th section or § 709 of the judiciary act, the party must claim for himself and not for a third person, in whose title he has no interest.[3] That title or right must be one of the

1. Tyler *v.* Judges of Court of Registration, 179 U. S. 405, 406, 45 L. Ed. 252, reaffirmed in Bigger *v.* Ryher, 184 U. S. 696, 46 L. Ed. 763.

2. Tyler *v.* Judges of Court of Registration, 179 U. S. 405, 45 L. Ed. 252.

3. Hale *v.* Gaines, 22 How. 144, 160, 16 L. Ed. 264, citing Henderson *v.* Tennessee, 10 How. 311, 323, 13 L. Ed. 434; Verden *v.* Coleman, 1 Black 472, 474, 17 L. Ed. 161; Long *v.* Converse, 91 U. S. 105, 114, 23 L. Ed. 233; Wynn *v.* Morris, 20 How. 3, 5, 15 L. Ed. 800; Carson *v.* Ober, 131 U. S., appx. clx, 25 L. Ed. 1157; Miller *v.* Lancaster Bank, 106 U. S. 542, 545, 27 L. Ed. 289; Smith *v.* Indiana, 191 U. S. 138, 48 L. Ed. 125; Ludeling *v.* Chaffe, 143 U. S. 301, 36 L. Ed. 313; Giles *v.* Little, 134 U. S. 645, 33 L. Ed. 1062; Texas, etc., R. Co. *v.* Johnson, 151 U. S. 81, 90, 38 L. Ed. 81; Waters-Pierce Oil Co. *v.* Texas, 177 U. S. 28, 43, 44 L. Ed. 657; Clark *v.* Kansas City, 176 U. S. 114, 44 L. Ed. 392; Tullis *v.* Lake Erie, etc., R. Co., 175 U. S. 348, 44 L. Ed. 192.

In Montgomery *v.* Hernandez, 12 Wheat. 129, 6 L. Ed. 575, it is said that "the supreme court has no jurisdiction under the twenty-fifth section of the judiciary act unless the right, title, privilege or exemption under a statute or commission of the United States be specially set up, by the party claiming it, in the state court, and the decision be against the same." Smith *v.* Hunter, 7 How. 738, 743, 12 L. Ed. 894, 896.

Under the 25th section of the judiciary act of 1789, ch. 20, this court has no appellate jurisdiction from the final judgment of the highest court of a state, in a suit where is drawn in question the construction of a statute of, or a commission held under, the United States, unless some title, right, privilege, or exemption, under such statute, etc., be specially set up by the party, and the decision be against the claim so made by him. Montgomery *v.* Hernandez, 12 Wheat. 129, 6 L. Ed. 575.

This court has no jurisdiction to review the decision of a state court against a right and a title under a statute of the United States, unless such right and title be specially set up and claimed by the party for himself, and not for a third person under whom he does not claim. So far as it relates to the above point, § 709 of the Revised Statutes, which authorizes this court, in certain cases, to re-examine upon a writ of error the judgment or decree of a state court, does not differ from the twenty-fifth section of the judiciary act of 1789. Long *v.* Converse, 91 U. S. 105, 23 L. Ed. 233, citing Henderson *v.* Tennessee, 10 How. 311, 13 L. Ed. 434; Hale *v.* Gaines, 22 How. 144, 149, 16 L. Ed. 264; Verden *v.* Coleman, 1 Black 472, 17 L. Ed. 161.

The plaintiff in error must claim (for himself) some title, right, privilege or exemption, under an act of congress, etc., and the decision must be against his claim, to give this court jurisdiction. Setting up a title in the United States, by way of defense, is not claiming a personal interest affecting the subject in litigation. This is the established construction of the 25th section of the judiciary act. Montgomery *v.* Hernandez, 12 Wheat. 129, 132, 6 L. Ed. 575; Hale *v.* Gaines, 22 How. 144, 16 L. Ed. 264, 269.

Alleging a title in the United States, by way of defense, is not claiming a personal interest affecting the subject in litigation, within 25th section of the judiciary act. Hale *v.* Gaines, 22 How. 144, 16 L. Ed. 264.

If a state statute, passed in professed exercise of an authority given by congress to the states to pass such a statute, does not deprive, contrary to the act of congress, the party to the suit, of any right, nor work, as to him, any effect which the act of congress forbids, this court cannot, on the case being brought here by such party, on the ground that the state statute violated the act of congress, declare the state statute void. Nor, in considering whether the act does or does not do this, will this court enter upon the question, whether, in another case arising upon a different state of facts from that of the case before it, the statute might not produce results in conflict with the act of congress, and which this court would therefore be bound to revise and correct. Austin *v.* Boston, 7 Wall. 694, 19 L. Ed. 224.

The rule that it is only the party whose right under the statute has been denied who is entitled to a writ of error to review the final judgment of the state court, was applied to a case in which a third party attempted to raise an objection that a receiver had been sued without prior leave of the court in contravention of the act of congress of March 3, 1887, c. 373, 24

Stat. 552. McNulta *v.* Lochridge, 141 U. S. 327, 35 L. Ed. 796.

In order to give this court jurisdiction to review the judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, that title or right must be a title or right of the plaintiff in error and not a third person only; and the statute or authority must be directly in issue. Conde *v.* York, 168 U. S. 642, 648, 42 L. Ed. 611, reaffirmed in Farmers' National Bank *v.* Robinson, 176 U. S. 681, 682, 44 L. Ed. 637.

Immunity of assignee in bankruptcy.—In order to give this court jurisdiction of a writ of error to review a judgment of a state court against a right claimed under a statute of the United States, that right must be one of the plaintiff in error, and not of a third person only. Giles *v.* Little, 134 U. S. 645, 33 L. Ed. 1062. "The immunity or privilege of the assignee in bankruptcy from being cited in these proceedings could only be set up by the assignee himself, or by a person claiming under him, and not by a person claiming under a conveyance from the bankrupt before the bankruptcy. The assignee, having appeared and answered to the petition for revival, and thereby submitted himself to the jurisdiction of the state court, would have been bound by its judgment, if against him. Winchester *v.* Heiskell, 119 U. S. 450, 30 L. Ed. 462; Adams *v.* Crittenden, 133 U. S. 296, 33 L. Ed. 623. But he set up no title in himself, no judgment was rendered against him, and he has sued out no writ of error." Ludeling *v.* Chaffe, 143 U. S. 301, 305, 36 L. Ed. 313.

Immunity of receiver asserted by corporation.—Where an action is brought in a state court against a railroad receiver and the railway company to recover for personal injuries sustained by reason of defects in the road sustained during the receivership, and the receiver sets up his receivership and discharge, and the company denies liability for any injury sustained during the receivership, and also sets up in defense an order made by the circuit court requiring the receiver to transfer the property with its improvements to the company, and that it should be received by the company, charged with operation liabilities, and subject to judgments to be rendered in favor of intervenors, and that all claims against the receiver should be presented within a certain time or be barred, but the case is dismissed as to the receiver and judgment is given against the company, which judgment was sustained by the highest court of the state in which the decision could be had, it was held, that jurisdiction could not be maintained on the ground that a right or immunity was claimed under the authority exercised by the receiver in virtue of the order of the circuit court of the United States, which right or immunity was denied, because the judgment was in favor of the receiver and the writ of error is brought by the company, and it is well settled that the right or immunity must be one of the plaintiff in error and not of a third person only. Texas, etc., R. Co. *v.* Johnson, 151 U. S. 81, 38 L. Ed. 81.

Impairment of obligation of contracts.—Whether the judgment below was ineffectual as against the trustee or the creditors named in the conveyance, either for want of notice or because the conveyance to them could not be set aside, or whether, on the other hand, that judgment was valid against them, because rendered in a proceeding in rem of which they were bound to take notice, is a question which could be presented by them only, and they are not parties to this writ of error. The plaintiff in error cannot invoke the judgment of this court upon the rights of persons under whom he does not claim. Long *v.* Converse, 91 U. S. 105, 23 L. Ed. 233; Ludeling *v.* Chaffe, 143 U. S. 301, 305, 36 L. Ed. 313; Brown *v.* Smart, 145 U. S. 454, 459, 36 L. Ed. 773.

If the defendant in an ejectment suit claims a right to the possession of land derived under a title which springs from a reservation in a treaty between the United States and an Indian tribe, and a state court decides against the validity of such title, this court has jurisdiction, under the twenty-fifth section of the judiciary act, to review that decision. But if such defendant merely sets up the title of the reservee as an outstanding title, and thus prevents a recovery by the plaintiff, without showing in himself a connection with the title of the reservee, and then a state court decides against the defendant in the ejectment, this court has no jurisdiction to review that decision. Henderson *v.* Tennessee, 10 How. 311, 13 L. Ed. 434.

"In Owings *v.* Norwood, 5 Cranch 344, 3 L. Ed. 120, an action of ejectment, defendant set up an outstanding title in one Scarth, a British subject, who held a mortgage upon the premises. The decision of the court being adverse to Owings, he sued out a writ of error from this court, contending that Scarth's title was protected by the treaty with Great Britain. It was held, that, as the defendant claimed no right under the treaty himself, and that the right of Scarth, if he had any, was not affected by the decision of the case, the court had no jurisdiction. 'If,' the court said, 'he (the defendant) claims nothing under a treaty, his title cannot be protected by the treaty. If Scarth or his heirs had claimed it would have been a case arising under a treaty. But neither the title of Scarth nor any person claiming under him can be affected by the decision of this court.'" Tyler *v.* Judges of Court of Registration, 179 U. S. 405,

407, 45 L. Ed. 252, reaffirmed in Bigger *v.* Ryher, 184 U. S. 696, 46 L. Ed. 763.

"In Henderson *v.* Tennessee, 10 How. 311, 13 L. Ed. 434, a similar case, namely, an action of ejectment, an outstanding title in a third person, was set up by the defendant, and alleged to have been derived under a treaty. The court held that an outstanding title in a third person might be set up, and that the title set up in this case was claimed under a treaty, 'but,' said the court, 'to give this jurisdiction to this court, the party must claim for himself, and not for a third person in whose title he has no interest. * * * The heirs of Miller,' who claimed under the treaty, 'appear to have no interest in this suit, nor can their rights be affected by the decision.' Like rulings were made under a similar state of facts in Montgomery *v.* Hernandez, 12 Wheat. 129, 6 L. Ed. 575; Hale *v.* Gaines, 22 How. 144, 16 L. Ed. 264; Verden *v.* Coleman, 1 Black. 472, 17 L. Ed. 161; and Long *v.* Converse, 91 U. S. 105, 23 L. Ed. 233." Tyler *v.* Judges of Court of Registration, 179 U. S. 405, 407, 45 L. Ed. 252, reaffirmed in Bigger *v.* Ryher, 184 U. S. 696, 46 L. Ed. 763.

In an action of ejectment for the Hot Springs in Arkansas, wherein one party claimed title through a pre-emption claim which they were allowed to enter by the register and receiver, and the other party through a New Madrid certificate, it was held, that whether or not the title acquired under the pre-emption is valid, is a question not now before this court; because the case is brought up from the supreme court of Arkansas under the twenty-fifth section of the judiciary act, and the decision of that court was in favor of the validity of the action of the register and receiver; and, moreover, the opposing party cannot set up an outstanding title in the United States. In order to bring himself within the rule of that section, he must have a personal interest in the subject in litigation. "He relies on an outstanding title in the United States to defeat the action. Being a trespasser, without a title in himself, he cannot be heard to set up such title. 'To give jurisdiction to this court, the party must claim for himself, and not for a third person, in whose title he has no interest.' Henderson *v.* Tennessee, 10 How. 311, 323, 13 L. Ed. 434. The plaintiff in error must claim (for himself) some title, right, privilege, or exemption, under an act of congress, etc., and the decision must be against his claim, to give this court jurisdiction. Setting up a title in the United States, by way of defense, is not claiming a personal interest affecting the subject in litigation. This is the established construction of the 25th section of the judiciary act. Montgomery *v.* Hernandez, 12 Wheat. 129, 132, 6 L. Ed. 575." Hale *v.* Gaines, 22 How. 144, 160, 16 L. Ed. 264.

Treaties.—The party prosecuting the writ must have claimed title for himself under the treaty; a claim for a third person is not sufficient. Owings *v.* Norwood, 5 Cranch 344, 3 L. Ed. 120; Verden *v.* Coleman, 1 Black 472, 17 L. Ed. 161; Maney *v.* Porter, 4 How. 55, 11 L. Ed. 873.

As early as 1809 it was held, by this court, in Owings *v.* Norwood, 5 Cranch 344, 3 L. Ed. 120, that in order to give us jurisdiction in this class of cases the right, title, or immunity which is denied must grow out of the constitution, or a treaty or statute of the United States relied on. Under this rule jurisdiction was not taken in that case, although it was an action of ejectment by Norwood's lessee, and the record showed that an effort was made to defeat the recovery because of an outstanding title in a third person adverse to Norwood and protected by a treaty. Mr. Chief Justice Marshall, in speaking for the court, said: "Whenever a right grows out of, or is protected by, a treaty, it is sanctioned against all the laws and judicial decisions of the states; and whoever may have this right is to be protected. But if the person's title is not affected by the treaty, or if he claims nothing under a treaty, his title cannot be protected by the treaty." The principle thus announced has been recognized in many cases since. Montgomery *v.* Hernandez, 12 Wheat. 129, 6 L. Ed. 575; Henderson *v.* Tennessee, 10 How. 311, 13 L. Ed. 434; Wynn *v.* Morris, 20 How. 3, 15 L. Ed. 800; Hale *v.* Gaines, 22 How. 144, 16 L. Ed. 264; Verden *v.* Coleman, 1 Black 472, 17 L. Ed. 161; Long *v.* Converse, 91 U. S. 105, 23 L. Ed. 233; Miller *v.* Lancaster Bank, 106 U. S. 542, 544, 27 L. Ed. 289.

Proceedings for a writ of prohibition to the judges of a court of land registration upon the ground that persons may be deprived of property without due process of law under the act of land registration, because the registration is obtained against residents and known persons only by posting notices and by registered letters, and as against nonresidents and unknown persons by publication in a newspaper, cannot be reviewed by the supreme court of the United States on a writ of error to the state court, where the plaintiff in error, throughout his objection, assumes that he has actual knowledge of the proceedings and without showing either that he has been, or is likely to be, deprived of his property without due process of law, in violation of the Fourteenth Amendment. Tyler *v.* Judges of Court of Registration, 179 U. S. 405, 410, 45 L. Ed. 252, reaffirmed in Bigger *v.* Ryher, 184 U. S. 696, 46 L. Ed. 763.

A patent was granted to a pre-emptor in 1841 for a tract of land which had been previously assigned, by the direction of the president, to a Pottawatomie Indian, under the terms of the treaty with that

plaintiff in error, and not of a third person only.[4] Where the title set up by the defendant is that of a third person in which they have no interest, a writ of error will be dismissed for want of jurisdiction.[5]

In the language of Mr. Justice Brown: "In order that the validity of a state statute may be 'drawn in question' under the second clause of § 709, Rev. Stat., it must appear that the plaintiff in error has a right to draw it in question by reason of an interest in the litigation which has suffered, or may suffer, by the decision of the state court in favor of the validity of the statute. This principle has been announced in so many cases in this court that it may not be considered an open question."[6]

"**It is true that under the third clause of § 709,** where a title, right, privilege or immunity is claimed under federal law, such title, etc., must be 'specially set up or claimed,' and that no such provision is made as to cases within the second clause, involving the constitutionality of statutes or authorities, but it is none the less true that the authority of such statute must 'be drawn in question' by some one who has been affected by the decision of a state court in favor of its validity, and that in this particular the three clauses of the section are practically identical."[7]

k. *Necessity for Adverse Decision—(1) Under First Clause of the Statute.*—It is manifest that it was not the object of the first clause of § 709 to give a right of review wherever the validity of a treaty or statute of, or authority exercised under the United States is drawn in question, but to prevent states from frittering away the authority of the federal government by limiting too closely the construction of federal statutes. Hence, the writ of error will only lie where the decision is adverse to the right claimed by the plaintiff in error.[8] Where a decision of the highest court of law or equity of a state is in favor of the validity

tribe. The patent was adjudged to be a valid grant of land by the supreme court of Indiana. Held, the fact that the title set up for the Indian in this case is under a treaty, does not avail to give this court jurisdiction, because neither the Indian himself nor any one claiming through him is party to the suit. "This court has decided in the cases of Owings *v.* Norwood, 5 Cranch 344, 3 L. Ed. 120, and of Henderson *v.* Tennessee, 10 How. 311, 13 L. Ed. 434, that 'in order to give jurisdiction to this court, the party must claim the title under the treaty for himself, and not for a third person, in whose title he has no interest.'" Verden *v.* Coleman, 1 Black 472, 474, 17 L. Ed. 161.

4. Owings *v.* Norwood, 5 Cranch 344, 3 L. Ed. 120; Montgomery *v.* Hernandez, 12 Wheat. 129, 132, 6 L. Ed. 575; Henderson *v.* Tennessee, 10 How. 311, 13 L. Ed. 434; Hale *v.* Gaines, 22 How. 144, 160, 16 L. Ed. 264; Long *v.* Converse, 91 U. S. 105, 23 L. Ed. 233; Giles *v.* Little, 134 U. S. 645, 650, 33 L. Ed. 1062; Tyler *v.* Judges of Court of Registration, 179 U. S. 405, 408, 45 L. Ed. 252, reaffirmed in Bigger *v.* Ryher, 184 U. S. 696, 46 L. Ed. 763.

5. Giles *v.* Little, 134 U. S. 645, 33 L. Ed. 1062.

6. Tyler *v.* Judges of Court of Registration, 179 U. S. 405, 407, 45 L. Ed. 252, reaffirmed in Bigger *v.* Ryher, 184 U. S. 696, 46 L. Ed. 763.

7. Tyler *v.* Judges of Court of Registration, 179 U. S. 405, 408, 45 L. Ed. 252, reaffirmed in Bigger *v.* Ryher, 184 U. S. 696, 46 L. Ed. 763.

8. Dower *v.* Richards, 151 U. S. 658, 666, 38 L. Ed. 305; Sayward *v.* Denny, 158 U. S. 180, 39 L. Ed. 941; Jersey City, etc., R. Co. *v.* Morgan, 160 U. S. 288, 40 L. Ed. 430; Rae *v.* Homestead, etc., Co., 176 U. S. 121, 44 L. Ed. 398; Abbott *v.* Tacoma Bank of Commerce, 175 U. S. 409, 44 L. Ed. 217; Missouri *v.* Andriano, 138 U. S. 496, 34 L. Ed. 1012; De Lama's Nevada Min. Co. *v.* Nesbitt, 177 U. S. 523, 44 L. Ed. 872; Montgomery *v.* Hernandez, 12 Wheat. 129, 6 L. Ed. 575; Baldwin *v.* Maryland, 179 U. S. 220, 45 L. Ed. 160; Lake Street Elec. R. Co. *v.* Farmer's Loan, etc., Co., 182 U. S. 417, 45 L. Ed. 1161; McClung *v.* Silliman, 6 Wheat. 598, 602, 5 L. Ed. 340; Baker *v.* Baldwin, 187 U. S. 61, 47 L. Ed. 75; citing Iowa *v.* Rood, 187 U. S. 87, 47 L. Ed. 86; Reddall *v.* Bryan, 24 How. 420, 16 L. Ed. 740; Gordon *v.* Caldcleugh, 3 Cranch 268, 2 L. Ed. 436; Fulton *v.* McAffee, 16 Pet. 149, 10 L. Ed. 918; Strader *v.* Baldwin, 9 How. 261, 13 L. Ed. 130; Linton *v.* Stanton, 12 How. 423, 13 L. Ed. 1050; Roosevelt *v.* Meyer, 1 Wall. 512, 17 L. Ed. 500; Ryan *v.* Thomas, 4 Wall. 603, 18 L. Ed. 460; Maney *v.* Porter, 4 How. 55, 11 L. Ed. 873.

The 25th section of the judiciary act only gave jurisdiction to this court in cases where the decision of the state court drew in question the validity of an authority exercised under the United States,

of a statute of or an authority exercised under the United States drawn in question in such court, this court, under the twenty-fifth section of the judiciary act

and the decision was against its validity. Hale *v.* Gaines, 22 How. 144, 16 L. Ed. 264, 269.

It is only where a state court decides against a claim set up under the laws of the United States, that appellate jurisdiction is given this court from a state decision. Not where the state court has decided in favor of its own jurisdiction. McClung *v.* Silliman, 6 Wheat. 598, 5 L. Ed. 340.

It is not sufficient that a federal question was raised and was decided. It must have been decided in a certain way, that is, against the right set up under the constitution, laws, treaties, or authority of the United States. The federal question may have been erroneously decided. It may be quite apparent to this court that a wrong construction has been given to the federal law, but if the right claimed under it by plaintiff in error has been conceded to him, this court cannot entertain jurisdiction of the case, so very careful is the statute, both of 1789 and of 1867, to narrow, to limit, and define the jurisdiction which this court exercises over the judgments of the state courts. Murdock *v.* Memphis, 20 Wall. 590, 626, 22 L. Ed. 429.

It is manifest that the object of § 709 was not to give a right of review whereever the validity of an act of congress was drawn in question, but to prevent states from frittering away the authority of the federal government by limiting too closely the construction of federal statutes. Hence, the writ of error will only lie where the decision is adverse to the right claimed. Dower *v.* Richards, 151 U. S. 658, 666, 38 L. Ed. 305; Sayward *v.* Denny, 158 U. S. 180, 39 L. Ed. 941; Jersey City, etc., R. Co. *v.* Morgan, 160 U. S. 288, 40 L. Ed. 430; Rae *v.* Homestead, etc., Co., 176 U. S. 121, 44 L. Ed. 398; Abbott *v.* Tacoma Bank of Commerce, 175 U. S. 409, 44 L. Ed. 217; De Lamar's Nevada Min. Co. *v.* Nesbitt, 177 U. S. 523, 529, 44 L. Ed. 872.

"Where the issue is as to the validity of 'an authority exercised under the United States,' we cannot review its determination by the state court, unless the decision was against the validity of the authority so exercised. As said in Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 223, 32 L. Ed. 908, 'the distinction is palpable between a denial of the authority and a denial of a right, title, privilege or immunity claimed under it.' Clough *v* Curtis, 134 U. S. 361, 369, 33 L. Ed. 945; United States *v.* Lynch, 137 U. S. 280, 286, 34 L. Ed. 700; Cook County *v.* Calumet, etc., Canal Co., 138 U. S. 635, 653, 34 L. Ed. 1110." Abbott *v.* Tacoma Bank of Commerce, 175 U. S. 409, 413, 44 L. Ed. 217.

To give us jurisdiction in a writ of error to a state court, a federal question must not only exist in the record, but it must have been decided against the party who sues out the writ. Murdock *v.* Memphis, 20 Wall. 590, 626, 22 L. Ed. 429; Weatherly *v.* Bowie, 131 U. S. 215, 25 L. Ed. 606, 607.

Denial of right under naturalization laws.—In the case of Missouri *v.* Andriano, 138 U. S. 496, 34 L. Ed. 1012, the contest was between rival claimants to the office of sheriff. Respondent relied upon the fact that he had received a majority of the votes cast at a popular election for the office. Relator claimed the election to be void under the state constitution, which declared that no one should be elected or appointed to office who was not a citizen of the United States. Respondent admitted his foreign birth, but claimed that, under Rev. Stat., § 2172, he became a citizen by the naturalization of his father. The decision of the court was in his favor, and it was held, that the relator had no right to a review of the question in this court, although if the judgment had been adverse to the claim of the respondent, there would have been no doubt of his right to a writ of error. It was said that the right or privilege must be personal to the plaintiff in error, and that he was not entitled to a review, where the right or privilege was asserted by the other party, and the decision was in favor of that party and adverse to himself. De Lamar's Nevada Min. Co. *v.* Nesbitt, 177 U. S. 523, 528, 44 L. Ed. 872.

Denial of right under bankrupt act.—The case of Linton *v.* Stanton, 12 How. 423, 13 L. Ed. 1050, was an action upon certain promissory notes, to which the defendant pleaded a discharge under the bankruptcy law. Objections were taken to the validity of the discharge, but they were overruled by the court and judgment entered for the defendant. It was held, the plaintiff had no right to a review in this court. "Undoubtedly," says Chief Jnstice Taney, "the defendant, in pleading his discharge under the bankrupt law, claimed a right or exemption under a law of congress. But in order to give jurisdiction, something more is necessary; the judgment of the state court must be against the right claimed." Missouri *v.* Andriano, 138 U. S. 496, 501, 34 L. Ed. 1012.

Where the defendant pleaded his discharge under the bankrupt act of 1841 passed by congress, and the plea was allowed, the plaintiff cannot bring the case to this court to be reviewed, under the twenty-fifth section of the judiciary act. Strader *v.* Baldwin, 9 How. 261, 13 L. Ed. 130.

Ejectment.—The case of Fulton *v.* Mc-

(by which alone it has jurisdiction of the judgments of state courts) has no revisory power.[9]

The object of the present judiciary act was not to give a right of review wherever the validity of an act of congress was drawn in question, but to prevent the courts of the several states from impairing or frittering away the authority of the federal government, by giving a construction to its statutes adverse to such authority. Of course, if the construction given by the state court to the act under which the right is claimed be favorable to such right, no such reason exists for

Affee, 16 Pet. 149, 10 L. Ed. 918, was an action of ejectment, in which the lessor of the plaintiff made title under a certificate issued to him as assignee of Jefferson College, the trustees of which college were authorized by an act of congress to relinquish certain lands which had been reserved for their use. Defendant offered testimony to show that the certificate was fraudulently obtained, that its authority had been denied by the commissioner of the land office, and consequently that it did not confer on the lessor of the plaintiff a valid legal title upon which he could recover in ejectment. These questions were decided by the state court in favor of the right claimed by the plaintiff, and the defendant took a writ of error from this court. It was held, that, as the decision of the state court was in favor of the right claimed, this court had no jurisdiction. Missouri *v.* Andriano, 138 U. S. 496, 500, 34 L. Ed. 1012.

Where a party brought an ejectment in a state court, founding his title upon documents showing a settlement claim under the laws of the United States, and the supreme court of the state decided in favor of that title, the opposite party cannot bring the case to this court under the 25th section of the judiciary act. Burke *v.* Gaines, 19 How. 328, 15 L. Ed. 655, following Fulton *v.* McAffee, 16 Pet. 149, 10 L. Ed. 918.

Legal tender act.—A judgment of a state court sustaining the act of congress of February 28, 1878, making silver dollars full legal tender, cannot be reviewed by the supreme court of the United States. Baker *v.* Baldwin, 187 U. S. 61, 47 L. Ed. 75.

Title to land under act of congress.—The high court of errors and appeals of the state of Mississippi, on a writ of error to the circuit court of Washington county, Mississippi, confirmed a judgment of the circuit court, by which a title to land set up under an act of congress of the United States, was held valid; thus construing the act of congress in favor of the party claiming a right to the land, under the act. The party against whom the decision of the court of appeals was given, prosecuted a writ of error to the supreme court of the United States. The writ of error was dismissed, the court having no jurisdiction, because in order to give the supreme court of the United States jurisdiction in such cases, it is not sufficient that the construction of the act of congress on the validity of the act on which the claim was founded was drawn in question. It must appear, also, that the decision was against the right claimed. The power of the supreme court is carefully defined and restricted by the judiciary act of 1789; and it is the duty of this court not to transcend the limits of the jurisdiction conferred upon it. Fulton *v.* McAffee, 16 Pet. 149, 10 L. Ed. 918.

There were two conflicting claims to land in that part of Louisiana west of the Perdido river; one founded upon a French grant in 1757, with possession continuing down to 1787; the other founded upon a Spanish grant in 1788, with possession continuing down to 1819. Both these claims were confirmed by congress. In an ejectment suit, where the titles were in conflict, the state court instructed the jury, that the confirmations balanced each other, and they must look to other evidences of title in order to settle the rights of the parties. The judgment of the court being, ultimately, in favor of the party who claimed under the Spanish grant, this court will not, under the circumstances of the case, disturb that judgment. Doe *v.* Eslava, 9 How. 421, 13 L. Ed. 200.

Jurisdiction of federal courts.—The decision of the highest court of a state that a circuit court of the United States has jurisdiction of an action brought by a national bank under § 5239 of the Revised Statutes, is not subject to review by the court under § 709, U. S. Rev. Stat., giving the court jurisdiction where there is drawn in question the validity of a treaty or statute of, or an authority exercised under the United States, and the decision is against their validity; since the decision is not against but in favor of federal jurisdiction. Abbott *v.* Tacoma Bank of Commerce, 175 U. S. 409, 44 L. Ed. 217.

Patent for public lands.—Where the decision of the state court is against the validity of a patent for land granted by the United States to one of the parties, jurisdiction is conferred notwithstanding the fact that the decision is in favor of a similar authority set up by the adversary party. Reichert *v.* Felps, 6 Wall. 160, 18 L. Ed. 849; Maney *v.* Porter, 4 How. 55, 11 L. Ed. 873.

9. Ryan *v.* Thomas, 4 Wall. 603, 18 L. Ed. 460.

a review by this court.[10]

A right or immunity set up or claimed under the constitution or laws of the United States may be denied as well by evading a direct decision thereon as by positive action. If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right within the meaning of § 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused. But if a decision of such a question is rendered unnecessary by the view which the court properly takes of the rest of the case, within the scope of the pleadings, the judgment is not open to review here.[11]

Where Both Parties Claim under Same Act.—A motion to dismiss a writ of error under the 25th section of the judiciary act on the ground that the decision of the state court was not against a right claimed under a statute of the United States, within the provisions of the 25th section of the judiciary act, where both parties claimed under the same act of Congress, will be denied.[12]

(2) *Under Second Clause of the Statute.*—A writ of error cannot issue from this court to a state court under the second clause of § 709 of the Revised Statutes, on the ground that a state statute is in contravention of the constitution of the United States, where the decision of the state court does not sustain the validity of the act, but on the contrary holds it to be wholly void as in contravention of the constitution of the United States.[13] When the state court decides that the statute of the state, drawn in question, is not valid, no appeal lies to the supreme court of the United States.[14] Our only jurisdiction to review this class

10. Missouri *v.* Andriano, 138 U. S. 496, 500, 34 L. Ed. 1012.

11. Chouteau *v.* Gibson, 111 U. S. 200, 28 L. Ed. 400; Adams County *v.* Burlington, etc., R. Co., 112 U. S. 123, 127, 28 L. Ed. 678; Chapman *v.* Goodnow, 123 U. S. 540, 548, 31 L. Ed. 235.

12. Buel *v.* Van Ness, 8 Wheat. 312, 5 L. Ed. 624, citing Matthews *v.* Zane, 4 Cranch 382, 2 L. Ed. 654.

13. McNulty *v.* California, 149 U. S. 645, 37 L. Ed. 882; Craig *v.* Missouri, 4 Pet. 410, 7 L. Ed. 903; Byrne *v.* Missouri, 8 Pet. 40, 8 L. Ed. 859; Crowell *v.* Randell, 10 Pet. 368, 9 L. Ed. 458; McKinney *v.* Carroll, 12 Pet. 66, 9 L. Ed. 1002; Commonwealth Bank *v.* Griffith, 14 Pet. 56, 10 L. Ed. 352; Curran *v.* Arkansas, 15 How. 304, 14 L. Ed. 705; Porter *v.* Foley, 24 How. 415, 16 L. Ed. 740; Bridge Proprietors *v.* Hoboken, etc., Co., 1 Wall. 116, 17 L. Ed. 571; The Binghamton Bridge, 3 Wall. 51, 18 L. Ed. 137; Walker *v.* Tailor, 5 How. 64, 12 L. Ed. 52; Lloyd *v.* Dollison, 194 U. S. 445, 446, 48 L. Ed. 1062; Elder *v.* Colorado, 204 U. S. 85, 51 L. Ed. 381.

The 25th section of the judiciary act of 1789 confers on this court the power of supervision over the state tribunal, where there is drawn in question the validity of a statute of, or an authority exercised under, any state, on the ground of their being repugnant to the constitution or laws of the United States, and the decision is in favor of such validity. Therefore, if the decision is against its validity, the writ of error will be dismissed for want of jurisdiction. Walker *v.* Tailor, 5 How. 64, 12 L. Ed. 52; Commonwealth Bank *v.* Griffith, 14 Pet. 56, 10 L. Ed. 352.

14. Winn *v.* Jackson, 12 Wheat. 135, 6 L. Ed. 577; Smith *v.* Hunter, 7 How. 738, 12 L. Ed. 894; Withers *v.* Buckley, 20 How. 84, 15 L. Ed. 816; Walker *v.* Tailor, 5 How. 64, 12 L. Ed. 52.

When the decision of a state court is against the validity of a state statute, as contrary to the constitution of the United States, a writ of error does not lie to the supreme court upon such a judgment. Commonwealth Bank *v.* Griffith, 14 Pet. 56, 10 L. Ed. 352, distinguishing Briscoe *v.* Bank of Kentucky, 11 Pet. 257, 9 L. Ed. 709, as follows: "In the case of Briscoe *v.* Bank of Kentucky, 11 Pet. 257, 9 L. Ed. 709, the decision of the state court was in favor of the validity of the statute. The party, therefore, who denied its validity, and alleged that it was repugnant to the constitution of the United States, was entitled to have that question re-examined in the supreme court. But it is otherwise, by the plain words of the law, when the decision of the state court is against the validity of the state statute, or the authority exercised under it."

Where the plaintiff below claimed a ferry right under an act of the legislature of Kentucky, and the ground of defense was that the act was unconstitutional and void as impairing vested rights, and the decision of the highest state court was against the plaintiff, a writ of error, issued under the 25th section of the judiciary act, will not lie. This court can entertain jurisdiction under that section only

of cases is where the validity of a state statute is drawn in question on the ground of its being repugnant to the constitution of the United States, and the decision of the state court is in favor of its validity.[15] Where a statute of, or authority exercised under, a state, is drawn in question, on the ground of its repugnance to the constitution of the United States, or a right is claimed under that instrument, the decision of a state court in favor of the validity of such statute or authority, or adverse to the right so claimed, can be reviewed here.[16]

(3) *Under Third Clause of the Statute.*—The appellate jurisdiction of this court under the third clause of § 709 is expressly limited to cases in which the decision of the state court is against the right, title, privilege or immunity claimed under the constitution, laws or treaties of the United States, because, when the decision of that court is in favor of such a right, no revision by this court is necessary to protect the national government in the exercise of its rightful powers.[17]

when the decision of the state court is in favor of the validity of such a statute. Here the decision was against its validity. Walker *v.* Tailor, 5 How. 64, 12 L. Ed. 52, following Commonwealth Bank *v.* Griffith, 14 Pet. 56, 10 L. Ed. 352.

15. Rev. Stat., § 709; Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 46 L. Ed. 86; Louisville, etc., R. Co. *v.* Kentucky, 183 U. S. 503, 507, 46 L. Ed. 298.

16. Home Ins. Co. *v.* Augusta Council, 93 U. S. 116, 23 L. Ed. 825.

17. Gordon *v.* Caldcleugh, 3 Cranch 268, 2 L. Ed. 436; Montgomery *v.* Hernandez, 12 Wheat. 129, 6 L. Ed. 575; Commonwealth Bank *v.* Griffith, 14 Pet. 56, 58, 10 L. Ed. 352; Missouri *v.* Andriano, 138 U. S. 496, 501, 34 L. Ed. 1012; Whitten *v.* Tomlinson, 160 U. S. 231, 238, 40 L. Ed. 406, reaffirmed in Washington State *v.* Coovert, 164 U. S. 702, 41 L. Ed. 1182; Iowa *v.* Rood, 187 U. S. 87, 47 L. Ed. 86, citing Baker *v.* Baldwin, 187 U. S. 61, 47 L. Ed. 75; Kizer *v.* Texarkana, etc., R. Co., 179 U. S. 199, 201, 45 L. Ed. 152; Scott *v.* Jones, 5 How. 343, 375, 12 L. Ed. 181; Bartlett *v.* Lockwood, 160 U. S. 357, 40 L. Ed. 455; Ferry *v.* King County, 141 U. S. 668, 673, 35 L. Ed. 895, 898; Ryan *v.* Thomas, 4 Wall. 603, 18 L. Ed. 460; Reddall *v.* Bryan, 24 How. 420, 16 L. Ed. 740; Ableman *v.* Booth, 21 How. 506, 16 L. Ed. 169; Strader *v.* Baldwin, 9 How. 261, 13 L. Ed. 130; Menard *v.* Aspasia, 5 Pet. 505, 8 L. Ed. 207; Williams *v.* Norris, 12 Wheat. 117, 6 L. Ed. 571; McClung *v.* Silliman, 6 Wheat. 598, 5 L. Ed. 340; McIntire *v.* Wood, 7 Cranch 504, 3 L. Ed. 420; Rutland R. Co. *v.* Central Vermont R. Co., 159 U. S. 630, 638, 40 L. Ed. 284; Coons *v.* Gallaher, 15 Pet. 18, 10 L. Ed. 645, 646; Jersey City, etc., R. Co. *v.* Morgan, 160 U. S. 288, 40 L. Ed. 430; Fulton *v.* McAffee, 16 Pet. 149, 10 L. Ed. 918; Linton *v.* Stanton, 12 How. 423, 13 L. Ed. 1050; Burke *v.* Gaines, 19 How. 328, 15 L. Ed. 655; Hale *v.* Gaines, 22 How. 144, 16 L. Ed. 264; Brooklyn, etc., Ferry Co. *v.* McMahon, 166 U. S. 718, 41 L. Ed. 1186; Goodsell *v.* Delta, etc., Land Co., 166 U. S. 718, 41 L. Ed. 1186; Spies *v.* Illinois, 123 U. S. 131, 31 L. Ed. 80; Brooks *v.* Missouri, 124 U. S. 394, 31 L. Ed. 454; Chappell *v.* Bradshaw, 128 U. S. 132, 32 L. Ed. 369; Texas, etc., R. Co. *v.* Southern Pac. Co., 137 U. S. 48, 34 L. Ed. 614; Schuyler Bank *v.* Bollong, 150 U. S. 85, 88, 37 L. Ed. 1008.

In error to a state court, to review one of its judgments, this court acts only upon the record of the court below, and, in order to give this court jurisdiction, it is essential that the record should disclose, not only that the alleged right, privilege or immunity, was set up and claimed in the court below, but that the decision of that court was against the right so set up or claimed. Clark *v.* Pennsylvania, 128 U. S. 395, 32 L. Ed. 487.

This court has no jurisdiction under the 25th section of the judiciary act of 1789, but in a case where a final judgment or decree has been rendered in the highest court of law or equity of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity, etc., or where is drawn in question the construction of any clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision is against the title, right, privilege or exemption, specially set up or claimed by either party under such clause of the said constitution, treaty, statute or commission. Gordon *v.* Caldcleugh, 3 Cranch 268, 2 L. Ed. 436.

Where land granted by the United States to the Northern Pacific Railroad Company was sold at a tax sale, but it was urged that as the land was a part of the public domain of the United States, no tax could be imposed thereon, if the state court holds that the land was not taxable at the time the taxes were assessed and levied, and that nothing passed by the sale, this is not a denial of an immunity under the constitution or laws of the United States. Tyler *v.* Cass County, 142 U. S. 288, 35 L. Ed. 1016.

Denial of full faith and credit.—Where the decision of a state court is in favor of the full faith and credit claimed for the decree of a court of another state under the constitution and laws of the United

In no case will a writ of error lie to the supreme court, where the decision of the state court is in favor of the privilege claimed under an act of congress.[19] It is not every case where a federal statute has been construed by a state court that gives a right of review to this court, but the claim of any right, title, privilege or immunity under the statute must have been denied by the state tribunal in order to give us jurisdiction to review its judgment.[20] That a Federal statute was construed unfavorably to one of the parties to the suit is no ground for jurisdiction by this court, unless such construction was not only unfavorable, but was against the right, etc., specially set up and claimed under the statute. In that case the party setting up and claiming the right under the statute, which has been denied, can obtain a review here.[21]

1. PARTIES—(1) *In General.*—A case arising under the constitution or laws of the United States is cognizable in this court under the 25th section of the judiciary act, whoever may be the parties to that case.[22] Our jurisdiction under § 709 of the Revised Statutes, for the review of a decision of the highest court of a state, is not dependent at all on the citizenship of the parties. In such cases we look only to the questions involved.[23]

States, its judgment cannot be reviewed by the supreme court of the United States on writ of error. Lynde *v.* Lynde, 181 U. S. 183, 45 L. Ed. 810, citing and approving Gordon *v.* Caldcleugh, 3 Cranch, 268, 2 L. Ed. 436; and Missouri *v.* Andriano, 138 U. S. 496, 34 L. Ed. 1012, reaffirmed in Jones *v.* Vane, 200 U. S. 614, 50 L. Ed. 621.

The highest court of a state having ruled that a decree of a court of another state for alimony was binding upon the husband, thereby deciding in favor of the full faith and credit claimed for that decree under the constitution and laws of the United States, its judgment on that question cannot be reviewed by the supreme court of the United States on writ of error. Lynde *v.* Lynde, 181 U. S. 183, 45 L. Ed. 810, citing and approving Gordon *v.* Caldcleugh, 3 Cranch 268, 2 L. Ed. 436; and Missouri *v.* Andriano, 138 U. S. 496, 34 L. Ed. 1012, reaffirmed in Jones *v.* Vane, 200 U. S. 614, 50 L. Ed. 621.

Denial of right under intestate commerce clause.—The plaintiff commenced an action in a state court to recover damages for the alleged breach of a contract. The defense put in was that the contract violated §§ 1, 2 and 3 of the intestate commerce act of February 4, 1887, ch. 104, 24 Stat. 379. The trial court held, that the contract violated said act and was, therefore, void. It was held, that the question whether that statute, properly construed, prohibited the making of such an agreement as that set up in the complaint in the state court, having been decided in favor of the claim set up by defendant under the statute, the supreme court of the United states has no jurisdiction to review the judgment. Kizer *v.* Texarkana, etc., R. Co., 179 U. S. 199, 45 L. Ed. 152, citing and approving De Lamar's Nevada Min. Co. *v.* Nesbitt, 177 U. S. 523, 528, 44 L. Ed. 872; Missouri *v.* Andriano, 138 U. S. 496, 34 L. Ed. 1012.

19. Gordon *v.* Caldcleugh, 3 Cranch 263, 2 L. Ed. 436; Strader *v.* Baldwin, 9 How. 261, 13 L. Ed. 130; Reddall *v.* Bryan, 24 How. 420, 16 L. Ed. 740; Roosevelt *v.* Meyer, 1 Wall. 512, 17 L. Ed. 500; Ryan *v.* Thomas, 4 Wall. 603, 18 L. Ed. 460; Linton *v.* Stanton, 12 How. 423, 13 L. Ed. 1050.

20. Kizer *v.* Texarkana, etc., R. Co., 179 U. S. 199, 201, 45 L. Ed. 152.

21. Kizer *v.* Texarkana, etc., R. Co., 179 U. S. 199, 201, 45 L. Ed. 152.

22. Opinion of Mr. Chief Justice Marshall in Cohens *v.* Virginia, 6 Wheat. 264, 383, 5 L. Ed. 257.

23. French *v.* Hopkins, 124 U. S. 524, 31 L. Ed. 536; Barrington *v.* Missouri, 205 U. S. 483, 487, 51 L. Ed. 890.

In United States *v.* Thompson, 93 U. S. 586, 588, 23 L. Ed. 982, Chief Justice Waite said: "Judgments in the state courts against the United States cannot be brought here for re-examination upon a writ of error, except in cases where the same relief would be afforded to private parties." This dictum, in so general a form, is in danger of misleading; and it went beyond anything required by the decision of that case, in which the only issue understood to have been decided in the state courts was one of payment, and no authority under the constitution, laws or treaties of the United States was set up and decided against. The United States are in the same condition as other litigants, in the sense that neither can invoke the jurisdiction of this court by writ of error to a state court, unless that court has decided against a right claimed under the constitution, laws or treaties of the United States. But surely the United States have, and may assert, a right, privilege or immunity under the constitution of the United States, which private parties could not have. Stanley *v.* Schwalby, 162 U. S. 255, 278, 40 L. Ed. 960.

If two citizens of the same state, in a suit in a court of their state, claim title

(2) *Effect of Eleventh Amendment to the Constitution.*—The supreme court has appellate jurisdiction for the review of the final judgment of the highest court of a state in a suit between a state and one of its own citizens arising under the laws of the United States.[1]

m. *Who May Make the Objection.*—In a case from a state court, this court does not listen to objections of those who do not come within the class whose constitutional rights are alleged to be invaded; or hold a law unconstitutional because, as against the class making no complaint, the law might be so held.[24]

n. *Where Both Parties Claim under Same Act of Congress.*—The appellate jurisdiction of this court extends to a case where both parties claim a right or title under the same act of congress, and the decision is against the right or title claimed by either party; in other words, the mere fact that both parties claim under the same act of congress does not prevent the decision of the state court from being "against a right claimed under a statute of the United States."[25]

o. *Power of State Courts to Decide Federal Questions.*—When federal questions arise in cases pending in the state courts, those courts are competent, and it is their duty, to decide them. If errors supervene, the remedy by writ of error is open to the party aggrieved.[26] But where rights under the constitution of

under the same act of congress, this court has an appellate jurisdiction to revise and correct the judgment of that court in such case. Matthews *v.* Zane, 4 Cranch 382, 2 L. Ed. 654, followed in Ross *v.* Doe, 1 Pet. 655, 7 L. Ed. 302.

1. Ames *v.* Kansas, 111 U. S. 449, 467, 28 L. Ed. 482, citing Cohens *v.* Virginia, 6 Wheat. 264, 5 L. Ed. 257.

The 11th amendment to the constitution which provides that the judicial power of the United States shall not be considered to extend to any suit in law or equity commenced or prosecuted against one of the United States, by a citizen of another state, or by citizens or subjects of any foreign state, offers no objection to the exercise by this court of appellate jurisdiction over state courts under the 25th section of the judiciary act. Cohens *v.* Virginia, 6 Wheat. 264, 5 L. Ed. 257; Hans *v.* Louisiana, 134 U. S. 1, 33 L. Ed. 842.

"Under the judiciary act, the effect of a writ of error is simply to bring the record into court, and submit the judgment of the inferior tribunal to re-examination. It does not in any manner act upon the parties; it acts only on the record. It removes the record into the supervising tribunal. Where, then, a state obtains a judgment against an individual, and the court, rendering such judgment, overrules a defense set up under the constitution or laws of the United States, the transfer of this record into the supreme court, for the sole purpose of inquiring whether the judgment violates the constitution or laws of the United States, can with no propriety * * * be denominated a suit commenced or prosecuted against the state whose judgment is so far re-examined. Nothing is demanded from the state. No claim against it of any description is asserted or prosecuted. The party is not to be restored to the possession of anything. Essentially, it is an appeal on a single point; and the defendant who appeals from a judgment rendered against him, is never said to commence or prosecute a suit against the plaintiff who has obtained the judgment. The writ of error is given rather than an appeal, because it is the more usual mode of removing suits at common law; and because, perhaps, it is more technically proper where a single point of law, and not the whole case, is to be re-examined. But an appeal might be given, and might be so regulated as to effect every purpose of a writ of error. The mode of removal is form, and not substance. Whether it be by writ of error or appeal, no claim is asserted, no demand is made by the original defendant; he only asserts the constitutional right to have his defense examined by that tribunal whose province it is to construe the constitution and laws of the Union. 'If this writ of error be a suit, in the sense of the 11th amendment, it is not a suit commenced or prosecuted "by a citizen of another state, or by a citizen or subject of any foreign state." It is not, then, within the amendment, but is governed entirely by the constitution as originally framed, and we have already seen, that in its origin, the judicial power was extended to all cases arising under the constitution or laws of the United States, without respect to parties.'" Cohens *v.* Virginia, 6 Wheat. 264, 5 L. Ed. 257.

24. New York ex rel. Hatch *v.* Reardon, 204 U. S. 152, 51 L. Ed. 415. See, also, Supervisors *v.* Stanley, 105 U. S. 305, 311, 26 L. Ed. 1044; Lampassas *v.* Bell, 180 U. S. 276, 283, 284, 45 L. Ed. 527; Clark *v.* Kansas City, 176 U. S. 114, 118, 44 L. Ed. 392; Cronin *v.* Adams, 192 U. S. 108, 114, 48 L. Ed. 365; The Winnebago, 205 U. S. 354, 360, 51 L. Ed. 836.

25. Buel *v.* Van Ness, 8 Wheat. 312, 5 L. Ed. 624.

26. Robb *v.* Connolly, 111 U. S. 624,

the United States were expressly and in due time asserted, and the effect of the judgment was to deny these rights, the power to decide whether the federal issue was rightly disposed of by the state court involves the exercise of jurisdiction.[27]

p. *Showing as to Jurisdiction*[1]—(1) *In General.*—The rule is well settled, that it must appear from the record that the highest court of the state passed on one of the questions described in the judiciary act.[28]

637, 28 L. Ed. 542; Arkansas *v.* Kansas, etc., Coal Co., 183 U. S. 185, 190, 46 L. Ed. 144, reaffirmed in Board, etc., of Frankfort *v.* State Nat. Bank, 184 U. S. 696, 46 L. Ed. 763; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 583, 40 L. Ed. 536, reaffirmed in Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179.

The state courts are perfectly competent to decide federal questions arising before them and it is their duty to do so. Robb *v.* Connolly, 111 U. S. 624, 637, 28 L. Ed. 542; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 583, 40 L. Ed. 536. And the presumption is in all cases that the state courts will do what the constitution and laws of the United States require. Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 108 U. S. 18, 27 L. Ed. 636; Shreveport *v.* Cole, 129 U. S. 36, 32 L. Ed. 589; Neal *v.* Delaware, 103 U. S. 370, 389, 26 L. Ed. 567; New Orleans *v.* Benjamin, 153 U. S. 411, 424, 38 L. Ed. 764. If error supervenes, the remedy is found in § 709 of the Revised Statutes. Defiance Water Co. *v.* Defiance, 191 U. S. 184, 193, 48 L. Ed. 140.

On an appeal from a judgment ordering the issue of a mandamus to compel the collection of a tax to pay a judgment recovered against a municipal corporation, the appellate court may authorize an inquiry whether the judgment was founded upon a contract or a tort, with a view to determine whether there was an impairment of the obligation of a contract; but has no authority to re-examine the validity of the contract or the propriety of the original judgment. That would involve a retrial of the case. Nelson *v.* St. Martin's Parish, 111 U. S. 716, 28 L. Ed. 574.

27. Penn., etc., Ins. Co. *v.* Austin, 168 U. S. 685, 42 L. Ed. 626; Andrews *v.* Andrews, 188 U. S. 14, 28, 47 L. Ed. 366, reaffirmed in Winston *v.* Winston, 189 U. S. 506, 47 L. Ed. 922.

The state court may construe a statute and define its meaning, but whether its construction creates a tax within the meaning of a federal statute, giving a preference to taxes, is a federal question, of ultimate decision in this court. New Jersey *v.* Anderson, 203 U. S. 483, 492, 51 L. Ed. 284.

1. The various sections under the head "Decisions Reviewable" in this subdivision must also be consulted in this connection.

28. Miller *v.* Nicholls, 4 Wheat. 311, 4 L. Ed. 578; Smith *v.* Hunter, 7 How. 738, 12 L. Ed. 894; Allen *v.* Tarlton, 154 U. S. 596, 21 L. Ed. 955; Goodenough Horse Shoe Co. *v.* Rhode Island Horse Shoe Co., 154 U. S. 635, 24 L. Ed. 368; In re Robertson, 156 U. S. 183, 39 L. Ed. 389; In re Buchanan, 158 U. S. 31, 39 L. Ed. 884; Hoyt *v.* Shelden, 1 Black 518, 17 L. Ed. 65; Clarke *v.* McDade, 165 U. S. 168, 41 L. Ed. 673; Insurance Co. *v.* The Treasurer, 11 Wall. 204, 20 L. Ed. 112; New York, etc., R. Co. *v.* Woodruff, 153 U. S. 689, 38 L. Ed. 869; Fowler *v.* Lamson, 164 U. S. 252, 41 L. Ed. 424; Nordstrom *v.* Washington, 164 U. S. 705, 41 L. Ed. 1183; Rector *v.* Ashley, 6 Wall. 142, 18 L. Ed. 733; Skaneateles Water Works Co. *v.* Skaneateles, 184 U. S. 354, 358, 46 L. Ed. 585, reaffirmed in Farmers' Loan & Trust Co. *v.* Sioux Falls, 199 U. S. 601, 50 L. Ed. 328.

No writ of error lies to the highest court of law or equity of a state under the 25th section of the judiciary act of 1789, unless there is something apparent on the record bringing the case within the appellate jurisdiction of this court. Inglee *v.* Coolidge, 2 Wheat. 363, 4 L. Ed. 261.

Until the record of the judgment, we are called upon to examine discloses the question necessary to give us jurisdiction, we cannot proceed. Goodenough Horse Shoe Co. *v.* Rhode Island Horse Shoe Co., 154 U. S. 635, 24 L. Ed. 368.

In order to give jurisdiction under the 25th section of the judiciary act, it must appear from the record of the case, either in express terms or by clear and necessary intendment, that one of the questions which this court has jurisdiction to re-examine and decide was actually decided by a state court. Medberry *v.* Ohio, 24 How. 413, 16 L. Ed. 739.

In order to give jurisdiction to the supreme court under the 25th section of the act of congress of 1789, ch. 20, it is incumbent on the plaintiff to show that one of the questions enumerated in this act arose at the trial, and that a right he claimed under the United States constitution, or an act of congress, was decided against him. Hoyt *v.* Sheldon, 1 Black 518, 17 L. Ed. 65.

To authorize the re-examination of a question brought here as within the 25th section of the judiciary act, the conflict of the state law with the constitution of the United States, and a decision by a state court in favor of its validity, must appear on the face of the record. And the question must have been necessarily involved in the decision, so that the state court could not have given a judgment

In the language of Mr. Justice Day, nothing is better settled in federal jurisprudence than that the jurisdiction of this court to review the judgment of the state court under § 709 of the Revised Statutes of the United States depends upon the assertion of a right, title, privilege or immunity under the federal constitution or laws set up and denied in the state courts.[29]

The 25th section of the act to establish the judicial courts of the United States, which gives to this court the power of revising certain judgments of state courts, limits that power in these words: "But no other error shall be assigned or regarded as a ground of reversal, in any such case as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties, statute, commissions or authorities in dispute."[30] Our jurisdiction to revise such a judgment is very strictly limited to cases where some right or title was set up by a party under the general government—its constitution, treaties, or laws, and was overruled. It is this federal character of the claim decided against which furnishes some justification for a revision of a state judgment in a federal court; and unless it be clearly of that character, the foundation as well as the policy for our interference entirely fails. So we are confined in our inquiries in a writ of error like this, under the twenty-fifth section, to what appears on the record in some way or other, not only to have been set up under the United States, but declared against by the court.[31] In an early case, Mr. Chief Justice Marshall said: "We say, with confidence, that this court has never taken jurisdiction, unless the case as stated in the record was brought within the provisions of the 25th section of the judiciary act."[32]

without deciding it. Parmalee *v.* Lawrence, 11 Wall. 36, 20 L. Ed. 48, affirming Railroad *v.* Rock, 4 Wall. 177, 18 L. Ed. 381.

This court cannot review the decision of a state court construing the state statute, which neither of itself, nor by its application, involves a conflict with the constitution of the United States. The conflict of a state law with the constitution of the United States, and a decision by a state court in favor of its validity, must appear on the face of the record, before it can be re-examined in this court. It must appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the ruling of the court. It must be that such a question was necessarily involved in the decision, and that the state court would not have given a judgment without deciding it. Lawler *v.* Walker, 14 How. 149, 14 L. Ed. 364; Grand Gulf, etc., R. Co. *v.* Marshall, 12 How. 165, 13 L. Ed. 938; Robertson *v.* Coulter, 16 How. 106, 14 L. Ed. 864; Michigan Central R. Co. *v.* Michigan Southern R. Co., 19 How. 378, 15 L. Ed. 689; Congdon *v.* Goodman, 2 Black 574, 17 L. Ed. 257; Lytle *v.* Arkansas, 22 How. 193, 16 L. Ed. 306; Worthy *v.* The Commissioners, 9 Wall. 611, 19 L. Ed. 565; Gill *v.* Oliver, 11 How. 529, 13 L. Ed. 799; Williams *v.* Oliver, 12 How. 111, 125, 13 L. Ed. 915.

In a suit to recover mineral lands on the Pacific coast, with the mines therein, an allegation of record, of prior possession of the land for the purpose of taking out the minerals, without an allegation that such possession is had under authority, or by some treaty or statute of the United States, does not give this court jurisdiction to re-examine the case under the 25th section of the judiciary act of 1789. Mining Co. *v.* Boggs, 3 Wall. 304, 17 L. Ed. 245.

The finding of the Maryland court of appeals, that there was no fund in the state treasury, which the state has received from the federal government, upon which the comptroller could lawfully draw his warrant, because there had been no appropriation made by the state legislature for the payment of the commissions here claimed, involves no federal question. Chouteau *v.* Gibson, 111 U. S. 200, 28 L. Ed. 400; Detroit City R. Co. *v.* Guthard, 114 U. S. 133, 29 L. Ed. 118; Wailes *v.* Smith, 157 U. S. 271, 276, 39 L. Ed. 698.

29. Beals *v.* Cone, 188 U. S. 184, 47 L. Ed. 435; Pennsylvania R. Co. *v.* Hughes, 191 U. S. 477, 485, 48 L. Ed. 268.

30. Fisher *v.* Cockerell, 5 Pet. 248, 255, 8 L. Ed. 114.

31. Montgomery *v.* Hernandez, 12 Wheat. 129, 6 L. Ed. 575; Crowell *v.* Randell, 10 Pet. 368, 392, 9 L. Ed. 458; McKinney *v.* Carroll, 12 Pet. 66, 9 L. Ed. 1002; Pollard *v.* Kibbe, 14 Pet. 353, 360, 10 L. Ed. 490; Coons *v.* Gallaher, 15 Pet. 18, 10 L. Ed. 645, 646. It must, too, be overruled improperly; otherwise is no grievance to be redressed. Doe *v.* Eslava, 9 How. 421, 443, 13 L. Ed. 200.

32. Fisher *v.* Cockerell, 5 Pet. 248, 256, 8 L. Ed. 114, reviewing Harris *v.* Dennie, 3 Pet. 292, 7 L. Ed. 683; Craig *v.* Missouri, 4 Pet. 410, 7 L. Ed. 903; Owing *v.*

And under § 709 of the Revised Statutes, if the ground on which the jurisdiction of this court is invoked is that the validity of a state law was drawn in question as in conflict with the constitution of the United States, and the decision of the state court was in favor of its validity, this must appear on the face of the record, before the decision below can be re-examined here.[33] Where it does not appear in the record of the case that there was set up any authority exercised under the United States, nor any treaty or statute of the United States, in virtue of which it was taken, and where it nowhere appears from the record that the decision of the state court was against the validity of any such authority, treaty or statute, the case is wanting in the requirement made essential to our jurisdiction by the 25th section of the judiciary act.[34] If the conflict of a state law with the constitution and the decision by the state court in favor of its validity are relied on, this must appear on the face of the record before the decision can be re-examined in this court, and this is equally true where the denial of a title, right, privilege or immunity under the constitution and laws of the United States, or the validity of an authority exercised under the United States, is urged as the ground of jurisdiction.[35]

Corporations Created under Acts of Congress.—This court has no jurisdiction to review the proceedings of a state court merely on the ground that the defendant is a body politic, incorporated by an act of the state legislature. To sustain a writ of error from this court to the state court in such a case, it must appear from the pleadings, evidence, or decree, that the validity of the act of incorporation was drawn in question. The validity of the act is not drawn in question where the defendants assert that they and those under whom they claim were owners of the land in dispute before the passage of the act, as well as afterwards, and where the plaintiffs assert title in themselves under a deed in no way connected with the act.[36]

Denial of Rights under Federal Constitution or Laws of Congress.—Where the validity of no treaty or statute of, or authority exercised under, the United States, nor of a statute of, or authority exercised under, any state, was drawn in question, it is essential to the maintenance of our jurisdiction that it should appear that some title, right, privilege, or immunity under the constitution or laws of the United States was specially set up or claimed in the state court, and that the decision of the highest court of the state, in which such decision could be had, was against the title, right, privilege, or immunity so set up or claimed.[37] The right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed;[38] or, at all events, it must appear from the record, by clear and necessary intendment, that the federal question was directly involved so that the state court could not have given judgment without deciding it; that is, a definite issue as to the possession of the right must be distinctly deducible from the record before the state court can be held to have disposed of such federal question by its decision.[39]

Norwood, 5 Cranch 344, 3 L. Ed. 120; Miller *v.* Nicholls, 4 Wheat. 311, 312, 4 L. Ed. 578.

33. Dibble *v.* Bellingham Bay Land Co., 163 U. S. 63, 70, 41 L. Ed. 72; Miller *v.* Cornwall R. Co., 168 U. S. 131, 133, 42 L. Ed. 409, reaffirmed in Charleston, etc., Bridge Co. *v.* W. Va., 168 U. S. 704, 42 L. Ed. 1212; Lufkin *v.* Lufkin, 192 U. S. 601, 48 L. Ed. 583.

34. Merced Mining Co. *v.* Boggs, 3 Wall. 304, 18 L. Ed. 245.

35. Dibble *v.* Bellingham Bay Land Co., 163 U. S. 63, 70, 41 L. Ed. 72.

36. Attorney-General *v.* Federal Street Meeting House, 1 Black 262, 17 L. Ed. 62.

37. Sayward *v.* Denny, 158 U. S. 180, 183, 39 L. Ed. 941, reaffirmed in Texas, etc., R. Co. *v.* Gay, 167 U. S. 745, 42 L. Ed. 1209; McNulty *v.* California, 149 U. S. 645, 37 L. Ed. 882, citing Spies *v.* Illinois, 123 U. S. 131, 31 L. Ed. 80; In re Kemmler, 136 U. S. 436, 34 L. Ed. 519; Caldwell *v.* Texas, 137 U. S. 692, 34 L. Ed. 816; Leeper *v.* Texas, 139 U. S. 462, 35 L. Ed. 225; Nordstrom *v.* Washington, 164 U. S. 705, 41 L. Ed. 1183.

38. Hoyt *v.* Sheldon, 1 Black 518, 17 L. Ed. 65; Maxwell *v.* Newbold, 18 How. 511, 515, 15 L. Ed. 506; Sayward *v.* Denny, 158 U. S. 180, 184, 39 L. Ed. 941, reaffirmed in Texas, etc., R. Co. *v.* Gay, 167 U. S. 745, 42 L. Ed. 1209.

39. Powell *v.* Brunswick County, 150

Distinguished from Writ of Error to Territorial Court.—A writ of error to review the judgment of the highest tribunal of a state stands on far different ground from a case removed from a territory, and cannot be maintained in the absence of a federal question giving us jurisdiction.[40]

(2) *That Federal Question Was Actually or Necessarily Raised and Decided*—aa. *In General.*—It has been repeatedly decided, under § 709 of the Revised Statutes, and was the settled construction of the twenty-fifth section of the judiciary act of 1789, that to give this court jurisdiction of a writ of error to a state court, it must appear affirmatively, not only that a federal question was presented for decision to the highest court of the state having jurisdiction, but that its decision was necessary to the determination of the cause, and that it was actually decided, or that the judgment as rendered could not have been given without deciding it.[41] "In order to give this court jurisdiction of a writ of error to re-

U. S. 433, 37 L. Ed. 1134; Sayward *v.* Denny, 158 U. S. 180, 184, 39 L. Ed. 941, reaffirmed in Texas, etc., R. Co. *v.* Gay, 167 U. S. 745, 42 L. Ed. 1209.

40. Davis *v.* Texas, 139 U. S. 651, 657, 35 L. Ed. 300, distinguishing Calton *v.* Utah, 130 U. S. 83, 32 L. Ed. 870.

41. Brown *v.* Atwell, 92 U. S. 327, 23 L. Ed. 511; Citizens' Bank *v.* Board of Liquidation, 98 U. S. 140, 25 L. Ed. 114; Chouteau *v.* Gibson, 111 U. S. 200, 28 L. Ed. 400; Adams County *v.* Burlington, etc., Co., 112 U. S. 123, 28 L. Ed. 678; Detroit City R. Co. *v.* Guthard, 114 U. S. 133, 29 L. Ed. 118; New Orleans Water Works Co. *v.* Louisiana Sugar Ref. Co., 125 U. S. 18, 31 L. Ed. 607; De Saussure *v.* Gaillard, 127 U. S. 216, 217, 234, 32 L. Ed. 125; Bridge Proprietors *v.* Hoboken, etc., Co., 1 Wall. 116, 143, 17 L. Ed. 571; Delaware City Nav. Co. *v.* Reybold, 142 U. S. 636, 35 L. Ed. 1141; Michigan Sugar Co. *v.* Michigan, 185 U. S. 112, 46 L. Ed. 829; Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429; Cook County *v.* Calumet, etc., Canal Co., 138 U. S. 635, 34 L. Ed. 1110; Eustis *v.* Bolles, 150 U. S. 361, 37 L. Ed. 1111; Pierce *v.* Somerset Railway, 171 U. S. 641, 43 L. Ed. 316; Harrison *v.* Morton, 171 U. S. 38, 47, 43 L. Ed. 63; Carnahan *v.* Connolly, 187 U. S. 636, 47 L. Ed. 343; Cueli *v.* Rodriguez, 198 U. S. 581, 49 L. Ed. 1172; Thomas *v.* Blair, 196 U. S. 637, 638, 49 L. Ed. 630; Rose *v.* Kansas, 203 U. S. 580, 51 L. Ed. 326; California Powder Works *v.* Davis, 151 U. S. 389, 396, 38 L. Ed. 206; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 576, 40 L. Ed. 536; Fowler *v.* Lamson, 164 U. S. 252, 255, 41 L. Ed. 424; Harding *v.* Illinois, 196 U. S. 78, 88, 49 L. Ed. 394; Otis Co. *v.* Ludlow Mfg. Co., 201 U. S. 140, 151, 50 L. Ed. 696; Louisville, etc., R. Co. *v.* Louisville, 166 U. S. 709, 41 L. Ed. 1173; Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 41 L. Ed. 1149; Kipley *v.* Illinois, 170 U. S. 182, 42 L. Ed. 998; Green Bay, etc., Canal Co. *v.* Patten Paper Co., 172 U. S. 58, 43 L. Ed. 364; Capital Nat. Bank *v.* First Nat. Bank, 172 U. S. 425, 42 L. Ed. 502; Citizens' Sav. Bank *v.* Owensboro, 173 U. S. 636, 643, 644, 43 L. Ed. 840; Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179; Wood Mowing, etc., Co. *v.* Skinner, 139 U. S. 293, 295, 35 L. Ed. 193; Craemer *v.* Washington, 164 U. S. 704, 41 L. Ed. 1183; Krug *v.* Washington, 164 U. S. 704, 41 L. Ed. 1183; Miller *v.* Swann, 150 U. S. 132, 37 L. Ed. 1028; Snell *v.* Chicago, 152 U. S. 191, 196, 38 L. Ed. 408; California *v.* Holladay, 159 U. S. 415, 40 L. Ed. 202; San Francisco *v.* Itsell, 133 U. S. 65, 33 L. Ed. 570; Beatty *v.* Benton, 135 U. S. 244, 34 L. Ed. 124; Hoadley *v.* San Francisco, 94 U. S. 4, 24 L. Ed. 34; Hoadley *v.* San Francisco, 124 U. S. 639, 31 L. Ed. 553; Klinger *v.* Missouri, 13 Wall. 257, 263, 20 L. Ed. 635; Hopkins *v.* McLure, 133 U. S. 380, 33 L. Ed. 660; Blount *v.* Walker, 134 U. S. 607, 614, 33 L. Ed. 1036; Davidson *v.* Starcher, 154 U. S. 566, appx., 19 L. Ed. 52; McLaughlin *v.* Fowler, 154 U. S. 663, 26 L. Ed. 176; Johnson *v.* Risk, 137 U. S. 300, 307, 34 L. Ed. 683; Grey *v.* Coan, 154 U. S., appx., 589, 38 L. Ed. 1088; Davidson *v.* Connelly, 154 U. S., appx., 589, 38 L. Ed. 1088; Hagar *v.* California, 154 U. S., appx., 639, 24 L. Ed. 1044; Ocean Ins. Co. *v.* Polleys, 13 Pet. 157, 10 L. Ed. 105; Parmalee *v.* Lawrence, 11 Wall. 36, 38, 20 L. Ed. 48; Gross *v.* United States Mortgage Co., 108 U. S. 477, 485, 27 L. Ed. 795; Felix *v.* Scharnweber, 125 U. S. 54, 59, 31 L. Ed. 687; Roby *v.* Colehour, 146 U. S. 153, 159, 36 L. Ed. 922; Schaefer *v.* Werling, 188 U. S. 516, 518, 47 L. Ed. 570; Hale *v.* Akers, 132 U. S. 554, 565, 33 L. Ed. 442; Butler *v.* Gage, 138 U. S. 52, 34 L. Ed. 869; Beaupre *v.* Noyes, 138 U. S. 397, 34 L. Ed. 991; Leeper *v.* Texas, 139 U. S. 462, 35 L. Ed. 225; Henderson Bridge Co. *v.* Henderson City, 141 U. S. 679, 35 L. Ed. 900; Hammond *v.* Johnston, 142 U. S. 73, 35 L. Ed. 941; New Orleans *v.* New Orleans Water Works Co., 142 U. S. 79, 35 L. Ed. 946; O'Neal *v.* Vermont, 144 U. S. 323, 336, 36 L. Ed. 450; Crowell *v.* Randell, 10 Pet. 368, 392, 9 L. Ed. 458; McKinney *v.* Carroll, 12 Pet. 66, 9 L. Ed. 1002; Coons *v.* Gallaher, 15 Pet. 18, 10 L. Ed. 645; Fulton *v.* McAffee, 16 Pet. 149, 10 L. Ed. 918; Smith *v.* Hunter, 7 How. 738, 743, 12 L. Ed. 894; Brown *v.* Colorado, 106 U. S. 95, 97, 27 L. Ed. 132; Kansas Endowment

view a judgment which the highest court of a state has rendered in favor of the validity of a statute of or an authority exercised under a state, the validity of the

Ass'n *v.* Kansas, 120 U. S. 103, 104, 30 L. Ed. 593; Choteau *v.* Marguerite, 12 Pet. 509, 9 L. Ed. 1174; Marrow *v.* Brinkley, 129 U. S. 178, 181, 32 L. Ed. 654; Marshall *v.* Knott, 131 U. S., appx. ccv; Edwards *v.* Elliott, 21 Wall. 532, 558, 22 L. Ed. 487; Armstrong *v.* The Treasurer, 16 Pet. 281, 10 L. Ed. 965; Hurley *v.* Street, 14 Wall. 85, 86, 20 L. Ed. 786; Lownsdale *v.* Parrish, 21 How. 290; 16 L. Ed. 80; The Victory, 6 Wall. 382, 384, 18 L. Ed. 848; Grand Gulf, etc., R. Co. *v.* Marshall, 12 How. 165, 13 L. Ed. 938; Planters' Bank *v.* Sharp, 6 How. 301, 12 L. Ed. 447; Baldwin *v.* Payne, 6 How. 301, 332, 12 L. Ed. 447; Maxwell *v.* Newbold, 18 How. 511, 15 L. Ed. 506; Boughton *v.* Exchange Bank, 104 U. S. 427, 26 L. Ed. 765; Murray *v.* Charleston, 96 U. S. 432, 24 L. Ed. 760; Dugger *v.* Bocock, 104 U. S. 596, 603, 26 L. Ed. 846; Taylor *v.* Morton, 2 Black 481, 483, 17 L. Ed. 277; Scott *v.* Jones, 5 How. 343, 376, 12 L. Ed. 181; Williams *v.* Norris, 12 Wheat. 117, 6 L. Ed. 571; McBride *v.* Hoey, 11 Pet. 167, 9 L. Ed. 673; Fisher *v.* Cockerell, 5 Pet. 248, 8 L. Ed. 114; Commercial Bank *v.* Buckingham, 5 How. 317, 341, 12 L. Ed. 169; Lawler *v.* Walker, 14 How. 49, 14 L. Ed. 364; Railroad *v.* Rock, 4 Wall. 177, 180, 18 L. Ed. 381; Hoyt *v.* Sheldon, 1 Black 518, 521, 17 L. Ed. 65; Hamilton Co. *v.* Massachusetts, 6 Wall. 632, 18 L. Ed. 904; Furman *v.* Nichol, 8 Wall. 44, 19 L. Ed. 370; Aldrich *v.* Ætna Ins. Co., 8 Wall. 491, 19 L. Ed. 473; Gibson *v.* Chouteau, 8 Wall. 314, 19 L. Ed. 317; Cockroft *v.* Vose, 14 Wall. 5, 20 L. Ed. 875; Maney *v.* Porter, 4 How. 55, 11 L. Ed. 873; Bolling *v.* Lersner, 91 U. S. 594, 595, 23 L. Ed. 366; Insurance Co. *v.* The Treasurer, 11 Wall. 204, 20 L. Ed. 112; Santa Cruz County Supervisors *v.* Santa Cruz R. Co., 111 U. S. 361, 28 L. Ed. 456.

Questions not decided in the state court, because not raised or presented by the complaining party, will not be re-examined in this court on a writ of error sued out under the twenty-fifth section of the judiciary act. Hamilton Co. *v.* Massachusetts, 6 Wall. 632, 636, 18 L. Ed. 904. Such is the settled practice, and the act of congress provides that it must appear that the question presented for decision in this court was raised in the state court, and that the decision of the state court was given as required by that section. Steines *v.* Franklin County, 14 Wall. 15, 20 L. Ed. 846; Caperton *v.* Bowyer, 14 Wall. 216, 237, 20 L. Ed. 882.

A writ of error will not lie from this court to a state court, where it does not appear from the record that the constitution, laws, treaties, or executive proclamations of the United States were necessarily involved in the judgment rendered by the court below. Bethell *v.* Demaret, 10 Wall. 537, 19 L. Ed. 1007; Delmas *v.* Merchants' Ins. Co., 14 Wall. 661, 666, 20 L. Ed. 757; Tarver *v.* Keach, 15 Wall. 67, 21 L. Ed. 82; Rockhold *v.* Rockhold, 92 U. S. 129, 23 L. Ed. 507; New York Ins. Co. *v.* Hendren, 92 U. S. 286, 23 L. Ed. 709.

"Only such questions as either have been or ought to have been passed upon by that court in the regular course of its proceedings can be considered by us upon error." Fashnacht *v.* Frank, 23 Wall. 416, 23 L. Ed. 81; Weatherly *v.* Bowie, 131 U. S. 215, 25 L. Ed. 606.

This court has no jurisdiction to re-examine the judgment of a state court where a federal question was not in fact passed upon, and where a decision of it was rendered unnecessary in the view which the court below took of the case. McManus *v.* O'Sullivan, 91 U. S. 578, 23 L. Ed. 390.

In a case where an alleged violation of the constitution of the United States is the ground of error, the supreme court has no jurisdiction, unless the point presented by the assignment and joinder was raised and decided in the state court to which the writ is directed. It must appear that the point was raised in the state court; that the party called attention to the particular clause in the federal constitution relied upon, and to the right claimed under it, and that the question thus distinctly presented was ruled against him; and if these things do not appear, the judgment of the state court cannot be reviewed here. Farney *v.* Towle, 1 Black 350, 17 L. Ed. 216.

In order to give jurisdiction to this court to revise the judgment of a state court, under the 25th section of the judiciary act, a question must not only exist on the record, actually or by necessary intendment, as mentioned in that section and the decision of the court as there stated, but the decision must be controlling in the disposition of the case; or, in the language of some of the cases on the subject, "the judgment of the state court would not have been what it is, if there had not been a misconstruction of some act of congress, or a decision against the validity of the right, title, privilege, or exemption set up under it." (3 Pet. 292, 302.) Or, as stated by Mr. Justice Story, in Crowell *v.* Randell, 10 Pet. 368, 392, 9 L. Ed. 458, where he reviewed all the cases, it must appear "from the facts stated by just and necessary inference, that the question was made, and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment." And in a recent case (5 How. 341), following out the doctrine of the pre-

statute or authority must have been 'drawn in question' 'on the ground of their being repugnant to the constitution, laws or treaties of the United States.' When

vious cases, "It is not enough that the record shows that the plaintiff in error contended and claimed that the judgment of the court impaired the obligation of a contract, and violated the provisions of the constitution of the United States, and that this claim was overruled by the court; but it must appear by clear and necessary intendment that the question must have been raised, and must have been decided, in order to induce the judgment." Williams *v.* Oliver, 12 How. 111, 13 L. Ed. 915, reaffirmed, p. 921.

Before the court can entertain jurisdiction to re-examine a judgment or decree of a state court, it must appear, either by express averment in the pleadings or by clear and necessary intendment, that some one of the questions mentioned in the twenty-fifth section of the judiciary act or in the second section of the act to amend the judiciary act was raised in the state court and that it was there decided in the manner therein required to give this court such appellate jurisdiction, or that the state court could not have reached the conclusion it did without deciding the question and in the manner required by those provisions to give this court jurisdiction in the case. Rector *v.* Ashley, 6 Wall. 142, 147, 18 L. Ed. 733; Steines *v.* Franklin County, 14 Wall. 15, 20, 20 L. Ed. 846.

Questions not decided in the state court, because not raised and presented by the complaining party, will not be re-examined in this court on a writ of error sued out under the twenty-fifth section of the judiciary act. Apart from the question of jurisdiction it is necessary that it shall appear that the question presented for decision in this court was raised in the state court, and that the decision of the state court was given as required in that section. Clear and necessary intendment that the question was raised and must have been decided as claimed in order to have induced the judgment, is sufficient, but it is not sufficient to show that such a question might have arisen and been applicable to the case, unless it appears in the record that it did arise and was applied by the state court in disposing of the controversy. Hamilton Co. *v.* Massachusetts, 6 Wall. 632, 636, 18 L. Ed. 904.

A decision of the highest court of a state adverse to the claim of the plaintiff in error that by reason of process of garnishment in attachment against a railroad, in the action removed to the circuit court from the state court, the circuit court acquired exclusive jurisdiction and custody of the moneys due from the railroad company to the construction company, does not so pass upon a federal question as to furnish ground for the interposition of this court, as it must appear affirmatively not only that a federal question was presented for decision, but that its decision was necessary to the determination of the cause and that it was actually decided or that the judgment as rendered could not have been given without deciding it. Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 40 L. Ed. 536.

Decision must be adverse to plaintiff in error.—To give us jurisdiction in a writ of error to a state court, a federal question must not only exist in the record, but it must have been decided against the party who sues out the writ. Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429; Weatherly *v.* Bowie, 131 U. S. 215, 25 L. Ed. 606; Crowell *v.* Randell, 10 Pet. 368, 392, 9 L. Ed. 458; Suydam *v.* Williamson, 20 How. 427, 440, 15 L. Ed. 978; Edwards *v.* Elliott, 21 Wall. 532, 558, 22 L. Ed. 487; Smith *v.* Adsit, 16 Wall. 185, 189, 21 L. Ed. 310.

The appointment of a receiver of a construction company by the highest court of a state to collect the amount of a decree against a railroad company, and its holding that the appointment of a receiver by the circuit court was ineffectual to divest the control of the state court over the assets of the construction company or defeat its right to enforce its judgment in the accounting, denies no federal right of the plaintiff in error. Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 40 L. Ed. 536.

Distinguished from cases brought from circuit court.—Cases brought here by writ of error to a state court, issued under the twenty-fifth section of the judiciary act, stand upon a very different footing from cases brought by error from the circuit court, as in such a case it must appear on the face of the record in express terms or by necessary implication, that some one, at least, of the questions described in that section did arise in the state court, and that the question so appearing in the record was decided in the state court, as required in that section; and if it does not so appear in the record, then this court has no jurisdiction of the case, and in that event the writ of error must be dismissed; as this court, under those circumstances, has no power either to reverse or affirm the judgment rendered in the state court. Suydam *v.* Williamson, 20 How. 427, 440, 15 L. Ed. 978; Taylor *v.* Morton, 2 Black 481, 483, 17 L. Ed. 277; New Orleans, etc., R. Co. *v.* Morgan, 10 Wall. 256, 260, 19 L. Ed. 892.

Admissibility of evidence in ejectment.—In Brown *v.* Colorado, 106 U. S. 95, 27 L. Ed. 132, a writ of error was sued out in this court to reverse the judgment of the supreme court of Colorado, rendered in a suit in ejectment brought by the state

no such ground has been presented to or considered by the courts of the state, it cannot be said that those courts have disregarded the constitution of the United

against the plaintiff in error. It was not claimed that any question which can give us jurisdiction was directly raised by the pleadings, but on the trial in the district court, the state, to make out its title, offered in evidence a deed from him to the territory of Colorado. To its introduction an objection was made, on the ground, among others, "that the territory of Colorado had no right to take a conveyance of real estate at the time of making the deed without the consent of the government of the United States." This objection was overruled and an exception taken. When the case went to the supreme court, one of the assignments of error was to the effect that the court erred in receiving this deed in evidence. As the judgment was affirmed, this assignment of error must have been overruled. But the court held, that the judgment was not reviewable here, because it does not appear that the court below decided against the validity of any treaty, statute, or authority of the United States, or in favor of any statute or authority of a state claiming to be repugnant to the constitution, treaties, or laws of the United States. The record furnishes no indication that any statute of the United States was brought to the attention of the court below, and a ruling asked upon it in connection with the objection which was made to the admissibility of the deed.

A federal question cannot be assumed to have been raised and passed on in a state court so as to give jurisdiction to this court, under the 25th section, when nothing appears in the record to show on what grounds the decision of the matter in which the federal question is alleged to be involved, was made. Caperton *v.* Bowyer, 14 Wall. 216, 20 L. Ed. 882.

Allegations by counsel here, and attempts to show that the plaintiff's right under the constitution of the United States, has been infringed by the decision, do not help the case, if the right has not been specially set up in the court below and there decided against. Worthy *v.* The Commissioners, 9 Wall. 611, 19 L. Ed. 565.

Certificate.—This court has jurisdiction to review on writ of error a judgment of a state court, where the record of a case in a state court shows that a federal question was raised, and in the absence of an opinion it appears by the certificate made a part of the record by that court, that the objection relied on was considered by that court and the record shows that the question was raised and the certificate shows that it was not treated as having been raised too late under the local procedure, a point upon which the state court is the judge. Cincinnati, etc., Packet Co. *v.* Bay, 200 U. S. 179, 182, 50 L. Ed. 428, citing Farmers', etc., Ins. Co. *v.* Dobney, 189 U. S. 301, 47 L. Ed. 821.

Return to writ of error.—To give us jurisdiction under § 709 of the Revised Statutes, it must in some way appear from the return which is made to the writ of error that "the validity of a treaty or statute of, or an authority exercised under, the United States" has been drawn in question, and the decision is against their validity; or that "the validity of a statute of, or an authority exercised under, any state" has been drawn in question "on the ground of their being repugnant to the constitution, treaties, or laws of the United States," and the decision is in favor of their validity; or that some "title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity" so claimed. Brown *v.* Colorado, 106 U. S. 95, 96, 27 L. Ed. 132.

Statement on motion for new trial.—It has long been settled, that this court has no jurisdiction to review the judgment of a state court unless it distinctly appears that a question under the constitution or a law of the United States not only might have been but actually was raised and decided. Accordingly, the statement on a motion for a new trial that a statute of the state was "unconstitutional and void," certainly does not make it appear unmistakably on the face of the record that the supreme court either knew or ought to have known that the validity of the statute in question was challenged on account of its repugnancy to the constitution or laws of the United States. Kansas Endowment Ass'n *v.* Kansas, 120 U. S. 103, 30 L. Ed. 593.

A statement in the opinion of the highest court of a state that the only federal question in the case was probably abandoned as "it is manifest that the circuit court could not have taken jurisdiction," is not such a decision of the question as to give this court jurisdiction. Weatherly *v.* Bowie, 131 U. S. 215, 25 L. Ed. 606.

Intention of parties unavailing.—Where the highest court of a state affirmed the judgment of a court below, because no transcript of the record was filed in the appellate court, such affirmance cannot be reviewed by this court under the twenty-fifth section of the judiciary act. The intention of the parties to raise a constitutional question is not enough. It must be actually raised and decided in the highest court of the state. Matheson

States, and this court has no jurisdiction."[42]

Federal Question Must Be Necessarily Decided.—In a case brought here from a state court, under the twenty-fifth section of the judiciary act, the record must show that some one of the matters mentioned in that section was necessarily decided by the court, notwithstanding there may be a certificate from the presiding judge, that such matters were drawn in question. If it appears from the record that the state court might have decided the case on some other ground, this court has no jurisdiction.[43] Before this court can entertain jurisdiction to

v. Bank of Alabama, 7 How. 260, 12 L. Ed. 692.

A judgment of a state court in regard to a state law imposing taxes, when it does not appear by express averment, or necessary intendment, or by the record, that any questions of which this court is entitled to take cognizance, under the 25th section of the judiciary act, arose or was decided in the cause, is not within the jurisdiction of this court to review. Christ Church *v.* Philadelphia County, 20 How. 204, 15 L. Ed. 803, citing 16 Pet. 282; 7 How. 738.

Impairment of obligation of contract.—Where the record shows that a federal question was not necessarily involved, this court has no jurisdiction to review the decision of the supreme court of Louisiana, that the act passed January 24, 1874, does not authorize the funding board of that state to fund the bonds of a railroad company, whereon the state is liable only as a guarantor. "The act only permitted the funding of 'valid outstanding bonds of the state, and valid warrants drawn previous to the passage of the act,' and the bonds held by the relator were not bonds of the state, but bonds of the railroad company, on which the state was liable only as guarantor." "As the state court has decided as a question of state law that even if the guaranties of the bond are valid obligations of the state, they are not fundable under the act, it matters not in this suit whether the decision against their validity was erroneous or not." No federal question having been specially raised by the pleadings, and the record showing clearly on its face that the decision of such a question was not necessarily involved, we will not go through the opinion of the court, even in Louisiana, to ascertain whether one was in fact decided. Citizens' Bank *v.* Board of Liquidation, 98 U. S. 140, 142, 25 L. Ed. 114.

If, in an action in a state court to recover damages for death by wrongful act, it does not appear, that any federal question was necessarily involved in the decision of the court below, or that any was in fact decided, a motion to dismiss for want of jurisdiction will be granted. Staten Island R. Co. *v.* Lambert, 131 U. S., appx. ccxi, 24 L. Ed. 615.

42. Rev. Stat., § 709; Murdock *v.* Memphis, 20 Wall. 590, 634, 22 L. Ed. 429; Levy *v.* San Francisco, 167 U. S. 175, 42 L. Ed. 126; Miller *v.* Cornwall R. Co., 168 U. S. 131, 42 L. Ed. 409; Columbia Water Power Co. *v.* Columbia St. Railway Co., 172 U. S. 475, 488, 43 L. Ed. 521; Scudder *v.* Comptroller of New York, 175 U. S. 32, 36, 44 L. Ed. 62.

When the jurisdiction depends upon a right, privilege or immunity under the constitution of the United States specially set up and denied in the state court, certain propositions, it is said by Mr. Chief Justice Fuller, speaking for the court in Sayward *v.* Denny, 158 U. S. 180, 184, 39 L. Ed. 941, are well settled, among others, "The right on which the party relies must have been called to the attention of the court, in some proper way, and the decision of the court must have been against the right claimed. Hoyt *v.* Sheldon, 1 Black. 518, 17 L. Ed. 65; Maxwell *v.* Newbold, 18 How. 511, 515, 15 L. Ed. 506. Or, at all events, it must appear from the record, by clear and necessary intendment, that the federal question was directly involved so that the state court could not have given judgment without deciding it." Giles *v.* Teasley, 193 U. S. 146, 160, 48 L. Ed. 655, reaffirmed in Delahanty *v.* Pitkin, 199 U. S. 602, 50 L. Ed. 328.

43. Railroad *v.* Rock, 4 Wall. 177, 18 L. Ed. 381, citing Lawler *v.* Walker, 14 How. 149, 14 L. Ed. 364; Mills *v.* Brown, 16 Pet. 525, 10 L. Ed. 1055.

A state statute directed a county treasurer to give certificates of indebtedness to any bank in the county for the amount of tax paid on its investments in the public indebtedness of the United States, "which taxes have been judicially decided to have been illegally imposed and collected." To an alternative mandamus to compel the treasurer to give such certificates, he answered that it had not been judicially decided that the particular tax was illegal. A peremptory mandamus was refused by the state court. Held, that, although this court had since decided the tax to be illegal, yet, as it did not appear by the record that the state court passed on the legality or illegality of the tax, but might have decided the case on the construction of the state statute, this court had no jurisdiction to review the decision of the state court. Insurance Co. *v.* The Treasurer, 11 Wall. 204, 20 L. Ed. 112.

Where the court perceives from the pleadings themselvs that a case may have

review a judgment of the state court, it must appear that one of the questions mentioned in the twenty-fifth section of the judiciary act was raised in the state court, and actually decided by it; that is to say, the question must have received the consideration or attention of the court. It is not sufficient that this court can see that it ought to have been raised, and that it might have been decided.[44] But where federal questions are directly involved in the pleadings, and it appears that none of the other defenses set up in the state court afford any legal answer to the suit, the conclusion must be that the case is properly here, as this court will not presume that the court below decided the issues erroneously in order to defeat their own jurisdiction.[45]

"**Was Necessarily Involved in the Decision.**"—We are not required to re-examine the judgment of a state court simply because a federal question may have been decided. To give us jurisdiction it must appear that such a question "was necessarily involved in the decision."[46] In a late case it was said: "Before we can pronounce the judgment of a state court in conflict with the federal constitution, it must be made to appear that its decision was one necessarily in conflict therewith and not that possibly, or even probably, it was."[47]

A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it.[48] A point that

been decided on the form of remedy which the practice in the state courts required the plaintiff to adopt, or on the technical insufficiency of the pleading—and especially where it perceives this more plainly from reported decisions in the state courts—jurisdiction of the case will not be entertained under the 25th section of the judiciary act, though the court can also perceive that the case might have been decided on grounds which would have brought it within that section, and which, therefore, would have given to the court jurisdiction. Commercial Bank *v.* Rochester, 15 Wall. 639, 21 L. Ed. 117.

44. The Victory, 6 Wall. 382, 18 L. Ed. 848.

45. Maguire *v.* Tyler, 8 Wall. 650, 665, 19 L. Ed. 320, citing Neilson *v.* Lagow, 12 How. 98, 110, 13 L. Ed. 909.

Error will lie to the supreme court of a state under the 25th section of the judiciary act, where a statute of the United States is technically in issue in the pleadings, or is relied on in them and is decided against by rulings asked for and refused, even though the case may have been disposed of generally by the court on other grounds. Minnesota *v.* Bachelder, 1 Wall. 109, 17 L. Ed. 551.

46. Armstrong *v.* The Treasurer, 16 Pet. 281, 282, 10 L. Ed. 965; Moore *v.* Mississippi, 21 Wall. 636, 638, 22 L. Ed. 653; De Saussure *v.* Gaillard, 127 U. S. 216, 32 L. Ed. 125; McPherson *v.* Blacker, 146 U. S. 1, 23, 36 L. Ed. 869; Louisville, etc., R. Co. *v.* Smith, etc., Co., 204 U. S. 551, 556, 51 L. Ed. 612.

Where a case is carried through the state courts upon arguments drawn from the state constitution alone, the jurisdiction of this court cannot be maintained by a contention on the part of the plaintiffs in error that the question of their rights under the constitution of the United States was necessarily involved in a decision, because it appears that the state law logically might have been assailed as invalid under the constitution of the United States, upon grounds more or less similar to those actually taken. Osborne *v.* Clark, 204 U. S. 565, 51 L. Ed. 619, distinguishing Columbia Water Power Co. *v.* Columbia Street Railway Co., 172 U. S. 475, 43 L. Ed. 521; McCullough *v.* Virginia, 172 U. S. 102, 43 L. Ed. 382.

When the highest appellate court of a state disposes of a question supposed to arise under the constitution of the United States without a direct decision, and in a way that is decisive of it, and which is not repugnant to the constitution of the United States, and upon a ground which was not evasive, but real, then the decision of the alleged federal question was not necessary to the judgment rendered, and consequently this court has no jurisdiction over the judgment. Brooks *v.* Missouri, 124 U. S. 394, 31 L. Ed. 454; Chouteau *v.* Gibson, 111 U. S. 200, 28 L. Ed. 400; Adams County *v.* Burlington, etc., R. Co., 112 U. S. 123, 127, 28 L. Ed. 678; Chapman *v.* Goodnow, 123 U. S. 540, 548, 31 L. Ed. 235; Murdock *v.* Memphis, 20 Wall. 590, 636, 22 L. Ed. 429.

47. Bachtel *v.* Wilson, 204 U. S. 36, 40, 51 L. Ed. 357.

"We certainly do not mean to qualify or limit the rule that, for this court to entertain jurisdiction of a writ of error to a state court, it must appear affirmatively that the state court could not have reached its judgment without tacitly, if not expressly, deciding the federal matter. Bachtel *v.* Wilson, 204 U. S. 36, 51 L. Ed. 257." Schlemmer *v.* Buffalo, etc., R. Co., 205 U. S. 1, 11, 51 L. Ed. 681.

48. Hamilton Co. *v.* Massachusetts, 6 Wall. 632, 18 L. Ed. 904; Dewey *v.*

was never raised cannot be said to have been decided adversely to a party, who never set it up or in any way alluded to it. Nor can it be said that the necessary effect in law of a judgment, which is silent upon the question, is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of.[49]

Where State Court Has Considered Federal Questions.—Whilst, when a state court has considered a federal question, that fact may serve to elucidate whether a federal issue properly arises for consideration by this court, that doctrine has no application to a case where the controversy presented is inherently not federal, and incapable of presenting a federal question for decision.[50]

bb. *Where Federal Question Only Collaterally Involved.*—In order to give this court jurisdiction to review the judgment of a state court against a title or right set up or claimed under a statute of, or an authority exercised under, the United States, the statute or authority must be directly in issue; if the statute is only collaterally involved, this court has no jurisdiction.[51]

cc. *Dismissal for Want of Jurisdiction.*—This court has no jurisdiction, where the state court dismisses the cause for want of jurisdiction, because in such case it does not appear that a federal question has been decided.[52]

dd. *Dismissal by State Court for Want of Proper Appeal.*—As the jurisdiction of this court to review the judgments or decrees of state courts when a fed-

Des Moines, 173 U. S. 193, 200, 43 L. Ed. 665, reaffirmed in Indiana Power Co. *v.* Elkhart Power Co., 187 U. S. 636, 47 L. Ed 343.

49. Dewey *v.* Des Moines, 173 U. S. 193, 200, 43 L. Ed. 665, reaffirmed in Indiana Power Co. *v.* Elkhart Power Co., 187 U. S. 636, 47 L. Ed. 343.

50. Elder *v.* Colorado, 204 U. S. 85, 89, 51 L. Ed. 381.

51. Conde *v.* York, 168 U. S. 642, 648, 42 L. Ed. 611, reaffirmed in Farmers' National Bank *v.* Robinson, 176 U. S. 681, 682, 44 L. Ed. 637, distinguishing Aldrich *v.* Ætna Ins. Co., 8 Wall. 491, 19 L. Ed. 473; Railroads *v.* Richmond, 15 Wall. 3, 21 L. Ed. 118.

This court has no jurisdiction to review the judgment of a state court on the ground that it denied the plaintiff in error a title or right set up or claimed under § 3477 of the Revised Statutes of the United States providing that all transfers and assignments made of any claim upon the United States shall be absolutely null and void, unless they are made and executed in a certain manner, where the controversy in said court is merely as to which of the claimants had the superior equity in the fund; the statute being only collaterally involved, and the plaintiffs in error asserting no right to the money based upon it. Conde *v.* York, 168 U. S. 642, 42 L. Ed. 611.

52. Callan *v.* Bransford, 139 U. S. 197, 35 L. Ed. 144.

Where two parties held patents for land from the United States, under Mexican grants, both of which included the same lands in part, and one of the parties brought a suit in a state court to vacate the patent of the other, to the extent of the conflict of title, and the state court refused to entertain jurisdiction of the question, and dismissed the complaint, this court has no jurisdiction, under the twenty-fifth section of the judiciary act, to review the judgments. Semple *v.* Hagar, 4 Wall. 431, 18 L. Ed. 402.

Where an action upon a mortgage is brought in a state court, and in the course of the proceedings in that court, a petition for removal to a United States court was filed, and the state court denies this petition and renders a money judgment in favor of the plaintiffs, their claim under the mortgage being denied, and the defendants appeal to the state supreme court, which dismisses the appeal for want of jurisdiction, this court has no jurisdiction. The judgment of the state court was one dismissing the suit for want of jurisdiction. Consequently, that court could not have decided the federal question presented to and passed upon by the district court. All it did was to determine that the district court was the highest court of the state in which a decision in the state could be had. Lane *v.* Wallace, 131 U. S., appx., ccxix, 26 L. Ed. 703.

Where a complainant setting out a case in the highest state court, for equitable relief against a sale, which a third party had undertaken to make of land, alleged that the party in making the sale had violated an act of congress, and that the sale was therefore null and void, and the state court dismissed the bill for want of jurisdiction; held, that although the question whether the sale was not a nullity might have been presented, yet that the case having been dismissed below for want of jurisdiction, it did not appear that a federal question had been decided, much less that it had been decided adversely to the complainant. Independently of this, whatever might have

eral question is presented is limited to the review of a final judgment or decree, actually or constructively deciding such question, when rendered by the highest court of a state in which a decision in the suit could be had, if, for the want of a proper appeal, no final judgment or decree in such court has been rendered, it results that the statutory prerequisite for the exercise of the reviewing power of this court is wanting. As where an appeal is dismissed for want of jurisdiction by the supreme court of the state, because the proper parties to the appeal are wanting.[53]

ee. *Reasons of Rule.*—The reason of these rules is obvious. Our jurisdiction for the review of a judgment of the highest court of a state depends on the decision by that court of one or more of the questions specified in § 709 Rev. Stat., and in the way there mentioned. If there has been no such decision in the suit, there can be no re-examination of the judgment here. It is what was actually decided that we are to consider, not what might have been decided; and, as our jurisdiction must appear affirmatively on the face of the record before we can proceed, the record must show either in express terms or by fair implication, not only the question, but its decision. It is not enough to find by searching after judgment, that the requisite question might have been raised and presented for decision. It must appear that it was actually raised and actually decided.[54]

1f. *Limitations of and Exceptions to General Rule.*—But this court has had frequent occasion to hold that it is not always necessary that the federal question should appear affirmatively on the record, or in the opinion, if an adjudication of such question was necessarily involved in the disposition of the case by the state court.[55] It is equally well settled that the failure of the state court to pass on the federal right or immunity specially set up, of record, is not conclusive, but this court will decide the federal question if the necessary effect of the judgment is to deny a federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law.[56] This court has jurisdiction, in error, over a judgment of the supreme court of a state when it necessarily involves the decision of the question, raised in that appellate court for the first time, and not noticed in its opinion, whether a statute of the state conflicts with the constitution of the United States.[57] In the language of Mr. Justice Holmes, if the question is duly raised and the judgment necessarily, or by what appears in

been the reasons for the decision, the question whether the state court had jurisdiction of the case, was a question exclusively for the state tribunals. Held, accordingly, that no jurisdiction existed here in such a case under the 25th section of the judiciary act of 1789, or the act of February 5th, 1867, amendatory of it. Smith *v.* Adsit, 16 Wall. 185, 21 L. Ed. 310.

53. Newman *v.* Gates, 204 U. S. 89, 95, 51 L. Ed. 385.

54. Brown *v.* Colorado, 106 U. S. 95, 97, 27 L. Ed. 132; Detroit City R. Co. *v.* Guthard, 114 U. S. 133, 136, 29 L. Ed. 118.

55. Wilson, *v.* Black Bird Creek Marsh Co., 2 Pet. 245, 7 L. Ed. 412; Armstrong *v.* The Treasurer, 16 Pet. 281, 10 L. Ed. 965; Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574, 28 L. Ed. 1084; Eureka Lake Co. *v.* Yuba County, 116 U. S. 410, 29 L. Ed. 671; Kaukauna Water Power Co. *v.* Green Bay, etc., Co., 142 U. S. 254, 269, 35 L. Ed. 1004.

56. When the court may reasonably infer from the record in a case brought here by writ of error from a state court that the federal question raised here was necessarily involved in the decision there, the court will not dismiss the writ on motion to dismiss for want of jurisdiction, although it may not appear affirmatively on the record that the question was raised there. Eureka Lake Co. *v.* Yuba County, 116 U. S. 410, 29 L. Ed. 671; Chicago, etc., R. Co. *v.* Illinois, 200 U. S. 561, 580, 50 L. Ed. 596; West Chicago R. Co. *v.* Chicago, 201 U. S. 506, 520, 50 L. Ed. 845. Compare Louisville, etc., R. Co. *v.* Smith, etc., Co., 204 U. S. 551, 556, 51 L. Ed. 612.

Where rights under a statute of the United States are claimed by the plaintiff in error in a state court, and that statute is referred to by the state court and is an element in its decision, this court has jurisdiction. Hammond *v.* Whittredge, 204 U. S. 538, 51 L. Ed. 606.

57. Farmers', etc., Ins. Co. *v.* Dobney, 189 U. S. 301, 47 L. Ed. 821; Cincinnati, etc., Packet Co. *v.* Bay, 200 U. S. 179, 50 L. Ed. 428; Arrowsmith *v.* Harmoning, 118 U. S. 194, 30 L. Ed. 243.

fact, involves such a decision, then this court will take jurisdiction, although the opinion below says nothing about it.[58]

Not Necessary to State in Terms That Federal Question Was Involved.—But it is not indispensable that it should appear on the record in totidem verbis, or by direct and positive statement, that the question was made, and the decision given by the court below on the very point; it is sufficient if it is clear from the facts stated, by just and necessary inference, that the question was made, and that the court below must, in order to have arrived at the judgment pronounced by it, have come to the very decision of that question as indispensable to that judgment.[59] Although it does not appear from the opinion of the court

58. Kaukauna Water Power Co., *v.* Green Bay, etc., Co., 142 U. S. 254, 35 L. Ed. 1004; Schlemmer *v.* Buffalo, etc., R. Co., 205 U. S. 1, 11, 51 L. Ed. 681.

59. Owings *v.* Norwood, 5 Cranch 344, 3 L. Ed. 120; Smith *v.* Maryland, 6 Cranch 286, 3 L. Ed. 225; Martin *v.* Hunter, 1 Wheat. 304, 4 L. Ed. 97; Inglee *v.* Coolidge, 2 Wheat. 363, 4 L. Ed. 261; Williams *v.* Norris, 12 Wheat. 117, 124, 6 L. Ed. 571; Hickie *v.* Starke, 1 Pet. 94, 7 L. Ed. 67; Satterlee *v.* Matthewson, 2 Pet. 380, 7 L. Ed. 458; Fisher *v.* Cockerell, 5 Pet. 248, 256, 8 L. Ed. 114; New Orleans *v.* De Armas, 9 Pet. 224, 9 L. Ed. 109; Crowell *v.* Randell, 10 Pet. 368, 9 L. Ed. 458; The Victory, 6 Wall. 382, 384, 18 L. Ed. 848; Hamilton Co. *v.* Massachusetts, 6 Wall. 632, 636, 18 L. Ed. 904; Furman *v.* Nichol, 8 Wall. 44, 56, 19 L. Ed. 370; Grand Gulf, etc., R. Co. *v.* Marshall, 12 How. 165, 167, 13 L. Ed. 938; Bridge Proprietors *v.* Hoboken, etc., Co., 1 Wall. 116, 143, 17 L. Ed. 571; Steines *v.* Franklin County, 14 Wall. 15, 21, 20 L. Ed. 846; New Orleans, etc., Co. *v.* Louisiana Sugar Refin. Co., 125 U. S. 18, 29, 31 L. Ed. 607; Miller *v.* Nicholls, 4 Wheat. 311, 4 L. Ed. 578; Wilson *v.* Black Bird Creek Marsh Co., 2 Pet. 245, 250, 7 L. Ed. 412; Harris *v.* Dennie, 3 Pet. 292, 301, 7 L. Ed. 683; Craig *v.* Missouri, 4 Pet. 410, 429, 7 L. Ed. 903; Davis *v.* Packard, 6 Pet. 41, 48, 8 L. Ed. 312; Wedding *v.* Meyler, 192 U. S. 573, 581, 48 L. Ed. 570.

It is sufficient to give this court jurisdiction of the cause, that the record should show that an act of congress was applicable to the case. Miller *v.* Nicholls, 4 Wheat. 311, 312, 4 L. Ed. 578; Harris *v.* Dennie, 3 Pet. 292, 7 L. Ed. 683; Miller *v.* Nicholls, 4 Wheat. 311, 4 L. Ed. 518; Williams *v.* Norris, 12 Wheat. 117, 6 L. Ed. 57; Willson *v.* Black Bird Creek Marsh Co., 2 Pet. 245, 7 L. Ed. 412; Smith *v.* Maryland, 6 Cranch 286, 3 L. Ed. 225; Martin *v.* Hunter, 1 Wheat. 304, 355, 4 L. Ed. 97; Craig *v.* Missouri, 4 Pet. 410, 429, 7 L. Ed. 903, reaffirmed in 8 L. Ed. 859.

"Objections to the jurisdiction of this court have been frequently made, on the ground that there was nothing apparent on the record to raise the question whether the court from which the case had been brought had decided upon the constitutionality of a law, so that the case was within the provisions of the 25th section of the judiciary act of 1789. This has given occasion to a critical examination of the section, which has resulted in the adoption of certain principles of construction applicable to it. One of those principles is, that if the repugnancy of a statute of a state to the constitution of the United States was drawn into question, or if that question was applicable to the case, this court has jurisdiction of the cause, although the record should not in terms state a misconstruction of the constitution of the United States; or that the repugnancy of the statute of the state to any part of that constitution was drawn into question." Satterlee *v.* Matthewson, 2 Pet. 380, 7 L. Ed. 458.

While the jurisdictional facts must appear from the record, yet it is not necessary that the record should show in express terms that the constitution, or a law or treaty of the United States, was drawn in question. It is enough if the proceedings set forth in the record show that a decision was made by the state court of one of the questions specified in § 25 of the judiciary act. Miller *v.* Nicholls, 4 Wheat. 311, 4 L. Ed. 578; Wilson *v.* Black Bird Creek Marsh Co., 2 Pet. 245, 7 L. Ed. 412; Satterlee *v.* Matthewson, 2 Pet. 380, 7 L. Ed. 458; Harris *v.* Dennie, 3 Pet. 292, 7 L. Ed. 683; Crowell *v.* Randell, 10 Pet. 368, 9 L. Ed. 458; Craig *v.* Missouri, 4 Pet. 410, 7 L. Ed. 903; Davis *v.* Packard, 6 Pet. 41, 8 L. Ed. 312; Murray *v.* Charleston, 96 U. S. 432, 24 L. Ed. 760; Minnesota *v.* Batchelder, 1 Wall. 109, 17 L. Ed. 551; Rector *v.* Ashley, 6 Wall. 142, 18 L. Ed. 733; Walker *v.* Villavaso, 6 Wall. 124, 18 L. Ed. 853; Maney *v.* Porter, 4 How. 55, 11 L. Ed. 873.

"Although there are other decisions in which it is said that the point raised must appear on the record, and that the particular act of congress, or part of the constitution supposed to be infringed by the state law, ought to be pointed out, it has never been held that this should be done in express words. But the true and rational rule is, that the court must be able to see clearly, from the whole record, that a certain provision of the constitution or act of congress was relied on by the party who brings the writ of error,

of original jurisdiction, or from the opinion of the highest state court, that either court formally passed upon any question of a federal nature, yet if the necessary effect of the decision was to determine adversely to the plaintiff in error the rights and immunities claimed by him in the pleadings and proof, under the proceeding in bankruptcy, this court has jurisdiction to review the decision and that the right thus claimed by him was denied." Bridge Proprietors *v.* Hoboken, etc., Co., 1 Wall. 116, 143, 17 L. Ed. 571, citing Crowell *v.* Randell, 10 Pet. 368, 9 L. Ed. 458; Armstrong *v.* The Treasurer, 16 Pet. 281, 10 L. Ed. 965.

Although the supreme court of the state does not in terms pass upon a claim distinctly made therein, that the statutes in question were in derogation of the rights and privileges secured to the appellant by the constitution of the United States, yet if the final judgment necessarily involved an adjudication of that claim, this court has jurisdiction to inquire whether any right or privilege protected by the constitution of the United States has been withheld or denied by a judgment below. Accordingly, a motion to dismiss the writ of error, upon the ground that the record does not raise any question of a federal nature, must be denied. Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574, 28 L. Ed. 1084.

Wherever rights, acknowledged and protected by the constitution of the United States, are denied or invaded by state legislation, which is sustained by the judgment of a state court, this court is authorized to interfere. Its jurisdiction, therefore, to re-examine such judgment, cannot be defeated by showing that the record does not, in direct terms, refer to some constitutional provision, nor expressly state that a federal question was presented. The true jurisdictional test is, whether it appears that such a question was decided adversely to the federal right. Murray *v.* Charleston, 96 U. S. 432, 24 L. Ed. 760.

If the record shows by clear and necessary intendment that the federal question must have been directly involved so that the state court could not have given judgment without deciding it, in such case it has been held, that the federal question sufficiently appears. Green Bay, etc., Canal Company *v.* Patten Paper Company, 172 U. S. 58, 68, 43 L. Ed. 364, and cases cited. In substance, the validity of the statute or the right under the constitution must have been drawn in question. Powell *v.* Brunswick County, 150 U. S. 433, 37 L. Ed. 1134; Sayward *v.* Denny, 158 U. S. 180, 39 L. Ed. 941. The latest decision to this effect is Capital Nat. Bank *v.* First Nat. Bank, 172 U. S. 425, 42 L. Ed. 502. Dewey *v.* Des Moines, 173 U. S. 193, 199, 43 L. Ed. 665, reaffirmed in Indiana Power Co. *v.* Elkhart Power Co., 187 U. S. 636, 47 L. Ed. 343.

As was said by the Chief Justice in Powell *v.* Brunswick County, 150 U. S. 433, 440, 37 L. Ed. 1134: "If it appear from the record by clear and necessary intendment that the federal question must have been directly involved, so that the state court could not have given judgment without deciding it, that will be sufficient; but resort cannot be had to the expedient of importing into the record the legislation of the state as judicially known to its courts, and holding the validity of such legislation to have been drawn in question, and a decision necessarily rendered thereon in arriving at conclusions upon the matters actually presented and considered." See, also, Louisville, etc., R. Co. *v.* Louisville, 166 U. S. 709, 715, 41 L. Ed. 1173; Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 41, 48, 45 L. Ed. 415; Mountain View, etc., Co. *v.* McFadden, 180 U. S. 535, 45 L. Ed. 656.

Extent of examination of record.—"It has never been held that the record of the proceedings of the highest court must state in terms a misconstruction by that court of the act of congress. It is enough that it is an inference of law, from the inspection of the whole record, that the highest court did thus misconstrue an act of congress, and annul a right or title, otherwise valid, by reason of such misconstruction. Any other rule, confining this court to an inspection of that part of the record which sets out the proceedings of the highest court alone, would be a departure from the general principle, that the whole of an instrument is to be looked at to determine the effect of each part of it, would present for decision an artificial and not a real case; and, inasmuch as the highest state court often simply affirms or reverses the judgment below, would, in all such cases, deprive the citizen of the rights secured to him by the constitution and the twenty-fifth section of the judiciary act. And it has been the practice of this court, whenever necessary, to look at the record of the proceedings of the inferior state court in connection with the proceedings of the highest court, in order to deduce therefrom the points decided by the latter." Neilson *v.* Lagow, 12 How. 98, 109, 13 L. Ed. 909.

Lien under federal statutes.—The claim of a lien on the goods under and by virtue of the laws of the United States, directly calls for a determination of a federal right, although no statute is mentioned. Crowell *v.* Randell, 10 Pet. 368, 9 L. Ed. 458; Bridge Proprietors *v.* Hoboken, etc., Co., 1 Wall. 116, 142, 17 L. Ed. 571; Furman *v.* Nichol, 8 Wall. 44, 56, 19 L. Ed. 370; Dooley *v.* Smith, 1

under Revised Statutes, § 709, providing that: "A final judgment or decree in any suit in the highest court of a state where any title, right, privilege or immunity is claimed under the constitution, or any * * * authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party, under such constitution, * * * or authority, may be re-examined and reversed or affirmed in the supreme court upon a writ of error."[60] Where a motion is made to dismiss a writ of error on the ground that the record exhibits no federal question, the motion will be denied if the plaintiff claimed and set up a right under the constitution of the United States, and the decision of the supreme court of the state is tantamount to the denial of that right.[61]

Rule Qualified.—While Mr. Justice Story, in Crowell *v.* Randell, 10 Pet. 368, 378, 9 L. Ed. 458, said that it was not necessary that the question should appear on the record to have been raised and the decision made in direct and positive terms, ipsissimis verbis, but that it was sufficient if it appeared by clear and necessary intendment that the question must have been raised, and must have been decided in order to have induced the judgment, he also said it was "not sufficient to show that a question might have arisen or been applicable to the case; unless it is further shown, on the record, that it did arise, and was applied by the state court to the case."[62] In order to be available in this court, some claim or right must have been asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the constitution or laws or treaties of the United States. In such case, if the court below denied the

Wall. 604, 20 L. Ed. 547; Wabash R. Co. *v.* Pearce, 192 U. S. 179, 185, 48 L. Ed. 397.

Misconstruction of act of congress.—Under the 25th section of the judiciary act of 1789, c. 20, where the construction of any clause in the constitution, or any statute of the United States, is drawn in question, in any suit in a state court, the decision must be against the title or right set up by the party under such clause of the constitution or statute, or this court has no appellate jurisdiction in the case. It is not sufficient that the construction of the statute was drawn in question, and that the decision was against the title of the party; it must appear that his title depended upon the statute. Where, in such a case, the validity of a statute of any state is drawn in question, upon the ground of its being repugnant to the constitution of the United States, and the decision has been in favor of its validity, it is necessary to the exercise of the appellate jurisdiction of this court, that it should distinctly appear that the title or right of the party depended upon the statute. Williams *v.* Norris, 12 Wheat. 117, 6 L. Ed. 571.

Where, under the 25th section of the judiciary act of 1789, the validity of a statute of any state is drawn in question, upon the ground of its being repugnant to the constitution of the United States, and the decision is in favor of its validity, it is necessary to the exercise of the appellate jurisdiction of this court that it should distinctly be stated in the record that the constitutionality of this act was drawn in question. Williams *v.* Norris, 12 Wheat. 117, 6 L. Ed. 571, distinguishing Miller *v.* Nicholls, 4 Wheat. 311, 4 L. Ed. 578.

60. Roby *v.* Colehour, 146 U. S. 153, 36 L. Ed. 922; Otis Co. *v.* Ludlow Mfg. Co., 201 U. S. 140, 50 L. Ed. 696.

61. Kaukauna Water Power Co. *v.* Green Bay, etc., Co., 142 U. S. 254, 35 L. Ed. 1004; Detroit, etc., R. Co. *v.* Osborn, 189 U. S. 383, 387, 47 L. Ed. 860; Harding *v.* Illinois, 196 U. S. 78, 88, 49 L. Ed. 394.

62. Brown *v.* Colorado, 106 U. S. 95, 27 L. Ed. 132; Hagar *v.* California, 154 U. S., appx., 639, 24 L. Ed. 1044; Edwards *v.* Elliott, 21 Wall. 532, 22 L. Ed. 487; The Victory, 6 Wall. 382, 384, 18 L. Ed. 848.

It is not enough to give jurisdiction to this court, under the 25th section of the judiciary act, that the decision of the state court was against a party claiming title under some statute of, or commission held under, the United States. The origin of the title may be but an accident of the controversy, and not the subject or substance of it. The suit must have drawn in question the construction of such statute or commission, and the judgment of the state court must have been adverse to the claim set up under them. "The record also must show, if not ipsissimis verbis, at least, by clear and necessary intendment, that such question of 'construction' was raised, and must have been decided in order to induce the judgment. It is not enough to show that the question might have arisen, and been applicable to the case, unless it is further shown on the record that it did arise, and was applied by the state court to the case." The cases which establish these principles are too numerous for quotation. Calcote *v.* Stanton, 18 How. 243, 15 L. Ed. 348.

right claimed, it would be enough; or if it did not in terms deny such right, if the necessary effect of its judgment was to deny it, then it would be enough. But the denial, whether expressed or implied, must be of some right or claim founded upon the constitution or the laws or treaties of the United States which had in some manner been brought to the attention of the court below.[63] A definite issue as to the validity of the statute or the possession of the right must be distinctly deducible from the record before the state court can be held to have disposed of such a federal question by its decision.[64]

(3) *Where Decision Is Based on Independent Grounds.*—**In General.**—To give us jurisdiction under § 709, Rev. Stat., it is not only necessary that some one of the questions mentioned in the section should exist on the record, but that the decision was controlling in the disposition of the cause.[65] It is a well-settled rule, limiting the jurisdiction of this court in such cases, that "where it appears by the record that the judgment of the state court might have been based either upon a law which would raise a question of repugnancy to the constitution, laws, or treaties of the United States, or upon some other independent ground; and it appears that the court did, in fact, base its judgment on such independent ground, and not on the law raising the federal question, this court will not take jurisdiction of the case, even though it might think the position of the state court an unsound one."[66] It is likewise settled law that, where the rec-

63. Dewey *v.* Des Moines, 173 U. S. 193, 199, 200, 43 L. Ed. 665, reaffirmed in Indiana Power Co. *v.* Elkhart Power Co., 187 U. S. 636, 47 L. Ed. 343.

64. Powell *v.* Brunswick County, 150 U. S. 433, 440, 37 L. Ed. 1134.

65. Williams *v.* Oliver, 12 How. 111, 125, 13 L. Ed. 921; Klinger *v.* Missouri, 13 Wall. 257, 20 L. Ed. 635; Citizens' Bank *v.* Board of Liquidation, 98 U. S. 140, 141, 25 L. Ed. 114.

66. Klinger *v.* Missouri, 13 Wall. 257, 263, 20 L. Ed. 635, per Mr. Justice Bradley; De Saussure *v.* Gaillard, 127 U. S. 216, 233, 32 L. Ed. 125; New Orleans, etc., Co. *v.* Louisiana Sugar Refin. Co., 125 U. S. 18, 29, 31 L. Ed. 607; Eustis *v.* Bolles, 150 U. S. 361, 367, 37 L. Ed. 1111; Haley *v.* Breeze, 144 U. S. 130, 132, 36 L. Ed. 373; Texas, etc., R. Co. *v.* Johnson, 151 U. S. 81, 38 L. Ed. 81; West Tennessee Bank *v.* Citizens' Bank, 13 Wall. 432, 20 L. Ed. 514; New Orleans, etc., Co. *v.* Louisiana Sugar Refin. Co., 125 U. S. 18, 31 L. Ed. 607; California Powder Works *v.* Davis, 151 U. S. 389, 38 L. Ed. 206; Dower *v.* Richards, 151 U. S. 658, 666, 38 L. Ed. 305; McQuade *v.* Trenton, 172 U. S. 636, 43 L. Ed. 581; Capital Nat. Bank *v.* First Nat. Bank, 172 U. S. 425, 43 L. Ed. 502; Allen *v.* Southern Pac. R. Co., 173 U. S. 479, 489, 43 L. Ed. 775.

A writ of error to a state court will be dismissed for want of jurisdiction, where the record fails to show that any question was made in the court below, or decided as to the effect of an act of congress upon the plaintiff's title to property, and where so far as anything appears, the case was disposed of without reaching that question. Basse *v.* Brownsville, 154 U. S., appx., 610, 22 L. Ed. 420.

Where the case is decided against the plaintiffs in error on an independent ground, not involving a federal question, and broad enough to maintain the judgment, in such case, even though the state court also decides a federal question against the plaintiffs in error, this court will dismiss the writ of error without considering the federal question. Marrow *v.* Brinkley, 129 U. S. 178, 181, 32 L. Ed. 654; Hale *v.* Akers, 132 U. S. 554, 565, 33 L. Ed. 442; San Francisco *v.* Itsell, 133 U. S. 65, 66, 33 L. Ed. 570; Hopkins *v.* McLure, 133 U. S. 380, 386, 33 L. Ed. 660; Beatty *v.* Benton, 135 U. S. 244, 254, 34 L. Ed. 124.

The court reasserts the principle that, in cases brought here by writs of error to the state courts, it will not entertain jurisdiction if it appears that, besides the federal question decided by the state court, there is another and distinct ground on which the judgment or decree can be sustained and which is sufficient to support it. Kennebec R. *v.* Portland R., 14 Wall. 23, 20 L. Ed. 850, citing Rector *v.* Ashley, 6 Wall. 142, 18 L. Ed. 733; Klinger *v.* Missouri, 13 Wall. 257, 20 L. Ed. 635; Steines *v.* Franklin County, 14 Wall. 15, 20 L. Ed. 846.

Where a case is brought here by a writ of error to a state court under the 25th section of the judiciary act, this court can only review the decision of the state court on the question or questions mentioned in that section. Therefore, if in addition to the decision of the state court on such question or questions, that court has rested its judgment on some point in the case not within the purview of that section, and that point is broad enough to sustain the judgment, then, although the ruling of the state court might be reversed on the point which is of federal cognizance, this court will not entertain

ord discloses that if a question has been raised and decided adversely to a party claiming the benefit of a provision of the constitution or laws of the United States, another question, not federal, has been also raised and decided against such party, and the decision of the latter question is sufficient, notwithstanding the federal question, to sustain the judgment, this court will not review the

jurisdiction of the case. Rector *v.* Ashley, 6 Wall. 142, 18 L. Ed. 733.

This view is in accordance with the decisions of this court in Kreiger *v.* Shelby R. Co., 125 U. S. 39, 32 L. Ed. 675; De Saussure *v.* Gaillard, 127 U. S. 216, 32 L. Ed. 125, and Hale *v.* Akers, 132 U. S. 554, 33 L. Ed. 442, the ruling in which cases is, that where the supreme court of a state decides a federal question, in rendering a judgment, and also decides against the plaintiff in error on an independent ground, not involving a federal question, and broad enough to maintain the judgment, the writ of error will be dismissed without considering the federal question. Hopkins *v.* McLure, 133 U. S. 380, 386, 33 L. Ed. 660.

A writ of error was prosecuted to the supreme court of Louisiana under the twenty-fifth section of the judiciary act of 1787, to revise the judgment of that court. The cause was dismissed, as it did not appear that any question was presented in the court below within the purview of the act, the case having been decided upon a collateral matter, independent of, and wholly aside from any such question. Keene *v.* Clark, 10 Pet. 291, 9 L. Ed. 429, citing Crowell *v.* Randell, 10 Pet. 368, 9 L. Ed. 458.

Where there are other questions in the record, on which the judgment of the state court might have rested, independently of the federal question, this court cannot reverse the judgment. Gibson *v.* Chouteau, 8 Wall. 314, 19 L. Ed. 317.

A case is not within the 25th section of the judiciary act when the judgment below is founded on a matter which is not within the section, even though it be founded also for an independent base, on other matter which it is asserted is within it. West Tennessee Bank *v.* Citizens' Bank, 13 Wall. 432, 20 L. Ed. 514, citing Bethell *v.* Demaret, 10 Wall. 537, 19 L. Ed. 1007.

Where the record only shows that a particular judgment was given by the highest state court, no writ under the 25th section lies if the judgment may have been given on grounds which that section does not make cause for error, as well as upon some ground which it does so make. Steines *v.* Franklin County, 14 Wall. 15, 20 L. Ed. 846.

Bankruptcy.—Where the defendants in the court below demurred to the declaration upon two grounds, one of which involved the construction of the provisions of the federal bankrupt act, and the other the bar to the statute of limitations of the state, and the record in this court discloses no specific statement of the grounds upon which a state court proceeds, if this court cannot see that if the supreme court of the state had sustained the defense of the statute of limitations that such decision would have been erroneous, it does not appear that the judgment as rendered could not have been given without deciding a federal question, or that its decision was necessary to the determination of the case and that it was actually decided. Johnson *v.* Risk, 137 U. S. 300, 34 L. Ed. 683.

Impairment of obligation of contract.—Where the trial court in a suit to recover against the defendant on a promissory note, conceding that his cause of action would not be taken away from him, without his consent, by proceedings under statutes of insolvency passed subsequently to the vesting of his rights, yet holds that where he proves his debt in the insolvency proceedings, and accepts and receipts for the money which had been awarded him, as his portion, under the insolvency proceedings, in so accepting and receipting for his dividend in the insolvency proceedings, was a waiver of his right to object to the validity of the insolvency statutes on the ground that they impair the obligation of the contract, presents no federal question. The court below in deciding that it was competent for him to waive his legal rights, and that accepting his dividends under the insolvency proceedings, was such a waiver, does not decide a federal question. It was broad enough in itself to support the final judgment, without reference to the federal question. Eustis *v.* Bolles, 150 U. S. 361, 37 L. Ed. 1111, citing Clay *v.* Smith, 3 Pet. 411, 7 L. Ed. 723; Beaupre *v.* Noyes, 138 U. S. 397, 34 L. Ed. 991.

Where both parties, who are respectively plaintiffs and defendants in the court below, derive title from the state by patents which were issued in execution of the grant to it of swamp and overflowed lands, but the decision of the state court merely determines the extent of the grant to the state, and interpreting the contending patents as conveyances, decides that the lands described in that of plaintiff did not embrace the lands in controversy, and that the lands described in that of defendant did embrace it, a motion to dismiss a writ of error will be sustained, because its decision was put upon an independent ground involving no federal question, and of itself sufficient to support the judgment. White *v.* Leovy, 174 U. S. 91, 43 L. Ed. 907.

judgment.[67] We have repeatedly held, that even the decision by the state court of a federal question will not sustain the jurisdiction of this court, if another

67. Eustis *v.* Bolles, 150 U. S. 361, 366, 37 L. Ed. 1111; Winter *v.* Montgomery, 156 U. S. 385, 39 L. Ed. 460; Union Nat. Bank *v.* Louisville, etc., R. Co., 163 U. S. 325, 41 L. Ed. 177; White *v.* Lening, 163 U. S. 711, 41 L. Ed. 314; Allen *v.* Southern, etc., R. Co., 173 U. S. 479, 43 L. Ed. 775; Leonard *v.* Vicksburg, etc., R. Co., 198 U. S. 416, 49 L. Ed. 1108; Rutland R. Co. *v.* Central Vermont R. Co., 159 U. S. 630, 40 L. Ed. 284; Seneca Nation of Indians *v.* Christy, 162 U. S. 283, 40 L. Ed. 970; Pierce *v.* Somerset Railway, 171 U. S. 641, 648, 43 L. Ed. 316; Wade *v.* Lawder, 165 U. S. 624, 41 L. Ed. 851; Harrison *v.* Morton, 171 U. S. 38, 47, 43 L. Ed. 63; Cueli *v.* Rodriguez, 198 U. S. 581, 49 L. Ed. 1172; Carnahan *v.* Connolly, 187 U. S. 636, 47 L. Ed. 343; Thomas *v.* Blair, 196 U. S. 637, 638, 49 L. Ed. 630; Rose *v.* Kansas, 203 U. S. 580, 51 L. Ed. 326; Lyon *v.* Gombret, 189 U. S. 507, 47 L. Ed. 922; Dibble *v.* Bellingham Bay Land Co., 163 U. S. 63, 41 L. Ed. 72; Klinger *v.* Missouri, 13 Wall. 257, 20 L. Ed. 635; Johnson *v.* Risk, 137 U. S. 300, 34 L. Ed. 683; Allen *v.* Arguimbau, 198 U. S. 149, 154, 49 L. Ed. 990; Rector *v.* Ashley, 6 Wall. 142, 18 L. Ed. 733; Kreiger *v.* Shelby R. Co., 125 U. S. 39, 46, 31 L. Ed. 675; De Saussure *v.* Gaillard, 127 U. S. 216, 234, 32 L. Ed. 125; Hale *v.* Akers, 132 U. S. 554, 564, 565, 33 L. Ed. 442; Hopkins *v.* McLure, 133 U. S. 380, 386, 387, 33 L. Ed. 660; Henderson Bridge Co. *v.* Henderson, 141 U. S. 679, 688, 35 L. Ed. 900; Egan *v.* Hart, 165 U. S. 188, 191, 41 L. Ed. 680; Powell *v.* Brunswick County, 150 U. S. 433, 441, 37 L. Ed. 1134; Castillo *v.* McConnico, 168 U. S. 674, 679, 42 L. Ed. 622, reaffirmed in Fenwick Hall Co. *v.* Old Saybrook, 169 U. S. 734, 42 L. Ed. 1215; Warren *v.* Chandos, 169 U. S. 734, 42 L. Ed. 1216; Nester *v.* Church, 189 U. S. 505, 47 L. Ed. 921; Thomas *v.* Kansas, 205 U. S. 535, 51 L. Ed. 919; Simmerman *v.* Nebraska, 116 U. S. 54, 29 L. Ed. 535; California Powder Works *v.* Davis, 151 U. S. 389, 38 L. Ed. 206; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 40 L. Ed. 536; Fowler *v.* Lamson, 164 U. S. 252, 41 L. Ed. 424; Iowa Central R. Co. *v.* Iowa, 160 U. S. 389, 40 L. Ed. 467; Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 41 L. Ed. 1165; Miller *v.* Cornwall R. Co., 168 U. S. 131, 42 L. Ed. 409; Chappell Chemical Co. *v.* Sulphèr Mines Co., 172 U. S. 465, 471, 43 L. Ed. 517; Giles *v.* Teasley, 193 U. S. 146, 160, 48 L. Ed. 655, reaffirmed in Delahanty *v.* Pitkin, 199 U. S. 602, 50 L. Ed. 328; New York, etc., R. Co. *v.* New York, 186 U. S. 269, 273, 46 L. Ed. 1158; Bachtel *v.* Wilson, 204 U. S. 36, 40, 51 L. Ed. 357; Bacon *v.* Texas, 163 U. S. 207, 227, 41 L. Ed. 132; Rutland *v.* Central Vermont R. Co., 159 U. S. 360, 630, 40 L. Ed. 284; Gillis *v.* Stinchfield, 159 U. S. 658, 660, 40 L. Ed. 295; New York, etc., R. Co. *v.* Woodruff, 153 U. S. 689, 38 L. Ed. 869; Hammond *v.* Conn. Mut. Life Ins. Co., 150 U. S. 633, 37 L. Ed. 1206; Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429; Jenkins *v.* Lowenthal, 110 U. S. 222, 28 L. Ed. 129; Wood Mowing, etc., Co. *v.* Skinner, 139 U. S. 293, 35 L. Ed. 193; Hammond *v.* Johnston, 142 U. S. 73, 35 L. Ed. 941; Tyler *v.* Cass County, 142 U. S. 288, 35 L. Ed. 1016; Delaware City, etc., Nav. Co. *v.* Reybold, 142 U. S. 636, 35 L. Ed. 1141; Blount *v.* Walker, 134 U. S. 607, 33 L. Ed. 1036; Miller *v.* Swann, 150 U. S. 132, 134, 37 L. Ed. 1028; Beaupre *v.* Noyes, 138 U. S. 397, 34 L. Ed. 991; Northern Pac. R. Co. *v.* Ellis, 144 U. S. 458, 464, 36 L. Ed. 504; O'Neil *v.* Vermont, 144 U. S. 323, 336, 36 L. Ed. 450; Chemical Bank *v.* City Bank, 160 U. S. 646, 40 L. Ed. 568; Sherman *v.* Grinnell, 144 U. S. 198, 202, 36 L. Ed. 403.

When it distinctly appears on the face of an opinion of a state court, which by a law of the state forms part of the record, that the decision below was properly put upon the ground that it did not involve a federal question, although such question was raised there, this court has no jurisdiction in error over the judgment. Jacks *v.* Helena, 115 U. S. 288, 29 L. Ed. 392, citing and following, Detroit City R. Co. *v.* Guthard, 114 U. S. 133, 29 L. Ed. 118.

Even though a federal question may have been raised and decided, yet if a question, not federal, is also raised and decided, and the decision of that question is sufficient to support the judgment, this court will not review the judgment. Capital Nat. Bank *v.* First Nat. Bank, 172 U. S. 425, 430, 43 L. Ed. 502.

In order to sustain the jurisdiction of this court upon the ground that a federal question is presented, it should appear either that such question was apparent in the record, and that a decision was made thereon, or that, from the facts stated, such question must have arisen, and been necessarily involved in the case. If it appear either that the decision of the state court was made upon rules of general jurisprudence, or that the case was disposed of upon other grounds, broad enough in themselves to sustain the judgment without considering the federal question, and that such question was not necessarily involved, the jurisdiction of this court will not attach. New Orleans *v.* New Orleans Water Works Co., 142 U. S. 79, 84, 35 L. Ed. 946.

The rule is well settled that, even if a federal question was raised in the state court, yet if the case was decided on grounds broad enough in themselves to sustain the judgment, without reference

question not federal was also raised and decided against the plaintiff in error, and the decision thereof be sufficient, notwithstanding the federal question, to sus-

to the federal question, this court will not entertain jurisdiction. The authorities in support of this rule are too numerous for citation. We cite only a few of the more recent ones: De Saussure *v.* Gaillard, 127 U. S. 216, 32 L. Ed. 125; Beaupre *v.* Noyes, 138 U. S. 397, 34 L. Ed. 991; Cook County *v.* Calumet, etc., Canal Co., 138 U. S. 635, 34 L. Ed. 1110; Wood Mowing, etc., Co. *v.* Skinner, 139 U. S. 293, 35 L. Ed. 193, and the following, at this term of the court: Hammond *v.* Johnston, 142 U. S. 73, 35 L. Ed. 941; New Orleans *v.* New Orleans Water Works Co., 142 U. S. 79, 35 L. Ed. 943; Henderson Bridge Co. *v.* Henderson City, 141 U. S. 679, 35 L. Ed. 900; Delaware City, etc., Nav. Co. *v.* Reybold, 636, 643, 35 L. Ed. 1141.

When a record shows that two questions are presented by the pleadings, one federal and one nonfederal, and that the judgment below rested upon a decision of the nonfederal question, this court has no jurisdiction to review that judgment. Adams County *v.* Burlington, etc., R. Co., 112 U. S. 123, 28 L. Ed. 678.

In Murdock *v.* Memphis, 20 Wall. 590, 636, 22 L. Ed. 429, this court announced, as one of the propositions which flowed from the provisions of the second section of the act of February 5, 1867, 14 Stat. 386, embodied in § 709 of the Revised Statutes of 1874, and still in force, that even assuming that a federal question was erroneously decided against the plaintiff in error, the court must further inquire whether there was any other matter or issue adjudged by the state court, which is sufficiently broad to maintain the judgment of that court, notwithstanding the error in deciding the issue raised by the federal question; and that, if that is found to be the case, the judgment must be affirmed, without inquiring into the soundness of the decision on such other matter or issue. Hale *v.* Akers, 132 U. S. 554, 564, 33 L. Ed. 442; McManus *v.* O'Sullivan, 91 U. S. 578, 23 L. Ed. 390; Brown *v.* Atwell, 92 U. S. 327, 23 L. Ed. 511; Citizens' Bank *v.* Board of Liquidation, 98 U. S. 140, 25 L. Ed. 114; Chouteau *v.* Gibson, 111 U. S. 200, 28 L. Ed. 400; Adams County *v.* Burlington, etc., R. Co., 112 U. S. 123, 28 L. Ed. 678; Detroit City R. Co. *v.* Guthard, 114 U. S. 133, 29 L. Ed. 118; New Orleans, etc., Co. *v.* Louisiana Sugar Refin. Co., 125 U. S. 18, 31 L. Ed. 607; De Saussure *v.* Gaillard, 127 U. S. 216, 234, 32 L. Ed. 125.

Recovery back of taxes.—In Tyler *v.* Cass County, 142 U. S. 288, 35 L. Ed. 1016, an action was brought against a county to recover back money paid at a sale for taxes of lands alleged to be subject to a lien of the United States, and therefore exempt from taxation. The supreme court of North Dakota—while holding that, in view of the decision of this court in Northern Pac. R. Co. *v.* Traill County, 115 U. S. 600, 29 L. Ed. 477, the lands were not taxable, and nothing passed by the sale—gave judgment for the defendant. 1 No. Dak. 369. In support of a writ of error sued out by the plaintiff from this court, it was argued that the assessor had no jurisdiction to decide whether the lands in question were or were not taxable; and that the state court, in holding that the act of the assessor, in assessing the lands against private parties in possession, though they in fact belonged to the United States, would not be without jurisdiction, decided against the immunity from the jurisdiction of the assessor. But this court dismissed the writ of error, and, speaking by the chief justice, said: "The question arising for determination in the state court was whether the money which had been paid by the purchaser of the lands at the tax sale could be recovered back, either at common law, or under the Dakota statute in that behalf. The ground upon which the tax title was held to have failed was that the United States had a lien upon the lands, and that, therefore, they could not, under the laws of the United States, be sold for taxes; but that fact did not impress with a federal character the inquiry as to the right of recovery." Rutland R. Co. *v.* Central Vermont R. Co., 159 U. S. 630, 641, 642, 40 L. Ed. 284.

Indian tribes.—Where the decision of the highest state court in an action of ejectment to recover lands conveyed away by the Seneca Nation of Indians is based on two grounds, one involving a federal question, but the other upon a distinct and independent ground, not involving any federal question, and sufficient in itself to maintain the judgment, the writ of error will be dismissed, according to the well-settled rule on that subject. Seneca Nation of Indians *v.* Christy, 162 U. S. 283, 40 L. Ed. 970, citing Eustis *v.* Bolles, 150 U. S. 361, 37 L. Ed. 1111; Gillis *v.* Stinchfield, 159 U. S. 658, 40 L. Ed. 295.

Mining states.—Where the decision of the state court was that the grantor of a mining claim was estopped, under the law of California, from claiming priority of title to the space of vein intersection by reason of the location which he had made after the execution of the deed, but before the location by the grantee of the ground conveyed to him, it was held, that this was an independent ground broad enough to maintain the judgment, and therefore, according to well-settled principles, the writ of error must be dismissed. Gillis *v.* Stinchfield, 159 U. S. 658, 40 L. Ed. 295, citing Eustis *v.* Bolles, 150 U. S. 361, 37 L. Ed. 1111; Rutland R. Co.

tain the judgment. Much more is this the case where no federal question is

v. Central Vermont R. Co., 159 U. S. 630, 40 L. Ed. 284. See, in accord, Lowry *v.* Silver City Gold, etc., Co., 179 U. S. 196, 45 L. Ed. 151.

Denial of right under fifteenth amendment.—The highest court of the state of Alabama affirmed a judgment denying an application for a writ of mandamus to compel a board of registrars to register the petitioner, a negro, as an elector. The petition alleged that the sections of the constitution fixing the qualifications of the electors and prescribing the mode of registration are unconstitutional because violative of the 14th and 15th amendments of the constitution of the United States. The highest court of the state held that, as the sections of the constitution assailed created the board of registrars, fixed their tenure of office, defined and prescribed their duties, if they are stricken down on account of being unconstitutional, the board would have no existence and no duties to perform; so that there would be no board to perform the duties sought to be compelled by the writ. It was held, that the decision of the state court is placed upon a ground adequate to sustain it and wholly independent of the right set up by the plaintiff and therefore not reviewable by the supreme court of the United States on writ of error to the state court. Giles *v.* Teasley, 193 U. S. 146, 48 L. Ed. 655, reaffirmed in Delahanty *v.* Pitkin, 199 U. S. 602, 50 L. Ed. 328.

Patent laws.—In accordance with the general rule that where a suit is brought on a contract of which a patent is the subject matter, either to enforce such contract, or to annul it, the case arises on the contract, or out of the contract, and not under the patent laws, this court has no jurisdiction to review, on a writ of error, the decision of the highest state court in a controversy in respect to the rescission of a contract for the exchange of an invention for a stock of merchandise, on the ground of fraud and misrepresentation, holding that there was in fact no fraud, that the plaintiff got what he bargained for, and was not deceived or misled in the premises, because the decree rests on grounds broad enough to sustain it without any reference to any federal question. Wade *v.* Lawder, 165 U. S. 624, 41 L. Ed. 851.

Qualifications of jurors.—Where the judgment of the highest court of the state was put upon the ground that objections to the qualifications of jurors were not open after verdict, independently of the opinion of that court that the objections had no merits, if that ground is sufficient to support the judgment, no federal question is involved, and this court has no jurisdiction. Brown *v.* Massachusetts, 144 U. S. 573, 580, 36 L. Ed. 546, citing Baldwin *v.* Kansas, 129 U. S. 52, 32 L. Ed. 640.

Tax title.—Where the highest court of the state decides that a defendant in an action for the recovery of real estate has a good title to the same under the constitution of the state, which limits the time for attacking the title acquired at a tax sale, the fact that the plaintiff claims title under a federal statute does not give the supreme court jurisdiction to review the judgment of the state court, upon the ground that a federal question is involved. Corkran Oil Co. *v.* Arnaudet, 199 U. S. 182, 50 L. Ed. 143.

Defense of laches.—The decision of a state court upholding the defense of laches against a mining claim, after abandonment for fourteen years, where it is claimed that title has been acquired in the meanwhile through a patent to the probate judge for the mine as part of a town site, is based on an independent nonfederal question and hence not reviewable here by writ of error. Moran *v.* Horsky, 178 U. S. 205, 44 L. Ed. 1038.

In Rutland R. Co. *v.* Central Vermont R. Co., 159 U. S. 360, 630, 40 L. Ed. 284, it appeared that the state statute imposed a tax upon the gross earnings of railroads, and also provided that taxes assessed, under said act, upon the earnings of railroads, operated by lessees thereof, shall be paid by such lessees, and charged and deducted from the rents due to the lessor of such railroads. This the lessee did, but an action was brought against him by the lessor for the rent, without deducting for the taxes. The state court held, that the provision of the statute, "which requires the lessee to pay the tax and deduct the amount from the rent, does not impair the obligation of a contract, because both railroad companies, as well as the rent due from the one to the other, were proper subjects for taxation under the laws of Vermont, and the method to be adopted for the collection of the tax was purely a question of legislative discretion." But the decision was not put upon that construction alone. But the court further held, that independently of the question of constitutionality, that, as between the lessor and the lessee, it was the duty of the lessor to pay the tax; that the lessee having been compelled by law to make the payment to discharge an obligation of the lessor, the law implied a promise to repay; that the lessor having made no suggestion that the statute was unconstitutional, and no offer to indemnify the lessee, the lessee could not, in prudence, do otherwise than pay the tax, and was under no duty to incur the expense, delay and perils of litigation to test the constitutionality of the statute; and that the lessor, in a court of equity, could not have relief for what,

shown to have been decided, and the case might have been, and probably was,

as between the parties, itself should have done, and what, by its own laches it had suffered to be done, professedly in its behalf, by the lessee. Held, that these grounds involved no federal question, and were brought only to support the judgment, without regard to the question whether the provision of the statute, under which the lessee paid the taxes and deducted them from the rent, was or was not constitutional. Following Tyler *v.* Cass County, 142 U. S. 288, 35 L. Ed. 1016.

Estoppel.—The decision of a state court that the rights involved under United States patents to mining claims has been settled by a specific contract between the parties, and as an independent ground that plaintiffs' rights are barred by estoppel, or by laches is sufficient to sustain the state court's judgment, and hence presents no federal question reviewable by this court on writ of error. Pittsburg, etc., R. Co. *v.* Cleveland, etc., Min. Co., 178 U. S. 270, 44 L. Ed. 1065, reaffirmed in Wright *v.* Seminary Tacoma, 187 U. S. 639, 47 L. Ed. 345. See, in accord, Lowry *v.* Silver City Gold, etc., Co., 179 U. S. 196, 45 L. Ed. 151; Leonard *v.* Vicksburg, etc., R. Co., 198 U. S. 416, 49 L. Ed. 1108.

A decision of the supreme court of a state holding, in substance, that, conceding the law in question to be unconstitutional, a corporation is estopped to set up its invalidity by the action of the board of directors, disposes of the case upon a nonfederal ground broad enough to support the judgment, and cannot be reviewed on writ of error from the supreme court of the United States to the state court. Hale *v.* Lewis, 181 U. S. 473, 45 L. Ed. 959, citing and approving Eustis *v.* Bolles, 150 U. S. 361, 37 L. Ed. 1111; Moran *v.* Horsky, 178 U. S. 205, 44 L. Ed. 1038; Beaupre *v.* Noyes, 138 U. S. 397, 34 L. Ed. 991; Electric Co. *v.* Dow, 166 U. S. 489, 41 L. Ed. 1088; Pierce *v.* Somerset R. Co., 171 U. S. 641, 43 L. Ed. 316; Seneca Nation of Indians *v.* Christy, 162 U. S. 283, 40 L. Ed. 970.

Limitation of actions.—In Jenkins *v.* Lowenthal, 110 U. S. 222, 28 L. Ed. 129, where two defenses were made in the state court, either of which, if sustained, barred the action, and one involved a federal question and the other did not, and the state court, in its decree, sustained them both, this court said that, as the finding by the state court of the fact which sustained the defense which did not involve a federal question was broad enough to maintain the decree, even though the federal question was wrongly decided, it would affirm the decree, without considering the federal question or expressing any opinion upon it, and that such practice was sustained by the case of Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429; Hale *v.* Akers, 132 U. S. 554, 565, 33 L. Ed. 442; Rector *v.* Ashley, 6 Wall. 142, 18 L. Ed. 733.

Grant of lands to railroads.—On the 3d of June, 1856, congress made a grant of public lands to the state of Alabama to aid in the construction of certain railroads. By acts of the state legislature, certain railroads were made beneficiaries of this grant, and in February 11, 1870, an act was passed by the state legislature loaning two millions of dollars of the state bonds to the Alabama and Chattanooga Railroad Company, providing for the execution of a mortgage by the company on all its property, including the land grant, to secure this loan. "The supreme court, in its first opinion, held that, under the act of 1870 and the reservation in the mortgage, the railroad company had absolutely no power to sell until the making of that certificate; and that any attempted sale made prior thereto was a nullity, not voidable, but absolutely void. Now, whether that was a correct construction or not of the act of 1870 and the reservation of the mortgage, is a purely local question, and involves nothing of a federal character. The question is not what rights passed to the state under the acts of congress, but what authority the railroad company had under the statute of the state. The construction of such a statute is a matter for the state court, and its determination thereof is binding on this court. The fact that the state statute and the mortgage refer to certain acts of congress as prescribing the rule and measure of the rights granted by the state, does not make the determination of such rights a federal question." Miller *v.* Swann, 150 U. S. 132, 136, 37 L. Ed. 1028.

Suit to quiet title.—In Dibble *v.* Bellingham Bay Land Co., 163 U. S. 63, 41 L. Ed. 72, a suit was brought in a state court seeking a decree quieting the plaintiff's title to certain lands therein described and establishing the existence and validity of a certain power of attorney alleged to have been lost without having been recorded. In its opinion, the supreme court of the state, after stating the case, said: "The proof of two facts was attempted by the respondent, the establishment of either of which would be fatal to appellant's claim. The facts attempted to be proved were as follows: 1st. The plaintiff's title to the land in controversy had been acquired by adverse possession; 2d. That the wife had executed a power of attorney to her husband authorizing him to sell the disputed premises." After overruling a contention by the appellant that under the pleadings as framed no testimony tending to prove adverse holding was admissible, the court took up the first proposition and held that the plaintiff had established his title by adverse possession during the statutory

disposed of upon nonfederal grounds.[68] If it appears that the court did in fact base its judgment on such independent ground, or, where it does not appear on which of the two grounds the judgment was based, if the independent ground on which it might have been based was a good and valid one, sufficient in itself to sustain the judgment, this court will not assume jurisdiction.[69] In other

period; that the adverse possession was actual, notorious, exclusive and continuous, under claim or color of title. Having reached this result the court added: "This renders an investigation of the second proposition discussed unnecessary." Thus it appears that the decision of the court rested on a ground that did not involve the validity of the question of the power of attorney and deed. This second proposition which was duly certified to by the chief justice of the state supreme court was whether the said power of attorney and deed made under it, which, by the law at the time of its making were absolutely void, were made valid by subsequent act of the legislature and whether if so made valid, it is not in violation of the fourtheenth amendment of the constitution. But the court held, that although the record might disclose that a question had been raised and decided adversely to a party claiming the benefit of a provision of the United States constitution, yet, as another question not federal had also been raised and decided against such party, and the decision of the latter question was sufficient notwithstanding the federal question to sustain the decision, this court would not review the judgment. Nor can this result be in any respect controlled by the certificate of the presiding judge, for the office of the certificate, as respects the federal question, is to make more certain and specific what is too general and indefinite in the record, but is incompetent to originate the question.

Statutory penalty for taking usury.—A decision of the highest state court in Illinois that the statutes of Illinois contain both a prohibition and a penalty; that the prohibition makes void pro tanto every contract in violation thereof, and that while § 11, prohibiting corporations from pleading the defense of usury, may prevent any claim to the benefits of the penalty, it does not give the other party a right to enforce a contract made in violation of the prohibition, denies no right given by any federal statute, and involves no judgment adverse to the plaintiff as to its meaning and effect, although the rights of a national bank as to interest are given by the federal statute. Union Nat. Bank *v.* Louisville, etc., R. Co., 163 U. S. 325, 41 L. Ed. 177, citing Eustis *v.* Bolles, 150 U. S. 361, 37 L. Ed. 1111.

Denial of due process of law.—Although the plaintiff in error made a claim in an action for damages in a state court for injury to his property by altering the grade of the street in front of his lot, that he had a right to state the nuisance caused by the proposed changes and in the refusal of the state court to recognize this principle he had been deprived of his property without due process of law, yet if the right of the defendant for damages was disposed of in the state court by deciding that the defendant had mistaken his remedy, and that he must resort to another proceeding against the city for his damages, this is beyond all doubt a ruling broad enough to support the decree regardless of any federal question that possibly might have been raised. McQuade *v.* Trenton, 172 U. S. 636, 43 L. Ed. 581.

Impairment of obligation of contract.—In a suit brought in a state court of Kentucky by the city of Henderson against the Henderson Bridge Company, to recover for taxes assessed by the city on the bridge of the company, which spanned the Ohio River at the city, the court of appeals of the state held that the city, as a taxing district, could tax the property of the company, and that, under an ordinance of the city, accepted by the company, the city acquired a contract right to tax the bridge to low-water mark on the Indiana shore, it being within the city limits, in consideration of rights and privileges granted to the company by the ordinance. On a motion to dismiss a writ of error from this court, sued out by the company, held, that although it was claimed in the pleadings, by the company, that the taxing ordinance impaired the obligation of a prior contract with the company, yet as the decision of the court of appeals was based wholly on the ground that the proper interpretation of the ordinance first above referred to was that the company voluntarily agreed that the bridge should be liable to taxation, and that did not involve a federal question, and was broad enough to dispose of the case, without reference to any federal question, and this court could not review the construction which was given by the state court to the ordinance, as a contract, in view of the constitution and laws of Kentucky, the writ of error must be dismissed. Held, also, that the taxation of the bridge was not a regulation of commerce among the states, or the taxation of any agency of the federal government. Henderson Bridge Co. *v.* Henderson City, 141 U. S. 679, 35 L. Ed. 900.

68. Harrison *v.* Morton, 171 U. S. 38, 43 L. Ed. 63; Bacon *v.* Texas, 163 U. S. 207, 41 L. Ed. 132, and cases cited; McQuade *v.* Trenton, 172 U. S. 636, 639, 43 L. Ed. 581.

69. Klinger *v.* Missouri, 13 Wall. 257,

words, where the decision complained of rests on an independent ground, not involving a federal question and broad enough to maintain the judgment, the writ of error will be dismissed by this court without considering any federal question that may also have been presented.[70]

In the language of Mr. Justice Harlan, the general rule is that where the judgment of the state court rests upon an independent, separate ground of local or general law, broad enough or sufficient in itself to cover the essential issues, and control the rights of the parties, however the federal question raised on the record might be determined, this court will affirm or dismiss, as the one course or the other may be appropriate, without considering that question.[71]

Limitations of General Rule.—But where there is a federal question, though the case may have been disposed of on some other independent ground, yet if it does not appear on which of the two grounds the judgment was based, then if the independent ground was not a good and valid one, sufficient of itself to sustain the judgment, this court will take jurisdiction of the case, because, when put to inference as to what points the state court decided, we ought not to assume that it proceeded on grounds clearly untenable.[72] Though where a defense is distinctly made, resting on local statute, we should not, in order to reach a federal question, resort to critical conjecture as to the action of the court in the disposition of such defense.[73] It is also settled that even though the judgment of the state court was based upon some ground of local or general law manifestly broad enough in itself to sustain the decision independently of any view that might be taken of such federal question, this court will pass on the federal question if the state court based its judgment solely on a ground involving a determination thereof.[74]

It is equally well settled that the failure of the state court to pass on the

20 L. Ed. 635; Dibble *v.* Bellingham Bay Land Co., 163 U. S. 63, 69, 41 L. Ed. 72.

70. Eustis *v.* Bolles, 150 U. S. 361, 37 L. Ed. 1111; California Powder Works *v.* Davis, 151 U. S. 389, 393, 38 L. Ed. 206; White *v.* Lennig, 163 U. S. 711, 41 L. Ed. 314; Hammond *v.* Horton, 169 U. S. 734, 42 L. Ed. 1215; Corkran Oil Co. *v.* Arnaudet, 199 U. S. 182, 50 L. Ed. 143; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 576, 40 L. Ed. 536, reaffirmed in Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179; Chemical Nat. Bank *v.* City Bank, 160 U. S. 646, 653, 40 L. Ed. 568; Allen *v.* Southern, etc., R. Co., 173 U. S. 479, 43 L. Ed. 775; Delaware City, etc., Nav. Co. *v.* Reybold, 142 U. S. 636, 35 L. Ed. 1141; Hammond *v.* Johnston, 142, U. S. 73, 35 L. Ed. 941; New Orleans *v.* New Orleans Water Works Co., 142 U. S. 86, 35 L. Ed. 946; New York, etc., R. Co. *v.* Woodruff, 153 U. S. 689, 38 L. Ed. 869.

Adequacy of Remedies.—The decision of a state court that a relator is not entitled to a writ of prohibition to restrain the harbor commissioners of a state from extending and locating harbor lines over wharves erected by and belonging to the petitioners in contravention to the act of congress, based on the ground that he had other remedies of which he might have availed himself, is a ground broad enough to sustain the judgment irrespective of the decision of any federal questions. Yesler *v.* Washington, etc., Commissioners, 146 U. S. 646, 36 L. Ed. 1119.

71. Chicago, etc., R. Co. *v.* Illinois, 200 U. S. 561, 580, 50 L. Ed. 596.

72. Johnson *v.* Risk, 137 U. S. 300, 307, 34 L. Ed. 683, citing Klinger *v.* Missouri, 13 Wall. 257, 20 L. Ed. 635; German Savings Society *v.* Dormitzer, 192 U. S. 125, 48 L. Ed. 373.

Where it does not appear on which of the two grounds the judgment was based, then, if the independent ground on which it might have been based was a good and valid one, sufficient of itself to sustain the judgment, this court will not assume jurisdiction of the case; but if such independent ground was not a good and valid one, it will be presumed that the state court based its judgment on the law raising the federal question, and this court will then take jurisdiction. Maguire *v.* Tyler, 8 Wall. 650, 19 L. Ed. 320; Neilson *v.* Lagow, 12 How. 98, 110, 13 L. Ed. 909; Railroad *v.* Rock, 4 Wall. 177, 18 L. Ed. 381; Railroad Co. *v.* McClure, 10 Wall. 511, 19 L. Ed. 997; Insurance Co. *v.* The Treasurer, 11 Wall. 204, 20 L. Ed. 112; Crowell *v.* Randell, 10 Pet. 368, 9 L. Ed. 458; Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978; Williams *v.* Oliver, 12 How. 111, 123, 13 L. Ed. 915; Klinger *v.* Missouri, 13 Wall. 257, 263, 20 L. Ed. 635.

73. Johnson *v.* Risk, 137 U. S. 300, 307, 34 L. Ed. 683; Bachtel *v.* Wilson, 204 U. S. 36, 51 L. Ed. 357.

74. Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 43 L. Ed. 835; Board of Liquidation *v.* Louisana, 179 U. S. 622, 45 L. Ed. 347.

federal right or immunity specially set up, of record, is not conclusive, but this court will decide the federal question if the necessary effect of the judgment is to deny a federal right or immunity specially set up or claimed, and which, if recognized and enforced, would require a judgment different from one resting upon some ground of local or general law.[75]

(4) *Question Must Be Real and Not Fictitious or Frivolous.*—**In General.**—A real and not a fictitious federal question is essential to the jurisdiction of this court over the judgments of state courts.[76] "It has long been the holding of this court that in order to warrant the exercise of jurisdiction over the judgments of state courts, there must be something more than a mere claim that a federal question exists. There must, in addition to the simple setting up of the claim, be some color therefor, or, in other words, the claim must be of such a character that its mere mention does not show it destitute of merit; there must be some fair ground for asserting its existence, and, in the absence thereof, a writ of error will be dismissed, although the claim of a federal question was plainly set up."[77] The cases cited in the note show the rule and its limitations, and where, by the record, it appears that, although the claim of a federal question had been plainly made, if it also clearly appears that it lacked all color of merit, and had no substance or foundation, the mere fact that it was raised is not sufficient to give the supreme court of the United States jurisdiction.[78]

75. Chicago, etc., R. Co. *v.* Illinois, 200 U. S. 561, 580, 50 L. Ed. 596.

76. Millingar *v.* Hartupee, 6 Wall. 258, 18 L. Ed. 829; New Orleans *v.* New Orleans Water Works Co., 142 U. S. 86, 87, 35 L. Ed. 946; Hamblin *v.* Western Land Co., 147 U. S. 531, 37 L. Ed. 267; Sawyer *v.* Piper, 189 U. S. 154, 157, 47 L. Ed. 757; Wilson *v.* North Carolina, 169 U. S. 586, 595, 42 L. Ed. 865, reaffirmed in Gates *v.* Commissioners, 183 U. S. 693, 46 L. Ed. 393.

As was said in New Orleans *v.* New Orleans Water Works Co., 142 U. S. 861, 35 L. Ed. 946: While there is in the * * * answer of the city a formal averment that the ordinance impaired the obligation of a contract arising out of the act of 1877, which entitled the city to a supply of water free from charge, the bare averment of a federal question is not, in all cases, sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay." St. Louis, etc., R. Co. *v.* Merriam, 156 U. S. 478, 483, 39 L. Ed. 502.

And in Hamblin *v.* Western Land Co., 147 U. S. 531, 532, 37 L. Ed. 267, where the foregoing opinion was quoted with approval, it was said: "A real and not a fictitious federal question is essential to the jurisdiction of this court over the judgment of state courts." St. Louis, etc., R. Co. *v.* Merriam, 156 U. S. 478, 483, 39 L. Ed. 502.

77. New Orleans Waterworks *v.* Louisiana, 185 U. S. 336, 344, 46 L. Ed. 936, reaffirmed in Brewster *v.* Cahill, 194 U. S. 629, 48 L. Ed. 1158; Gates *v.* Parmly, 191 U. S. 557, 48 L. Ed. 301; Weltmer *v.* Bishop, 191 U. S. 560, 561, 48 L. Ed. 302; Coventry *v.* Davis, 193 U. S. 669, 48 L. Ed. 840; Hamburg, etc., Steamship Co. *v.* Lennan, 194 U. S. 628, 629, 48 L. Ed. 1157; Iron Bridge Co. *v.* Brennan, 194 U. S. 630, 48 L. Ed. 1158; Swafford *v.* Templeton, 185 U. S. 487, 493, 46 L. Ed. 1005, reaffirmed in Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328.

78. New Orleans Waterworks Co. *v.* Louisiana, 185 U. S. 336, 346, 46 L. Ed. 936, reaffirmed in Brewster *v.* Cahill, 194 U. S. 629, 48 L. Ed. 1158; Gates *v.* Parmly, 191 U. S. 557, 48 L. Ed. 301; Weltmer *v.* Bishop, 191 U. S. 560, 561, 48 L. Ed. 302; Coventry *v.* Davis, 193 U. S. 669, 48 L. Ed. 840; Hamburh, etc., Steamship Co. *v.* Lennan, 194 U. S. 628, 629, 48 L. Ed. 1157; Iron Bridge Co. *v.* Brennan, 194 U. S. 630, 48 L. Ed. 1158.

Thus in Millingar *v.* Hartupee, 6 Wall. 258, 18 L. Ed. 829, the chief justice (at page 261) said: "Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence, derived from competent governmental power." This case arose under the twenty-fifth section of the judiciary act, and jurisdiction was sought to be maintained upon the assertion that the validity of an authority exercised under the United States was drawn in question, and the decision was against its validity. It was held, not sufficient to make the claim, but there must be some color of foundation for its assertion.

In New Orleans *v.* New Orleans Water Works Co., 142 U. S. 86, 35 L. Ed. 946, upon a motion to dismiss the writ of error on the ground that no federal question was involved, it was said by the court (page 87): "While there is in the

In the language of Mr. Justice Brown: "The mere fact that a plaintiff in error asserts title under a clause of the constitution or an act of congress is not in itself sufficient to give the supreme court of the United States jurisdiction to review a decision of the state court denying such title, unless there be a

amended and supplemental answer of the city, a formal averment that the ordinance No. 909 impaired the obligation of a contract arising out of the act of 1877, which entitled the city to a supply of water free of charge, the bare averment of a federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay."

Again, in Hamblin *v.* Western Land Company, 147 U. S. 531, 37 L. Ed. 267, upon a like motion to dismiss the writ of error, the court said: "It is doubtful whether there is a federal question in this case. A real, and not a fictitious, federal question is essential to the jurisdiction of this court over the judgment of state courts." Citing the two cases just above referred to.

In St. Joseph, etc., R. Co. *v.* Steele, 167 U. S. 659, 42 L. Ed. 315, it was said by the court (page 662): "We cannot accede to the proposition that, because the acts of congress, which authorized the construction of the bridge in question, gave the right to build a railroad and toll bridge, the conceded power of the state to tax did not extend to the bridge in both aspects. Nor can we agree that the making of such a contention raised a federal question of a character to confer original jurisdiction in the circuit court of the United States. Not every mere allegation of the existence of a federal question in a controversy will suffice for that purpose. There must be a real, substantive question, on which the case may be made to turn."

Although the above case relates to the jurisdiction of the circuit court, yet, so far as this question is concerned, the principle is the same as to both courts. But see Swafford *v.* Templeton, 185 U. S. 487, 46 L. Ed. 1005.

"And in Wilson *v.* North Carolina, 169 U. S. 586, 42 L. Ed. 865, it was held, that there must be a real and substantial federal question existing in order to give this court jurisdiction to review a judgment of a state court, and if the question raised were so unfounded in substance that the court would be justified in saying there was no fair color for the claim that it was of a federal nature, the writ would be dismissed." New Orleans Water Works Co. *v.* Louisiana, 185 U. S. 336, 46 L. Ed. 936.

Forfeiture of corporate charter.—The state secured the forfeiture of the charter of the defendant corporation by means of a judicial decree obtained in a state court which had jurisdiction to give relief prayed for, and after a hearing of the defendant in the usual manner pertaining to courts of justice. The facts upon which such forfeiture was based were judicially declared and found, and the defendant had full opportunity for its defense upon such hearing. The cause of forfeiture was the fact, which was found by the court, that the corporation had charged illegal rates for the water it furnished, and the right to declare such forfeiture, because of a violation by defendant of the conditions of its charter, was implied in the very grant of the charter itself. It was held, that this did not present a federal question which gives jurisdiction to the supreme court of the United States to review the judgment of the state court on writ of error. The claim that the forfeiture was a violation of the charter, and of the contract therein contained, and was on that account a taking of defendant's property without due process of law, or that the state by such judgment had denied to defendant the equal protection of the laws, cannot obtain. Whether defendant had so violated its charter was a fact to be decided by the state court. That court had full jurisdiction over the parties and the subject matter, and its decision of the question was conclusive in this case so far as the supreme court of the United States is concerned. New Orleans Waterworks Co. *v.* Louisiana, 185 U. S. 336, 352, 353, 46 L. Ed. 936, reaffirmed in Brewster *v.* Cahill, 194 U. S. 629, 48 L. Ed. 1158; Gates *v.* Parmly, 191 U. S. 557, 48 L. Ed. 301; Weltmer *v.* Bishop, 191 U. S. 560, 561, 48 L. Ed. 302; Coventry *v.* Davis, 193 U. S. 669, 48 L. Ed. 840; Hamburg, etc., Steamship Co. *v.* Lennan, 194 U. S. 628, 629, 48 L. Ed. 1157; Iron Bridge Co. *v.* Brennan, 194 U. S. 630, 48 L. Ed. 1158.

That the bondholders of a corporation, who it was insisted were necessary parties, were not made parties to a suit in a state court, by the attorney general in the name of the state, to enforce a forfeiture of the charter of the corporation for an alleged violation of its terms, is not a question which the supreme court of the United States can review on writ of error to a state court. New Orleans Waterworks Co. *v.* Louisiana, 185 U. S. 336, 353, 46 L. Ed. 936, citing and approving Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574, 28 L. Ed. 1084, reaffirmed in Brewster *v.* Cahill, 194 U. S. 629, 48 L. Ed. 1158; Gates *v.* Parmly, 191 U. S. 557, 48 L. Ed. 301; Weltmer *v.* Bishop, 191

least a plausible foundation for the claim." "A party may assert a right, title, privilege or immunity without even color for such assertion, and if that were alone sufficient to give this court jurisdiction, a vast number of cases might be brought here simply for delay or speculative advantage."[79]

Where Claim Is Formally Made and Disposed of without Reference to Its Substantial Foundations.—It is settled that not every mere allegation of a federal question will suffice to give jurisdiction. "There must be a real, substantive question on which the case may be made to turn," that is, a real and not a merely formal federal question is essential to the jurisdiction of this court.[80] Stated in another form, the doctrine thus declared is that although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail.[81] The power, however, to dismiss because of the want of substantiality in the claim upon which the assertion of jurisdiction is predicated, does not apply to cases where the subject matter of the controversy is per se and inherently federal.[82]

A general statement that the decision of a court is against the constitutional rights of the objecting party or against the fourteenth amendment, or that it is without due process of law, particularly, when these objections appear only in specifications of error, so called, will not raise a federal question even where the judgment is a final one, within § 709 of the Revised Statutes. There must be

U. S. 560, 48 L. Ed. 302; Coventry *v.* Davis, 193 U. S. 669, 48 L. Ed. 840; Hamburg, etc., Steamship Co. *v.* Lennan, 194 U. S. 628, 629, 48 L. Ed. 1157; Iron Bridge Co. *v.* Brennan, 194 U. S. 630, 48 L. Ed. 1158.

On writ of error from the supreme court of the United States to a state court to review a proceeding in the entry of a quo warranto brought by the attorney general of the state to obtain a forfeiture of the charter of the defendant, a waterworks company, the plaintiff in error, the corporation, claimed the existence in the record of a federal question which the brief of the defendant in error set forth as follows: "The charter of the waterworks company prescribing mandamus as the remedy to maintain a lawful tariff of water rates, is not the substitution by the writs of forfeiture of charter, as a remedy for the maintenance of unlawful rates, a breach of the contract, and a deprivation of the property without due process of law, and a denial of the equal protection of the laws?" It was held, that the answer as to, "mandamus being the exclusive remedy for illegal rates, is that the state court has otherwise construed the charter, and has held that mandamus is not the only remedy, but that the company was liable to be proceeded against by quo warranto at the suit of the state through its attorney general. The claim that by so proceeding there is any impairment of the obligation of a contract by any subsequent legislation, or that there has thus been a deprivation of property without due process of law, or a denial of the equal protection of the laws, has no colorable foundation. An examination of this question, among others, was made by the state court after full hearing by all parties, and all that can possibly be claimed on the part of the plaintiff in error is that such court erroneously decided the law. That constitutes no federal question." New Orleans Waterworks Co. *v.* Louisiana, 185 U. S. 336, 46 L. Ed. 936, reaffirmed in Brewster *v.* Cahill, 194 U. S. 629, 48 L. Ed. 1158; Gates *v.* Parmly, 191 U. S. 557, 48 L. Ed. 301; Weltmer *v.* Bishop, 191 U. S. 560, 48 L. Ed. 302; Coventry *v.* Davis, 193 U. S. 669, 48 L. Ed. 840; Hamburg, etc., Steamship Co. *v.* Lennan, 194 U. S. 628, 629, 48 L. Ed. 1157; Iron Bridge Co. *v.* Brennan, 194 U. S. 630, 48 L. Ed. 1158.

79. New Orleans Waterworks Co. *v.* Louisiana, 185 U. S. 336, 46 L. Ed. 936; Iowa *v.* Rood, 187 U. S. 87, 92, 47 L. Ed. 86.

80. Equitable Life Assurance Society *v.* Brown, 187 U. S. 308, 311, 47 L. Ed. 190, reaffirmed in Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171.

81. New Orleans Waterworks Co. *v.* Louisiana, 185 U. S. 336, 345, 46 L. Ed. 939; Equitable Life Assurance Society *v.* Brown, 187 U. S. 308, 311, 47 L. Ed. 190, reaffirmed in Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171.

82. Swafford *v.* Templeton, 185 U. S. 487, 493, 46 L. Ed. 1005; Equitable Life Assurance Society *v.* Brown, 187 U. S. 308, 311, 47 L. Ed. 190, reaffirmed in Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171.

at least some color of a federal question.[83]

The bare averment of a federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay.[84] The mere assertion of a federal right and its denial do not justify our assuming jurisdiction, where it indubitably appears that the federal right asserted is frivolous; that is, without color of merit.[85]

Denial of Right to Amend.—The mere averment, in an application for leave to file a supplementary answer, that to render a decree foreclosing an equitable mortgage would, under the circumstances, be a taking of property without due process of law and denying to them the equal protection of the law, is not sufficient to give this court jurisdiction, because while they thus asserted the existence of a federal question, yet it is well settled that the mere averment of such a question is not sufficient.[86]

That, in a foreclosure suit, to appoint a receiver is to deprive the defendant of its property within the meaning of the constitution of the United States, is a novel proposition, and does not, in our view, raise a real, as distinguished from a fictitious, federal question.[87]

Limitation of General Rules.—But in determining the existence of a federal question, it is only necessary to show that it is set up in good faith and is not wholly destitute of merit.[88] The doctrine, that when, on writ of error from the supreme court of the United States to a state court, the federal question asserted to be contained in the record is manifestly lacking all color of merit, the writ of error should be dismissed, "relates to questions arising on writs of error from state courts where, aside from the federal status of the parties to the action or the inherent nature of the federal right which is sought to be vindicated,

83. Hamblin *v.* Western Land Co., 147 U. S. 531, 37 L. Ed. 267; Clarke *v.* McDade, 165 U. S. 168, 172, 41 L. Ed. 673.

84. Wilson *v.* North Carolina, 169 U. S. 586, 42 L. Ed. 865, citing New Orleans *v.* New Orleans Water Works Co., 142 U. S. 79, 35 L. Ed. 943, reaffirmed in Gates *v.* Commissioners, 183 U. S. 693, 46 L. Ed. 393; Hamblin *v.* Western Land Co., 147 U. S. 531, 37 L. Ed. 267; St. Joseph, etc., R. Co. *v.* Steele, 167 U. S. 659, 42 L. Ed. 315; New Orleans, etc., *v.* Louisiana Sugar Refin. Co., 125 U. S. 18, 39, 31 L. Ed. 607; Sawyer *v.* Piper, 189 U. S. 154, 157, 47 L. Ed. 757.

Said Chief Justice Chase in Millingar *v.* Hartupee, 6 Wall. 258, 261, 18 L. Ed. 829, speaking of the validity of an authority exercised under the United States: "Something more than a bare assertion of such authority seems essential to the jurisdiction of this court. The authority intended by the act is one having a real existence, derived from competent governmental power. If a different construction had been intended, congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against claims of authority under the United States. * * * If a right were claimed under a treaty or statute, and on looking into the record it should appear that no such treaty or statute existed or was in force, it would hardly be insisted that this court could review the decision of a state court that the right claimed did not exist." Illinois Central R. Co. *v.* Chicago, 176 U. S. 646, 656, 44 L. Ed. 622.

A bare averment in an answer of supposed infringements in the proceedings of rights possessed by the respondents under the Constitution of the United States will not alone suffice. St. Louis, etc., R. Co. *v.* Merriam, 156 U. S. 478, 483, 39 L. Ed. 502.

In New Orleans *v.* New Orleans Water Works Co., 142 U. S. 79, 35 L. Ed. 946, it was said that "the bare averment of a federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment; otherwise, a federal question might be set up in almost any case and the jurisdiction of this court invoked simply for the purpose of delay." Hamblin *v.* Western Land Co., 147 U. S. 531, 532, 37 L. Ed. 267; Illinois Central R. Co. *v.* Chicago, 176 U. S. 646, 656, 44 L. Ed. 622.

85. American R. Co. *v.* Castro, 204 U. S. 453, 455, 51 L. Ed. 564, citing New Orleans Waterworks Co. *v.* Louisiana, 185 U. S. 336, 46 L. Ed. 936; Newburyport Water Co. *v.* Newburyport, 193 U. S. 561, 48 L. Ed. 795.

86. Sawyer *v.* Piper, 189 U. S. 154, 47 L. Ed. 757.

87. St. Louis, etc., R. Co. *v.* Merriam, 156 U. S. 478, 484, 39 L. Ed. 502.

88. Illinois Central R. Co. *v.* Chicago, 176 U. S. 646, 656, 44 L. Ed. 622.

jurisdiction is to be determined by ascertaining whether the record raises a bona fide federal question. In that class of cases not only this court may, but it is its duty to, determine whether in truth and in fact a real federal question arises on the record. But the doctrine referred to has no application to a case brought in a federal court where the very subject matter of the controversy is federal, however much wanting in merit may be the averments which it is claimed establish the violation of the federal right.[89]

(5) *Necessity of Showing Error in Judgment of State Court.*—It need not appear that the state court erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiff in error, and that the court was induced by it to make the judgment which it did.[90]

(6) *Effect of Failure to Comply with State Practice.*—Where a state court has, in fact, decided a federal question adversely to the plaintiff, error will lie, notwithstanding the state court may have violated its own rules of practice in making such decision. As where there was no special assignment of error in the state court, as required by the law and the practice of that court.[91]

(7) *Where Decree Is Silent as to Grounds of Decision.*—When the decree of a state court sought to be reversed is silent as to the ground upon which it was rendered, jurisdiction under the 25th section of the judiciary act is maintainable if the case shows that federal questions were involved, though it also appears that there were other defenses not re-examinable in this court if these defenses afford no legal answer to the suit. This court will not presume that the court below decided these defenses erroneously, in order to defeat their own jurisdiction.[92]

(8) *Error to Supreme Court of Louisiana.*—In order to give this court jurisdiction under the twenty-fifth section, it must appear on the record itself to be one of the cases enumerated in that section, and nothing out of the record certified to the court can be taken into consideration; and when the proceeding is according to the law of Louisiana, the case within the section must appear by the statement of facts and decisions, as usually made in such cases by the court.[93]

(9) *Judicial Notice.*—**In General.**—Jurisdiction may be maintained where a definite issue as to the possession of the right is distinctly deducible from the record and necessarily disposed of, but this cannot be made out by resort to judicial knowledge.[94]

This court cannot judicially know that a federal question is relied on in a court below in a writ of error to a state court.[95]

89. Swafford *v.* Templeton, 185 U. S. 487, 493, 494, 46 L. Ed. 1005, reaffirmed in Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328.

90. Furman *v.* Nichol, 8 Wall. 44, 19 L. Ed. 370; Daniels *v.* Tearney, 102 U. S. 415, 26 L. Ed. 187.

91. Darrington *v.* Bank of Alabama, 13 How. 12, 14 L. Ed. 30.

92. McGuire *v.* Tyler, 8 Wall. 650, 19 L. Ed. 320.

93. Armstrong *v.* The Treasurer, 16 Pet. 281, 285, 10 L. Ed. 965; Walker *v.* Villavaso, 6 Wall. 124, 128, 18 L. Ed. 853; Grand Gulf, etc., R. Co. *v.* Marshall, 12 How. 165, 13 L. Ed. 938.

In writs of error under the 25th section of the judiciary act of 1789, which gives jurisdiction to this court to review no error but such as appears on the face of the record, etc.—where the writ is to the supreme court of Louisiana, the Code of which state enacts that—"when the defendant alleges on his part new facts, these shall be considered as denied by the plaintiff; therefore neither replication nor rejoinder shall be allowed," a question was held to appear sufficiently on the face of the record when the petition for review in the supreme court of the state set forth that the question was raised in the court below and decided against, and when the supreme court on the question being thus before it, decided the case in the same way. Stewart *v.* Kahn, 11 Wall. 493, 20 L. Ed. 176.

94. Powell *v.* Brunswick County, 150 U. S. 433, 37 L. Ed. 1134; Mountain View, etc., Co. *v.* McFadden, 180 U. S. 533, 45 L. Ed. 656; Arkansas *v.* Kansas, etc., Coal Co., 183 U. S. 185, 46 L. Ed. 144; Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 309, 47 L. Ed. 480, reaffirmed in Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

95. Fisher *v.* Cockerell, 5 Pet. 248, 8 L. Ed. 114.

When the question is whether this

Laws and Statutes.—The courts of the United States, when exercising their original jurisdiction, take notice, without proof, of the laws of the several states.[96] But in the supreme court of the United States, when acting under its appellate jurisdiction, whatever was matter of fact in the state court whose judgment or decree is under review is matter of fact there. And whenever a court of one state is required to ascertain what effect a public act of another state has in that state, the law of such other state must be proved as a fact.[97] This court, upon writ of error to the highest court of a state, does not take judicial notice of the law of another state, not proved in that court and made part of the record sent up, unless by the local law that court takes judicial notice of it.[98]

Decisions of State Courts.—This court does not take judicial notice of the decisions of the courts of one state in a case coming to us from the courts of another.[99] Although this court does not take judicial notice of the decision of the courts of one state in a case coming to us from the courts of another, it may properly refer to the opinion of a case therefrom as to the construction of the laws of that state involving a statute before this court for construction; this rule is equally applicable to a decision rendered subsequently to the rendition of the judgment appealed from.[1]

court has jurisdiction under the twenty-fifth section of the judiciary act, nothing out of the record certified to the court can be taken into consideration. Accordingly, when it was sought by counsel to bring before it as matter of which it would take judicial cognizance, the fact that a judgment in a primary state court of the south—affirmed in the highest state court after the restoration of the federal authority—was rendered after the state was in proclaimed rebellion, and by judges who had sworn allegiance to the rebel confederacy, the record not disclosing the fact that the want of authority under the federal constitution of such primary court was in such court drawn in question and decided against—this court dismissed the writ. Walker *v.* Villavaso, 6 Wall. 124, 18 L. Ed. 853.

96. Lloyd *v.* Matthews, 155 U. S. 222, 227, 38 L. Ed. 128.

97. Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615, 30 L. Ed. 519; Hanley *v.* Donoghue, 116 U. S. 1, 29 L. Ed. 535; Lloyd *v.* Matthews, 155 U. S. 222, 227, 38 L. Ed. 128; Allen *v.* Alleghany Co., 196 U. S. 458, 464, 49 L. Ed. 551.

The decision in Lamar *v.* Micou, 112 U. S. 452, 28 L. Ed. 751, and S. C., 114 U. S. 218, 29 L. Ed. 94, did not in the least qualify this rule, but only applied the settled doctrine that the circuit courts of the United States, and this court, on appeal from their decisions, take judicial notice of the laws of the several states of the Union as domestic laws; and it has since been adjudged, in accordance with the general rule as to foreign law, that this court, upon writ of error to the highest court of a state, does not take judicial notice of the law of another state, not proved in that court and made part of the record sent up, unless by the local law that court takes judicial notice of it. Hanley *v.* Donoghue, 116 U. S. 1, 29 L. Ed. 535; Renaud *v.* Abbott, 116 U. S. 277, 285, 29 L. Ed. 629; Liverpool, etc., Steam Co. *v.* Phenix Ins. Co., 129 U. S. 397, 445, 32 L. Ed. 788.

On a writ of error to the highest court of a state, in which the revisory power of this court is limited to determining whether a question of law depending upon the constitution, laws or treaties of the United States has been erroneously decided by the state court upon the facts before it—while the law of that state, being known to its courts as law, is of course within the judicial notice of this court at the hearing on error—yet, as in the state court the laws of another state are but facts, requiring to be proved in order to be considered, this court does not take judicial notice of them, unless made part of the record sent up, as in Green *v.* Van Buskirk, 7 Wall. 139, 19 L. Ed. 109. Hanley *v.* Donoghue, 116 U. S. 1, 6, 29 L. Ed. 535.

98. Hanley *v.* Donoghue, 116 U. S. 1, 29 L. Ed. 535; Renaud *v.* Abbott, 116 U. S. 277, 285, 29 L. Ed. 629.

99. Hanley *v.* Donoghue, 116 U. S. 1, 6, 29 L. Ed. 535; Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615, 30 L. Ed. 519; Lloyd *v.* Matthews, 155 U. S. 222, 227, 38 L. Ed. 128; Eastern Building, etc., Association *v.* Williamson, 189 U. S. 122, 128, 47 L. Ed. 735.

1. Eastern Building, etc., Association *v.* Williamson, 189 U. S. 122, 47 L. Ed. 735.

The court in Eastern Building, etc., Association *v.* Williamson, 189 U. S. 122, 47 L. Ed. 735, in speaking of the construction given by the court of appeals of New York to the building and loan law of New York, said: "But, nevertheless, we may properly refer to the opinion as a construction of the law, and the views therein expressed not only commend themselves to our judgment as intrinsic-

(10) *Time and Manner of Showing Existence of Federal Question*—aa. *In General.*—In order to give this court jurisdiction under the 25th section of the judiciary act of 1789, which authorizes the removal of a case by writ of error or appeal from the highest court of a state to the supreme court of the United States, in certain cases, it must appear on the record itself to be one of the cases enumerated in that section, and nothing out of the record certified to this court can be taken into consideration. This must be shown: First, either by express averment, or by necessary intendment in the pleadings in the case; or, second, by the directions given by the court, and stated in the exceptions; or, third, when the proceedings are according to the law of Louisiana, by the statement of facts, and of the decision, as is usually made in such cases by the court; or, fourth, it must be entered on the record of the proceedings in the appellate court in cases where the record shows that such a point may have arisen and been decided that it was in fact raised and decided; and this entry must appear to have been made by order of the court, or by the presiding judge by order of the court, and certified by the clerk as part of the record in the state court; or, fifth, in proceedings in equity, it may be stated in the body of the final decree of the state court, from which the appeal is taken to this court; or, sixth, it must appear from the record that the question was necessarily involved in the decision, and that the state court could not have given the judgment or decree which they passed, without deciding it.[2] The proper way for setting up or claiming the right, title, priv-

ally sound, but also as to the means of the law of New York entertained by the justices of the highest courts, have a peculiar and persuasive appropriateness."

2. Armstrong *v.* The Treasurer, 16 Pet. 281, 10 L. Ed. 965; Smith *v.* Hunter, 7 How. 738, 743, 12 L. Ed. 894, 896; Neilson *v.* Lagow, 12 How. 98, 13 L. Ed. 909; Susquehanna Boom Co. *v.* West Branch Boom Co., 110 U. S. 57, 28 L. Ed. 69.

Where the record fails to show that a federal question was raised, it may be ascertained either from the pleadings, or by bill of exceptions, or by a certificate of the court. Medberry *v.* Ohio, 24 How. 413, 16 L. Ed. 739.

To determine whether the validity of a statute of a state was drawn in question, it is proper to inspect the pleadings in the cause, as well as the judgment of the court. Craig *v.* Missouri, 4 Pet. 410, 7 L. Ed. 903.

The action was assumpsit on a promissory note, and the record stated "that neither party having required a jury, the cause was submitted to the court, and the court having seen and heard the evidence, the court found that the defendants did assume as the plaintiff had declared, that the consideration for the note and the assumpsit was for loan office certificates loaned by the state of Missouri at her loan office in Chariton, which certificates were issued under "an act for establishing loan offices, etc." Held, that it could not be doubted that the declaration is on a note given in pursuance of the act of Missouri; and that, under the plea of non assumpsit, the defendants were at liberty to question the validity of the consideration which was the foundation of the contract, and the constitutionality of the law in which it originated. The record thus exhibiting the case gives jurisdiction to this court over the case on a writ of error prosecuted by the defendants to this court from the supreme court of Missouri, under the provisions of the twenty-fifth section of the judiciary act of 1789. Craig *v.* Missouri, 4 Pet. 410, 7 L. Ed. 903, reaffirmed in Byrne *v.* Missouri, 8 Pet. 40, 8 L. Ed. 859.

Where a writ of error is sued out to review the judgment of a state court, on the ground that an order of the circuit court of the United States appointing receivers of a corporation organized under the laws of the state, deprived the state court of its jurisdiction, it was held, that copies of the orders made by the circuit court of the state after the entry of the final judgment to which the writ of error is sued out, which orders were annexed to the petition for a writ of error, are produced in the case too late to constitute any ground for importing a federal question into the cause. Calhoun *v.* Lanaux, 127 U. S. 634, 32 L. Ed. 297.

Denial of due process of law.—Where it is contended that the result of the rulings and decision of the state court was to hold the plaintiff in error conclusively bound by a judgment rendered against him in an action "in which he was not a party and to which he had no notice," and that this was in effect to deprive him of his property without due process of law or to deny him the equal protection of the law, and amounted to a decision adverse to the right, privilege or immunity of the plaintiff in error under the constitution, it being protected in such deprivation or denial, but it nowhere affirmatively appears in the record that

ilege or immunity relied on is by pleading, motion, exception, or other action, part, or being made part, of the record, showing that the claim was presented to the court.[3] Where neither in the pleadings nor in the proceedings during the trial, nor in the specifications of error below, was any federal question specifically raised, nor was any right, title, privilege, or immunity of a federal nature set up or claimed, the writ of error will be dismissed.[4]

Mr. Justice Harlan States the rule as follows: It is essential to our jurisdiction in re-examining the judgment of the state court that the alleged conflict between the state law and the constitution of the United States appear in the pleadings of the suit, or from the evidence in the course of the trial, in the instructions asked for, or from exceptions taken to the rulings of the court, or it must be that such a question was necessarily involved in the decision, and that the state court would not have given a judgment without deciding it.[5]

Must Appear in Plaintiff's Own Statement.—The result of all the authorities is that the federal character of the suit must appear in the plaintiff's own statement of his claim, and where a defense has been interposed, the reply to which brings out matters of a federal nature, those matters thus brought out by

such a right was set up or claimed in the trial court when the demurrer of the complainant was overruled or evidence admitted or excluded, or instructions given or refused, or in the supreme court in disposing of the rulings below, the writ of error will be dismissed. Sayward *v.* Denny, 158 U. S. 180, 39 L. Ed. 941, reaffirmed in Texas, etc., R. Co. *v.* Gay, 167 U. S. 745, 42 L. Ed. 1209.

By bill of exceptions.—Where the grounds of the decision of the supreme court of the state are not stated in the record, this court will look into the bill of exceptions taken in the court of original jurisdiction, to see what points were carried up to the supreme court, and whether they were necessarily involved in the judgment of the supreme court. Neilson *v.* Lagow, 12 How. 98, 13 L. Ed. 909.

In a writ of error to a state court under the 25th section of the judiciary act, although it does not appear from the report of the case in the state reports, that the point taken before this court was raised or passed upon by the supreme court of that state, yet if found in the record, and arising out of the transactions at the trial, as exhibited in the bill of exceptions, it is the duty of this court to examine it. Klinger *v.* Missouri, 13 Wall. 257, 20 L. Ed. 635.

Impairment of obligation of contract.—A motion to dismiss a writ of error on the ground that the federal question was not set or claimed in a state court at the proper time and in the proper way cannot be allowed, where the record shows that the plaintiff in error, in his answer to a writ of mandamus issued out of the district court, claimed that by reason of certain provisions of its charter, a contract was created between the plaintiff in error and the defendant in error, the obligation of which was impaired by a statute of the state, contrary to the provisions of the constitution of the United States, but the district court held that the laws and ordinances so pleaded did not create a contract between the defendant in error on the one side and the plaintiff in error on the other. Chicago, etc., R. Co. *v.* Nebraska, 170 U. S. 57, 42 L. Ed. 948.

3. Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 481, 45 L. Ed. 280; Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 308, 47 L. Ed. 480, reaffirmed in Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

4. Gillis *v.* Stinchfield, 159 U. S. 658, 659, 40 L. Ed. 295; Jersey City, etc., R. Co. *v.* Morgan, 160 U. S. 288, 292, 40 L. Ed. 430.

Where it does not appear, either by express averment or by a necessary intendment from any matter stated in the case, nor does any entry on the record of the cause in the supreme court of the state show, that any of the questions of which this court is entitled to take cognizance, under the terms of the 25th section of the judiciary act, arose in the cause, and were actually decided by that court, the writ of error must be dismissed. Christ Church *v.* Philadelphia County, 20 How. 264, 15 L. Ed. 803, citing Armstrong *v.* The Treasurer, 16 Pet. 281, 10 L. Ed. 965; Smith *v.* Hunter, 7 How. 738, 12 L. Ed. 894.

5. Home for Incurables *v.* New York City, 187 U. S. 155, 157, 47 L. Ed. 117, reaffirmed in St. Louis Expanded Metal, etc., Co. *v.* Standard Fireproofing Co., 195 U. S. 627, 49 L. Ed. 351; Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328, citing Parmelee *v.* Lawrence, 11 Wall. 36, 38, 20 L. Ed. 48; Lawler *v.* Walker, 14 How. 149, 152, 14 L. Ed. 364; Railroad *v.* Rock, 4 Wall. 177, 18 L. Ed. 381.

the plaintiff do not form a part of his cause of action, but are merely a reply to the defense set up by the defendant.[6]

An assignment of error alleged to have been made by the state court, is unavailable for the purpose of showing that any federal question was decided, where the record does not show that any such question was passed upon by the state court.[7]

bb. *Must Be "Specially Set Up or Claimed"*—aaa. *In General.*—By the second section of the act of February 5, 1867, 14 Stat. 385, 386, c. 28, the original twenty-fifth section was re-enacted with certain changes, and, among others, the words of the third clause were made to read: "Or where any title, right, privilege, or immunity is claimed under the constitution, or any treaty or statute of or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed by either party under such constitution, treaty, statute, commission, or authority." And this was reproduced in § 709 of the Revised Statutes. The change from the drawing in question of the construction of a clause of the constitution, or of a treaty, statute, or commission, to the claim of a right under the constitution, treaty, statute, commission, or authority, emphasized the necessity that the right must be specially set up, and denied.[8] The rule has ever since been well settled that this court has no authority to review the final judgment of the highest court of a state in which a decision of the case could be had, and to determine whether that judgment is in derogation of a title, right, privilege or immunity protected by the constitution of the United States, unless the party, against whom such judgment was rendered, "specially set up or claimed" such right under that instrument.[9] In other words, the court must be able to see clearly from the whole record that a provision of the constitution or act of congress is relied upon by the

6. Houston, etc., R. Co. *v.* Texas, 177 U. S. 66, 78, 44 L. Ed. 673.

Although the federal character of the case must appear in the plaintiff's own statement of his claim, and although where a defense has been interposed, the reply to which brings out matters of a federal nature, these matters thus brought out by the plaintiff do not form a part of his cause of action, but merely a reply to the defense set up by the defendant; the review of the federal question by the supreme court of the United States is not thereby precluded, for it having been properly raised in the state court and decided against the contention of the party setting it up, the supreme court of the United States may review it on error to the highest court of the state. Houston, etc., R. Co. *v.* Texas, 177 U. S. 66, 78, 44 L. Ed. 673.

7. Fowler *v.* Lamson, 164 U. S. 252, 41 L. Ed. 424, citing Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 40 L. Ed. 536.

8. Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 313, 47 L. Ed. 480, reaffirmed in Huber *v.* Jennings-Heywood Oil Syndicate, 201 U. S. 641, 50 L. Ed. 901; Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

Section 709 of the Revised Statutes provides, that a final judgment in any suit in the highest court of a state, in which a decision in the suit could be had, where any title, right, privilege, or immunity is claimed under the constitution, and the decision is against the title, right, privilege, or immunity "specially set up or claimed" by either party, under such constitution, may be re-examined, and reversed or affirmed, in the supreme court, upon a writ of error. Baldwin *v.* Kansas, 129 U. S. 52, 56, 32 L. Ed. 640.

9. Rev. Stat., § 709. Chicago, etc., R. Co. *v.* Chicago, 164 U. S. 454, 457, 41 L. Ed. 511, reaffirmed in Goodsell *v.* Delta, etc., Land Co., 166 U. S. 718, 41 L. Ed. 1186; Telluride, etc., Co. *v.* Rio Grande, etc., R. Co., 187 U. S. 569, 580, 47 L. Ed. 307; Onandaga Nation *v.* Thacher, 189 U. S. 306, 311, 47 L. Ed. 826; Caro *v.* Davidson, 197 U. S. 197, 49 L. Ed. 723; Seale *v.* Georgia, 201 U. S. 642, 50 L. Ed. 903, Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 47 L. Ed. 480; Powell *v.* Brunswick County, 150 U. S. 433, 37 L. Ed. 1134; Sayward *v.* Denny, 158 U. S. 180, 39 L. Ed. 941; Beals *v.* Cone, 188 U. S. 184, 186, 47 L. Ed. 435, reaffirmed in Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328; Susquehanna Boom Co. *v.* West Branch Boom Co., 110 U. S. 57, 28 L. Ed. 69; Southern R. Co. *v.* Carson, 194 U. S. 136, 48 L. Ed. 907; Farmers', etc., Ins. Co. *v.* Dobney, 189 U. S. 301, 47 L. Ed. 821; Johnson *v.* New York Life Ins. Co., 187 U. S. 491, 495, 47 L. Ed. 273; Kennard *v.* Nebraska, 186 U. S. 304, 307, 46 L. Ed. 1175; Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557,

party who brings the writ of error, and that the right thus claimed by him was denied.[10]

Rule in Oxley Stave Co. v. Butler.—There is a class of cases wherein it has been held and laid down as settled doctrine that "the revisory power of this court

48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921; California Bank *v.* Thomas, 171 U. S. 441, 43 L. Ed. 231.

"It is well settled that this court, on error to a state court, cannot consider an alleged federal question, when it appears that the federal right thus relied upon had not been by adequate specification called to the attention of the state court and had not been by it considered, not being necessarily involved in the determination of the cause. Green Bay, etc., Canal Co. *v.* Patten Paper Co., 172 U. S. 58, 67, 43 L. Ed. 364; Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 654, 655, 41 L. Ed. 1149; Capital City Dairy Co. *v.* Ohio, 183 U. S. 238, 248, 46 L. Ed. 171." Harding *v.* Illinois, 196 U. S. 78, 86, 49 L. Ed. 394, reaffirmed in Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171; Seale *v.* Georgia, 201 U. S. 642, 50 L. Ed. 902.

Spies v. Illinois, 123 U. S. 131, 31 L. Ed. 80.—To give us jurisdiction under § 709 of the Revised Statutes, because of the denial by a state court of any title, right, privilege or immunity claimed under the constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was "specially set up or claimed" at the proper time in the proper way. To be reviewable here, the decision must be against the right so set up or claimed. If the right was not set up or claimed in the proper court below, the judgment of the highest court of the state in the action is conclusive, so far as the right of review here is concerned. Spies *v.* Illinois, 123 U. S. 131, 181, 31 L. Ed. 80; Chappell *v.* Bradshaw, 128 U. S. 132, 133, 32 L. Ed. 369; Brooks *v.* Missouri, 124 U. S. 394, 31 L. Ed. 454.

Where the record fails to show, either expressly or by implication, that any "right, title, privilege, or immunity," under the constitution or laws of the United States, was "specially set up or claimed," in either of the courts below, this is fatal to our jurisdiction. Spies *v.* Illinois, 123 U. S. 131, 181, 31 L. Ed. 80; French *v.* Hopkins, 124 U. S. 524, 31 L. Ed. 536.

"In Oxley Stave Co. v. Butler County, 166 U. S. 648, 41 L. Ed. 1149, it was held, that the federal question must be specially taken or claimed in the state court; that the party must have the intent to invoke, for the protection of his rights, the constitution or some statute or treaty of the United States, and that such intention must be declared in some unmistakable manner, and unless he do so, this court is without jurisdiction to re-examine the final judgment of the state court upon that matter. See, also, Levy *v.* San Francisco, 167 U. S. 175, 42 L. Ed. 126; Kipley *v.* Illinois, 170 U. S. 182, 42 L. Ed. 998." Dewey *v.* Des Moines, 173 U. S. 193, 198, 43 L. Ed. 665, reaffirmed in Indiana Power Co. *v.* Elkhart Power Co., 187 U. S. 636, 47 L. Ed. 343.

A claim made in objections to the confirming of a special assessment, but not afterwards brought to the attention of the trial court or of the highest state court, that the statute under which the assessment was made is contrary to the constitution of the United States, is not sufficient to give the supreme court of the United States jurisdiction to review the judgment of the state court, where it does not appear from the record that the decision of either of the state courts was invoked upon the ground of the right claimed under the constitution of the United States. Hulbert *v.* Chicago, 202 U. S. 275, 50 L. Ed. 1026, citing Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 41 L. Ed. 1149; Capital City Dairy Co. *v.* Ohio, 183 U. S. 238, 46 L. Ed. 171; Chapin *v.* Fye, 179 U. S. 127, 45 L. Ed. 119.

10. Bridge Proprietors *v.* Hoboken, etc., Co., 1 Wall. 116, 143, 17 L. Ed. 571; Dewey *v.* Des Moines, 173 U. S. 193, 198, 43 L. Ed. 665, reaffirmed in Indiana Power Co. *v.* Elkhart Power Co., 187 U. S. 636, 47 L. Ed. 343.

"We held at the present term in Chicago, etc., R. Co. *v.* Chicago, 164 U. S. 454, 457, 41 L. Ed. 511, as had frequently before been adjudged, that this court could not review the final judgment of the highest court of the state, alleged to have denied a right protected by the constitution of the United States, unless such right was specially set up or claimed in the state court by the party against whom the judgment was rendered. Rev. Stat., § 709." Pim *v.* St. Louis, 165 U. S. 273, 41 L. Ed. 714, reaffirmed in Ross *v.* King, 172 U. S. 641, 43 L. Ed. 1180.

This court may re-examine the final judgment of the highest court of a state when the validity of a treaty or statute of or an authority exercised under the United States is "drawn in question" and the decision is against its validity, or when the validity of a statute of or an authority exercised under any state is "drawn in question" on the ground of repugnancy to the constitution, treaties or laws of the United States, and the decision is in favor of its validity. But it cannot review such final judgment, even

does not extend to rights denied by the final judgment of the highest court of a state, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the constitution, treaties or statutes of the United States; that if a party intends to invoke for the protection of his rights the constitution of the United States, or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare 'specially,' that is, unmistakably, this court is without authority to re-examine the final judgment of the state court; and this statutory

if it denied some title, right, privilege or immunity of the unsuccessful party, unless it appear from the record that such title, right, privilege or immunity was "specially set up or claimed" in the state court as belonging to such party, under the constitution or some treaty, statute, commission or authority of the United States. Rev. Stat., § 709; Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 653, 41 L. Ed. 1149, reaffirmed in Harkins *v.* Ashville, 180 U. S. 635, 45 L. Ed. 709; Baldwin *v.* County Commissioners, 168 U. S. 705, 42 L. Ed. 1213; Tompkins *v.* Cooper, 170 U. S. 703, 42 L. Ed. 1217; Mutual Life Ins. Co. *v.* Kirchoff, 169 U. S. 103, 42 L. Ed. 677; Chappell *v.* Stewart, 169 U. S. 733, 42 L. Ed. 1215; Fenwick Hall Co. *v.* Old Saybrook, 169 U. S. 734, 42 L. Ed. 1215; Speed *v.* McCarthy, 181 U. S. 269, 45 L. Ed. 855.

Where it is assigned in this court as error that the judgment of a state court deprived the plaintiff in error of its property without due process of law, in violation of the fourteenth amendment of the constitution of the United States, but the record does not show that the plaintiff in error specially set up or claimed in the state court such title, right, privilege or immunity, this court has no authority to review the judgment of the state court. Chicago, etc., R. Co. *v.* Chicago, 164 U. S. 454, 41 L. Ed. 511, reaffirmed in Goodsell *v.* Delta, etc., Land Co., 166 U. S. 718, 41 L. Ed. 1186.

Mr. Chief Justice Fuller has reviewed the whole question as follows: "To justify our taking jurisdiction, the federal question must be specially set up or claimed in the state court; the party must have the intent to invoke for the protection of his rights the constitution or some statute or treaty of the United States, and such intention must be declared in some unmistakable manner. Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 41 L. Ed. 1149. 'In other words, the court must be able to see clearly from the whole record that a provision of the constitution or act of congress is relied upon by the party who brings the writ of error, and that the right thus claimed by him was denied. * * * Although no particular form of words is necessary to be used in order that the federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the state court which at least would call its attention to the federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment, or that such was its necessary effect in law. * * * It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a federal nature. Hamilton Co. *v.* Massachusetts, 6 Wall. 632, 18 L. Ed. 904. In order to be available in this court some claim or right must have been asserted in the court below by which it would appear that the party asserting the right founded it in some degree upon the constitution or laws or treaties of the United States. In such case, if the court below denied the right claimed, it would be enough; or if it did not in terms deny such right, if the necessary effect of its judgment was to deny it, then it would be enough. But the denial, whether expressed or implied, must be of some right or claim founded upon the constitution or the laws or treaties of the United States which had in some manner been brought to the attention of the court below. The record shows nothing of the kind in this case. A claim or right which has never been made or asserted cannot be said to have been denied by a judgment which does not refer to it. Hamilton Co. *v.* Massachusetts, supra. A point that was never raised cannot be said to have been decided adversely to a party, who never set it up or in any way alluded to it. Nor can it be said that the necessary effect in law of a judgment, which is silent upon the question, is the denial of a claim or right which might have been involved therein, but which in fact was never in any way set up or spoken of.' 173 U. S. 198, 199, 200." Keokuk, etc., Bridge Co. *v.* Illinois, 175 U. S. 626, 633, 44 L. Ed. 299.

Claim of right under treaties.—Where an action was brought on a policy of insurance payable to the assured's wife, and in an amended answer to the complaint, the recovery of a decree of divorce was averred, and it was alleged, "that under and by virtue of the Hawaiian law in force at the time said decree of divorce

requirement is not met if such declaration is so general in its character that the purpose of the party to assert a federal right is left to mere inference."[11]

The words "specially set up or claimed" in § 709 of the Revised Statutes, were in the twenty-fifth section of the judiciary act of 1789 (1 Stat. 85), and were inserted in order that the revisory power of this court should not extend to rights denied by the final judgment of the highest court of a state, unless the party claiming such rights plainly and distinctly indicated, before the state court disposed of the case, that they were claimed under the constitution, treaties or statutes of the United States. The words "specially set up or claimed" imply that if a party intends to invoke for the protection of his rights the constitution of the United States or some treaty, statute, commission or authority of the United States, he must so declare; and unless he does so declare "specially," that is, unmistakably, this court is without authority to re-examine the final judgment of the state court.[12] And while it is not necessary to plead the claim in

was granted and now in force," all the wife's rights in such policy passed to and became the property of her husband, it was held, that neither the pleading of the decree of divorce nor of the statute of Hawaii providing for the forfeiture of a divorced wife's rights in the policy of insurance, nor of both together, amounted to specially asserting any right under the treaty. Both averments did not assert that claim in the trial court in such manner as to bring it to the attention of that court, nor, indeed, to show that any right under the treaty was present in the mind of counsel. Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 47 L. Ed. 480, reaffirmed in Huber *v.* Jennings, Heywood Oil Syndicate, 201 U. S. 641, 50 L. Ed. 901; Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

Answer to writ of mandamus.—Where the constitutionality of a state statute under the constitution of the United States is directly attacked in the answer to a writ of mandamus to compel a railroad to build and maintain a station house on its line in compliance with an order of the state railroad commission, the supreme court of the United States, on motion to dismiss a writ of error to the highest court of a state, will deny the motion and consider whether the grounds of objection are substantial and sufficient. Minneapolis, etc., R. Co. *v.* Minnesota, 193 U. S. 53, 62, 48 L. Ed. 614.

Denial of liability under commerce clause.—Where in a suit brought in a state court by the defendant in error against the plaintiff in error, for damages alleged to have been received by the defendant in error to certain carloads of corn shipped over the Southern Railway from certain points in Tennessee to be delivered to the defendant in error in Alabama, the bill charges a breach of the contracts of shipment by one or the other of the railway companies who, the bill alleges, were connecting common carriers, and as such bound by the contracts and the law relative to common carriers to receive and forward to destination the goods shipped in good order and in a reasonable time, and plaintiff in error admitted that it was a common carrier in some states, but was not a connecting and ultimate carrier of the corn in question, denied that it was bound by the contracts, and denied that "it was bound by law" to receive the corn and forward and deliver it to its ultimate destination, it was held, that the denial by the state court of the allegations of this bill raises no federal question, because "the denial was of a legal conclusion resulting from the facts alleged, and added nothing to them. Besides, if a party relies upon a federal right, he must specially set it up, and a denial of liability under the law is not a compliance with that requirement." Louisville, etc., R. Co. *v.* Smith, etc., Co., 204 U. S. 551, 51 L. Ed. 612.

11. Green Bay, etc., Canal Co. *v.* Patten Paper Co., 172 U. S. 58, 67, 43 L. Ed. 364, citing Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 649, 41 L. Ed. 1149.

"It is settled that this court, on error to a state court, cannot consider an alleged federal question, when it appears that the federal right thus relied upon had not been by adequate specification called to the attention of the state court and had not been by it considered, not being necessarily involved in the determination of the cause. Green Bay, etc., Canal Co. *v.* Patten Paper Co., 172 U. S. 58, 67, 43 L. Ed. 364; Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 655, 41 L. Ed. 1149." Capital City Dairy Co. *v.* Ohio, 183 U. S. 238, 248, 46 L. Ed. 171, reaffirmed in Herold *v.* Franks, 191 U. S. 558, 48 L. Ed. 302; Huber *v.* Jennings-Heywood Oil Syndicate, 201 U. S. 641, 50 L. Ed. 901.

12. Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 655, 41 L. Ed. 1149, reaffirmed in Harkins *v.* Ashville, 180 U. S. 635, 45 L. Ed. 709; Baldwin *v.* County Commissioners, 168 U. S. 705, 42 L. Ed. 1213; Tompkins *v.* Cooper, 170 U. S. 703, 42 L. Ed. 1217; Mutual Life Ins. Co. *v.*

order to show it was specially set up, it must have been so referred to and mentioned as to show that it was present in the minds of the parties claiming the right, or must have been in some way presented to the court.[13]

In Motion for New Trial and Assignment of Errors.—It is a sufficient compliance with § 709, U. S. Rev. Stat. that a federal right must be "specially set up or claimed in the state court," that the claim to such right appears in a motion for a new trial and in the assignment of error, in the state supreme court, and was fully considered by the state supreme court.[14] But where the record in a motion for a new trial states simply that a statute is contrary to the constitution of the United States, without calling attention to the provision of that instrument whose protection is denied to the plaintiff in error, this is clearly insufficient to give this court jurisdiction to review the decision of a state court on the ground that a federal question is presented.[15] Likewise where no federal question appears in the pleadings or in the testimony, a transcript of which is contained in the record, but it first appears in the motion for a new trial in which it is charged that the judgment deprives the plaintiff in error of his property without due process of law, and denies him the equal protection of the laws, contrary to the fourteenth amendment, no allegation being made as to why the judgment has this effect, and no notice being taken of the constitutional point by the state court in denying the motion, the writ of error will be dismissed although the writ of error from this court was allowed by the presiding judge.[16]

But no particular form of words or phrases has ever been declared necessary in which the claim of federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the state court in such manner as to bring it to the attention of that court.[17]

Kirchoff, 169 U. S. 103, 110, 42 L. Ed. 677; Chappell *v.* Stewart, 169 U. S. 733, 42 L. Ed. 1215; Fenwick Hall Co. *v.* Old Saybrook, 169 U. S. 734, 42 L. Ed. 1215.

Where it does not appear in the record that a claim of title under an act of congress was made in the trial court or upon appeal in the supreme court of the state, and does not seem to have been thought of until the case reached this court, the claim of title is not so asserted as to confer jurisdiction upon the supreme court of the United States to review the judgment of the state court upon writ of error. Sweringen *v.* St. Louis, 185 U. S. 38, 46 L. Ed. 795.

13. Sweringen *v.* St. Louis, 185 U. S. 38, 46, 46 L. Ed. 795, citing Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 41 L. Ed. 1149; Green Bay, etc., Canal Co. *v.* Patten Paper Co., 172 U. S. 58, 43 L. Ed. 364; Columbia Water Power Co. *v.* Columbia Street Railway Co., 172 U. S. 475, 43 L. Ed. 521; Dewey *v.* Des Moines, 173 U. S. 193, 199, 43 L. Ed. 665.

14. San Jose Land, etc., Co. *v.* San Jose Ranche Co., 189 U. S. 177, 47 L. Ed. 765.

A federal question raised by an assignment of error in the state supreme court, and considered and decided by specially appointed commissioners to aid the court, whose report was affirmed by the state supreme court, is sufficiently raised to give the court jurisdiction to review the state court's decisions. Farmers', etc., Ins. Co. *v.* Dobney, 189 U. S. 301, 305, 47 L. Ed. 821.

In motion in arrest of judgment.—"While the constitutionality of the law was not specially set up and claimed before the trial in the circuit court, there was a motion made in arrest of judgment, in which the invalidity of the statute was specially set up upon the ground of its repugnancy to the fourteenth amendment to the constitution. The motion was denied, although the supreme court did not in terms pass upon the federal constitutionality of the law. It was held, that this was a sufficient presentation of the federal question to give jurisdiction to the supreme court of the United States to review the judgment of the supreme court of the state on writ of error." St. Louis, etc., Coal Co. *v.* Illinois, 185 U. S. 203, 207, 46 L. Ed. 872.

15. Farney *v.* Towle, 1 Black 350, 17 L. Ed. 216; Harding *v.* Illinois, 196 U. S. 78, 88, 49 L. Ed. 394, reaffirmed in Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171; Seale *v.* Georgia, 201 U. S. 642, 50 L. Ed. 902, distinguishing Chicago, etc., R. Co. *v.* Chicago, 164 U. S. 454, 41 L. Ed. 511.

16. Keen *v.* Keen, 201 U. S. 319, 50 L. Ed. 772.

17. Green Bay, etc., Canal Co. *v.* Patten Paper Co., 172 U. S. 58, 67, 43 L. Ed. 364.

Where in a proceeding in equity in a state court, the bill and answer show that

Although no particular form of words is necessary to be used in order that the federal question may be said to be involved, within the meaning of the cases on this subject, there yet must be something in the case before the state court which at least would call its attention to the federal question as one that was relied on by the party, and then, if the decision of the court, while not noticing the question, was such that the judgment was by its necessary effect a denial of the right claimed or referred to, it would be sufficient. It must appear from the record that the right set up or claimed was denied by the judgment or that such was its necessary effect in law.[18] It is not enough that there may be somewhere hidden in the record a question which, if raised, would be of a federal nature.[19]

General Allegations.—This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the circuit courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentatively from the facts stated. Hence, the averment that a party resides in a particular state does not import that he is a citizen of that state.[20]

the plaintiff claims certain rights in property formerly owned by the state, under a conveyance authorized by a statute of the state, and that the defendant claims rights under the statute afterwards passed, conflicting with these rights of the plaintiff, and it appears by the record that the rights under this subsequent statute were sustained by the state court, the question whether the contract of the plaintiff was impaired by a subsequent statute appears on the face of the pleadings, and this court has jurisdiction of the writ of error. Columbia Water Power Co. *v.* Columbia Street Railway Co., 172 U. S. 475, 43 L. Ed. 521.

18. Roby *v.* Colehour, 146 U. S. 153, 159, 36 L. Ed. 922; Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 231, 41 L. Ed. 979; Green Bay, etc., Canal Co. *v.* Patten Paper Co., 172 U. S. 58, 43 L. Ed. 364; Lincoln Nat. Bank *v.* Cadiz Nat. Bank, 172 U. S. 425, 43 L. Ed. 502; Dewey *v.* Des Moines, 173 U. S. 193, 199, 43 L. Ed. 665, reaffirmed in Indiana Power Co. *v.* Elkhart Power Co., 187 U. S. 636, 47 L. Ed. 343.

It was assigned as error in the supreme court of the United States that the supreme court of the state disregarded certain portions of counsel's brief, alleged to have treated of a federal question. It was held, that this did not meet with the requirements of § 709 of the Revised Statutes, to the effect that a party to an action in a state court who intends to invoke for the protection of his rights, the constitution of the United States, or some treaty, statute, commission or authority of the United States, must so declare. Chapin *v.* Fye, 179 U. S. 127, 45 L. Ed. 119, citing and approving Zadig *v.* Baldwin, 166 U. S. 485, 41 L. Ed. 1087; Miller *v.* Cornwall R. Co., 168 U. S. 131, 42 L. Ed. 409; Dewey *v.* Des Moines, 173 U. S. 193, 43 L. Ed. 665; Keokuk, etc., Bridge Co. *v.* Illinois, 175 U. S. 626, 633, 44 L. Ed. 299, reaffirmed in Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Brewster *v.* Cahill, 194 U. S. 629, 48 L. Ed. 1158; Gates *v.* Commissioners, 183 U. S. 693, 46 L. Ed. 393; Huber *v.* Jennings-Heywood Oil Syndicate, 201 U. S. 641, 50 L. Ed. 901.

19. Hamilton Co. *v.* Massachusetts, 6 Wall. 632, 18 L. Ed. 904; Bolln *v.* Nebraska, 176 U. S. 83, 92, 44 L. Ed. 382; Dewey *v.* Des Moines, 173 U. S. 193, 199, 43 L. Ed. 665, reaffirmed in Indiana Power Co. *v.* Elkhart Power Co., 187 U. S. 636, 47 L. Ed. 343.

20. Brown *v.* Keene, 8 Pet. 112, 115, 8 L. Ed. 885; Robertson *v.* Cease, 97 U. S. 646, 649, 24 L. Ed. 1057; Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 655, 41 L. Ed. 1149, reaffirmed in Harkins *v.* Asheville, 180 U. S. 635, 45 L. Ed. 709; Baldwin *v.* County Commissioners, 168 U. S. 705, 42 L. Ed. 1213; Tompkins *v.* Cooper, 170 U. S. 703, 42 L. Ed. 1217; Mutual Life Ins. Co. *v.* Kirchoff, 169 U. S. 103, 110, 42 L. Ed. 677; Chappell *v.* Stewart, 169 U. S. 733, 42 L. Ed. 1215; Fenwick Hall Co. *v.* Old Saybrook, 169 U. S. 734, 42 L. Ed. 1215; Marvin *v.* Trout, 199 U. S. 212, 50 L. Ed. 157.

"The rule is firmly established, and has been frequently reiterated, that the jurisdiction of this court to re-examine the final judgment of a state court, under the third division of § 709, cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case here from such court intended to assert a federal right. The statutory requirement is not met unless the party unmistakably declares that he invokes for the protection of his rights, the constitution, or some treaty, statute, commission or authority, of the United States." Michigan Sugar Co. *v.* Michigan, 185 U. S. 112, 114, 46 L. Ed. 829.

Denial of right under fourteenth amendment.—No question of a federal nature claimed under the constitution of the

The general allegation or claim, in different forms, that the decree of the state court was passed against some persons who were at the time dead, and against others who were necessary parties but who had no notice of the proceedings, does not, within the meaning of § 709 of the Revised Statutes, specially set up a right or immunity under the fourteenth amendment of the constitution

United States can be said to have been made by the mere allegation "that the amount of said tax is greater than the reasonable market value of said lots, whether considered singly or together; the assessment against each particular lot being greater in amount than the value of such particular lot, and the aggregate assessment being greater in amount than the reasonable market value of all of said lots taken together; and that said defendants are seeking to enforce as against plaintiff not merely a sale of said lots, but also to compel plaintiff to pay the full amount of said tax regardless of whatever sum said lots may be sold for and regardless of the actual value of the same." Dewey *v.* Des Moines, 173 U. S. 193, 200, 43 L. Ed. 665, reaffirmed in Indiana Power Co. *v.* Elkhart Power Co., 187 U. S. 636, 47 L. Ed. 343.

On a motion to dismiss a writ of error from the supreme court of the United States to a state court, statements in a motion for nonsuit, that "the cause of action alleged in such action has not been proved," and that "no cause of action has been proved in either of the actions consolidated in the action on trial," are too vague and general to indicate that the defendant distinctly claimed anything under the fourteenth amendment to the constitution of the United States. Such a record is consistent with the idea that the defendant did not claim, in the trial court, in any form generally or specially, that the statute deprived him of property without due process of law or denied to him the equal protection of the laws. Erie R. Co. *v.* Purdy, 185 U. S. 148, 46 L. Ed. 847; Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328; Carnahan *v.* Connolly, 187 U. S. 636, 47 L. Ed. 343; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Illinois *v.* Binns, 189 U. S. 505, 506, 47 L. Ed. 921; Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 41 L. Ed. 1149, involved a decree, in respect of which there was a general allegation that it was rendered against dead persons, as well as in the absence of necessary parties who had no notice of the suit; and we held that such general allegations did not meet the statutory requirement that the final judgment of a state court may be re-examined here if it denies some title, right, privilege, or immunity "specially set up or claimed," under the constitution or authority of the United States. Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 309, 47 L. Ed. 480, reaffirmed in Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

A general statement in an answer to a proceeding in a state court by a quo warranto, to forfeit the charter of a corporation that "this proceeding is in violation of the constitution of the United States" is not a sufficient raising of a federal question in the state court, where it does not appear that any specification was made as to the particular clause of the constitution relied upon to establish that the granting of relief by quo warranto would be repugnant to the constitution, and there is nothing in the record which could give rise even to a remote inference that the mind of the state court was directed to or considered this question. Capitol City Dairy Co. *v.* Ohio, 183 U. S. 238, 46 L. Ed. 171; Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Huber *v.* Jennings-Heywood Oil Syndicate, 201 U. S. 641, 50 L. Ed. 901.

Where the only possible support to the claim that a federal question on the subject under consideration was raised below, was a general statement in an answer that "this proceeding is in violation of the constitution of the United States," and nowhere does it appear that at any time was any specification made as to the particular clause of the constitution relied upon to establish that the granting of relief by quo warranto would be repugnant to that constitution, nor is there anything in the record which could give rise even to a remote inference that the mind of state court was directed to or considered this question. On the contrary, it is apparent from the record that such a contention was not raised in the state court. Thus, although at the request of the defendant below, the plaintiff in error here, the state court certified as to the existence of the federal questions which had been called to its attention and which it had decided, no reference was made in the certificate to the claim of federal right we are now considering, and because this court is without jurisdiction to review the state court's decisions. Capital City Dairy Co. *v.* Ohio, 183 U. S. 238, 46 L. Ed. 171; Harding *v.* Illinois, 196 U. S. 78, 86, 49 L. Ed. 394, reaffirmed in Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171; Seale *v.* Georgia, 201 U. S. 642, 50 L. Ed. 902.

of the United States, forbidding a state to deprive any person of his property without due process of law, unless it appears that the supreme court of the state regarded these general allegations as asserting such federal right or immunity, and denied the claim so asserted.[22]

Cannot Arise from Mere Inference.—Upon like grounds the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right.[23]

A general statement in the petition in error to the supreme court of Ohio that a statute of the state is in violation of certain sections of the federal constitution, is insufficient to raise a federal question.[24]

Not every mere allegation of the existence of a federal question in a controversy will suffice. There must be a real substantive question, on which the case may be made to turn. Nor can jurisdiction be inferred argumentatively from the averments in the pleadings, but the averments should be positive.[25]

22. Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 660, 41 L. Ed. 1149, reaffirmed in Harkins *v.* Ashville, 180 U. S. 635, 45 L. Ed. 709; Baldwin *v.* County Commissioners, 168 U. S. 705, 42 L. Ed. 1213; Tompkins *v.* Cooper, 170 U. S. 703, 42 L. Ed. 1217; Mutual Life Ins. Co. *v.* Kirchoff, 169 U. S. 103, 110, 42 L. Ed. 677; Chappell *v.* Stewart, 169 U. S. 733, 42 L. Ed. 1215; Fenwick Hall Co. *v.* Old Saybrook, 169 U. S. 734, 42 L. Ed. 1215.

23. Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 655, 41 L. Ed. 1149, reaffirmed in Harkins *v.* Ashville, 180 U. S. 635, 45 L. Ed. 709; Baldwin *v.* County Commissioners, 168 U. S. 705, 42 L. Ed. 1213; Tompkins *v.* Cooper, 170 U. S. 703, 42 L. Ed. 1217; Mutual Life Ins. Co. *v.* Kirchoff, 169 U. S. 103, 110, 42 L. Ed. 677; Chappell *v.* Stewart, 169 U. S. 733, 42 L. Ed. 1215; Fenwick Hall Co. *v.* Old Saybrook, 169 U. S. 734, 42 L. Ed. 1215; Louisville, etc., R. Co. *v.* Louisville, 166 U. S. 709, 41 L. Ed. 1173; Levy *v.* San Francisco, 167 U. S. 175, 178, 42 L. Ed. 126.

When the jurisdiction of this court is invoked for the protection, against the final judgment of the highest court of a state, of some title, right, privilege or immunity secured by the constitution or laws of the United States, it must appear expressly or by necessary intendment, from the record, that such right, title, privilege or immunity was "specially set up or claimed" under such constitution or laws. Rev. Stat., § 709. Our jurisdiction cannot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case up intended to assert a federal right. Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 41 L. Ed. 1149; Levy *v.* San Francisco, 167 U. S. 175, 177, 42 L. Ed. 126; Kipley *v.* Illinois, 170 U. S. 182, 187, 42 L. Ed. 998, reaffirmed in Harkins *v.* Ashville, 180 U. S. 635, 45 L. Ed. 709; Ross *v.* King, 172 U. S. 641, 43 L. Ed. 1180; Jones *v.* Vane, 200 U. S. 614, 50 L. Ed. 621.

The assertion of the right, title, privilege or immunity relied on must be made unmistakably and not left to mere inference. Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 41 L. Ed. 1149; Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 308, 47 L. Ed. 480, reaffirmed in Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

In Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 655, 41 L. Ed. 1149, Mr. Justice Harlan said: "This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the circuit courts of the United States must appear affirmatively from the record, and that it is not sufficient that it may be inferred argumentatively from the facts stated. * * * Upon like grounds the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a federal right." Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 310, 47 L. Ed. 480, reaffirmed in Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 92.

24. Marvin *v.* Trout, 199 U. S. 212, 50 L. Ed. 157, citing Clarke *v.* McDade, 165 U. S. 168, 41 L. Ed. 673.

25. Hanford *v.* Davies, 163 U. S. 273, 279, 41 L. Ed. 157; St. Joseph, etc., R.

Judicial Notice.—Judicial knowledge cannot be resorted to to raise controversies not presented by the record, so as to supply a failure to set up a right or title under a treaty.[26]

bbb. *Qualifications of General Rules.*—It is only under the third class of cases mentioned in § 709 of the Revised Statutes giving a writ to a state court, namely, "where any title, right, privilege or immunity is claimed under the constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up and claimed by either party under such constitution, statute, commission or authority," that the federal right, title, privilege or immunity must be, with possibly some rare exceptions, especially set up or claimed to give this court jurisdiction.[27]

Where Federal Question Is Actually or Necessarily Raised and Decided.—But under the first and second clause of Revised Statutes, § 709, in cases in which the validity of a state statute under the constitution of the United States

Co. *v.* Steele, 167 U. S. 659, 662, 42 L. Ed. 315.

If the denial by the state court of a right under a statute of the United States is relied on as justifying our interposition, before it can be held that the state court thus disposed of a federal question, the record must show, either by the words used or by clear and necessary intendment therefrom that the right was specifically claimed, or a definite issue as to the possession of the right must be distinctly deducible from the record, without an adverse decision of which, the judgment could not have been rendered. Capital Nat. Bank *v.* First Nat. Bank, 172 U. S. 425, 430, 42 L. Ed. 502.

26. Mountain View, etc., Co. *v.* McFadden, 180 U. S. 533, 45 L. Ed. 656; Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 312, 47 L. Ed. 480, reaffirmed in Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 302; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

27. Spies *v.* Illinois, 123 U. S. 131, 181, 31 L. Ed. 80; French *v.* Hopkins, 124 U. S. 524, 31 L. Ed. 536; Chappell *v.* Bradshaw, 128 U. S. 132, 32 L. Ed. 369; Baldwin *v.* Kansas, 129 U. S. 52, 32 L. Ed. 640; Leeper *v.* Texas, 139 U. S. 462, 35 L. Ed. 225; Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 41 L. Ed. 1149; Columbia Water Power Co. *v.* Columbia Street Railway Co., 172 U. S. 475, 488, 43 L. Ed. 521; Michigan Sugar Co. *v.* Michigan, 185 U. S. 112, 46 L. Ed. 829.

It is only in cases arising under the third clause, Rev. Stat., § 709, where a right, title, privilege or immunity is claimed, that the federal question must be specially set up. The cases are collected in Columbia Water Power Co. *v.* Columbia Street Railway Company, 172 U. S. 475, 488, 43 L. Ed. 521; Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 1, 14, 45 L. Ed. 395.

"The assertion that although no federal question was raised below, and although the mind of the state court was not directed to the fact that a right protected by the constitution of the United States was relied upon, nevertheless it is our duty to look into the record and determine whether the existence of such a claim was not necessarily involved, is demonstrated to be unsound by a concluded line of authority. Spies *v.* Illinois, 123 U. S. 131, 181, 31 L. Ed. 80; French *v.* Hopkins, 124 U. S. 524, 31 L. Ed. 536; Chappell *v.* Bradshaw, 128 U. S. 132, 32 L. Ed. 369; Baldwin *v.* Kansas, 129 U. S. 52, 32 L. Ed. 640; Leeper *v.* Texas, 139 U. S. 462, 35 L. Ed. 225; Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 41 L. Ed. 1149; Columbia Water Power Co. *v.* Columbia Street Railway Co., 172 U. S. 475, 43 L. Ed. 521. The error involved in the argument arises from failing to observe that the particular character of federal right which is here asserted is embraced within those which the statute requires to be 'specially set up or claimed.' The confusion of thought involved in the proposition relied upon is very clearly pointed out in the authorities to which we have referred, and especially in the latest cases cited. Columbia Water Power Co. *v.* Columbia Street Railway Co., 172 U. S. 475, 43 L. Ed. 521." Eastern Bldg. Ass'n *v.* Welling, 181 U. S. 47, 49, 45 L. Ed. 739.

Denial of faith and credit to judgments of sister states.—Where the state court refuses to give effect to the judgment of a court of another state, the case falls within the third class. Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 47 L. Ed. 480, reaffirmed in Huber *v.* Jennings-Heywood Oil Syndicate, 201 U. S. 641, 50 L. Ed. 901; Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921; German Savings Society *v.* Dormitzer, 192 U. S. 125, 127, 48 L. Ed. 373.

is necessarily drawn in question, and the decision of the state court is in favor of its validity, the supreme court of the United States will take jurisdiction, though the federal question be not specially set up or claimed.[28] And the general rule undoubtedly is that those federal questions which are required to be specially set up and claimed must be so distinctly asserted below as to place it beyond question that the party bringing the case here from the state court intended to and did assert such a federal right in the state court.[29] It has been frequently held, that in cases coming within the second class less particularity is required in asserting the federal right than in cases in the third class, wherein a right, title, privilege or immunity is claimed under the United States, and the decision is against such right, title, privilege or immunity.[30] It is equally true that even although the allegations of federal right made in the state court were so general and ambiguous in that character that they would not in and of themselves neces-

28. Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 1, 14, 45 L. Ed. 395; Orandaga Nation *v.* Thacher, 189 U. S. 306, 47 L. Ed. 826; Harding *v.* Illinois, 196 U. S. 78, 88, 49 L. Ed. 394, reaffirmed in Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171; Seale *v.* Georgia, 201 U. S. 642, 50 L. Ed. 902; Eureka Lake Co. *v.* Yuba County, 116 U. S. 410, 29 L. Ed. 671.

In the latter class the statute requires such right or privilege to be "specially set up and claimed." Under the second class it may be said to be the result of the rulings in this court that if the federal question appears in the record in the state court and was decided, or the decision thereof was necessarily involved in the case, the fact that it was not specially set up will not preclude the right of review here. Columbia Water Power Co. *v.* Columbia Street Railway Co., 172 U. S. 475, 43 L. Ed. 521; Harding *v.* Illinois, 196 U. S. 78, 85, 49 L. Ed. 394, reaffirmed in Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171; Seale *v.* Georgia, 201 U. S. 642, 50 L. Ed. 902.

It affirmatively appears that a federal right was "specially set up" sufficiently to give this court authority to re-examine that question on a writ of error, "where it clearly and unmistakably appears from the opinion of the state court under review that a federal question was assumed by the highest court of the state to be in issue, was actually decided against the federal claim, and the decision of the question was essential to the judgment rendered." Haire *v.* Rice, 204 U. S. 291, 51 L. Ed. 490, citing San Jose Land, etc., Co. *v.* San Jose Ranch Co., 189 U. S. 177, 47 L. Ed. 765.

It is true that this court has sometimes held that, if a federal question appear in the record and was decided, or such decision was necessarily involved in the case, and that such case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review here; but such cases have usually, if not always, arisen under the first or second clauses of § 709, and have involved the validity of a treaty, statute or authority exercised under the United States, or the validity of a statute or authority exercised under a state, where such statute or authority is alleged to be repugnant to the constitution or laws of the United States. Columbia Water Power Co. *v.* Columbia Street Railway Co., 172 U. S. 475, 43 L. Ed. 521; Bolln *v.* Nebraska, 176 U. S. 83, 91, 44 L. Ed. 382.

The assertion that a judgment rests upon an unconstitutional state statute, the validity of which has been drawn in question and sustained, presents one of a class of cases which may be reviewed here. Harding *v.* Illinois, 196 U. S. 78, 85, 49 L. Ed. 394, reaffirmed in Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171; Seale *v.* Georgia, 201 U. S. 642, 50 L. Ed. 902.

Claim of right under fourteenth amendment.—In the analysis of § 709 of the Revised Statutes of the United States, in Columbia Water Power Co. *v.* Columbia Street Railway Co., 172 U. S. 475, 488, 43 L. Ed. 521, it was pointed out that cases of the character of the one now under consideration come within the second class of those provided for in the section: "Where is drawn in question the validity of a statute of, or an authority exercised under, any state on the ground of their being repugnant to the constitution, treaties or laws of the United States, and the decision is in favor of their validity." Harding *v.* Illinois, 196 U. S. 78, 85, 49 L. Ed. 394, reaffirmed in Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171; Seale *v.* Georgia, 201 U. S. 642, 50 L. Ed. 902.

29. Missouri, etc., R. Co. *v.* Elliott, 184 U. S. 530, 533, 46 L. Ed. 673.

30. Harding *v.* Illinois, 196 U. S. 78, 85, 49 L. Ed. 394, reaffirmed in Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171; Seale *v.* Georgia, 201 U. S. 642, 50 L. Ed. 902.

sitate the conclusion that a right of a federal nature was brought to the attention of the state court, yet if the state court in deciding the case has actually considered, and determined a federal question, although arising on ambiguous averments, then a federal controversy having been actually decided, the right of this court to review obtains.[31] All that is essential is that the federal questions must be presented in the state court in such a manner as to bring them to the attention of that tribunal.[32] Where it is shown by the record that the state court considered and decided the federal question, the purpose of the statute is subserved.[33] The fact that a state court, while deciding a federal question, erroneously holds that it is not a federal one, does not take the case out of the rule that where a federal question has been decided below, jurisdiction exists to review.[34] The result of the contrary doctrine would be this, that no case where the question of federal right had been actually decided could be reviewed here if the state court, in passing upon the question, had also decided that it was nonfederal in its character.[35] If the state court decides a federal question which it assumes is distinctly presented to it in some way, that will be sufficient to give the supreme court jurisdiction.[36]

In Petition for Rehearing.—And so controlling as to the existence of the

31. Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 660, 41 L. Ed. 1149; Missouri, etc., R. Co. *v.* Elliott, 184 U. S. 530, 534, 46 L. Ed. 673.

The supreme court has jurisdiction to review the judgment on writ of error, when the federal question is distinctly set up in the bill, and insisted on at every stage, and the state court could not have decided as it did without overruling the claim. Otis Co. *v.* Ludlow Mfg. Co., 201 U. S. 140, 50 L. Ed. 696.

In Wilson *v.* Black Bird Creek Marsh Co., 2 Pet. 245, 7 L. Ed. 412, the record did not show that the constitutionality of an act of a state legislature was drawn in question; "but," said the chief justice, "we think it impossible to doubt that the constitutionality of the act was the question, and the only question, which could have been discussed in the state court." Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 1, 14, 45 L. Ed. 395.

In Satterlee *v.* Matthewson, 2 Pet. 380, 7 L. Ed. 458, it was said that if it sufficiently appear from the record itself that the repugnancy of the statute of a state to the constitution of the United States was drawn in question, this court has jurisdiction, though the record does not in terms declare that this question was raised. See, also, Crowell *v.* Randell, 10 Pet. 368, 9 L. Ed. 458; Furman *v.* Nichol, 8 Wall. 44, 19 L. Ed. 370; Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574, 28 L. Ed. 1084; Eureka Lake Co. *v.* Yuba County, 116 U. S. 410, 29 L. Ed. 671; Kaukauna Water Power Co. *v.* Green Bay, etc., Co., 142 U. S. 254, 35 L. Ed. 1004; Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 1, 14, 15, 45 L. Ed. 395.

As was said by Chief Justice Waite in Chapman *v.* Goodnow, 123 U. S. 540, 548, 31 L. Ed. 235; "If a federal question is fairly presented by the record, and its decision is actually necessary to the determination of the case, a judgment which rejects the claim, but avoids all reference to it, is as much against the right, within the meaning of § 709 of the Revised Statutes, as if it had been specifically referred to and the right directly refused." Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 1, 15, 45 L. Ed. 395.

32. Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 41 L. Ed. 979; Missouri, etc., R. Co. *v.* Elliott, 184 U. S. 530, 534, 46 L. Ed. 673.

33. Missouri, etc., R. Co. *v.* Elliott, 184 U. S. 530, 534, 46 L. Ed. 673.

34. Missouri, etc., R. Co. *v.* Elliott, 184 U. S. 530, 535, 46 L. Ed. 673.

35. Missouri, etc., R. Co. *v.* Elliott, 184 U. S. 530, 535, 46 L. Ed. 673.

36. Home for Incurables *v.* New York City, 187 U. S. 155, 47 L. Ed. 117; Sweringen *v.* St. Louis, 185 U. S. 38, 46, 46 L. Ed. 795; Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 308, 47 L. Ed. 480, reaffirmed in Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921; Jacobi *v.* Alabama, 187 U. S. 133, 136, 47 L. Ed. 106; Mallett *v.* North Carolina, 181 U. S. 589, 45 L. Ed. 1015.

If the highest court of the state assumes that the record sufficiently presents a question of federal right and decides against the party claiming such right, we will look no further, and will proceed to a consideration of that question, unless the decision is made to rest, in part, upon some ground of local law, sufficient enough in itself to sustain the judgment, independently of any question of federal right. Home for Incurables *v.* New York City, 187 U. S. 155, 157, 47 L. Ed. 117, reaffirmed in St. Louis Expanded Metal, etc., Co. *v.* Standard Fireproofing Co., 195 U. S. 627, 49 L. Ed. 351; Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328.

federal question is the fact that it was actually considered and decided by the state court, that it has been held, although the general rule is that the raising of a federal question in a petition for rehearing in the highest court of the state is too late, yet when a question is thus raised and it is actually considered and decided by the state court, the right to review exists.[37]

Where Fully Considered in Court's Opinion.—Under the rule of this court, requiring the opinions to be sent up with the record, it has been frequently held, to be a sufficient compliance with the words "specially set up and claimed," that it was fully considered in the opinion of the court and ruled against the plaintiff in error.[38]

Therefore, where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held, that, if the federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here.[39]

Nevertheless, it is equally well settled that the right of review, dependent upon the adverse decision of a federal question, exists only in those cases wherein a decision of the question involved was brought in some proper manner to the attention of the court and decided, or it appears that the judgment rendered could not have been given without deciding it.[40]

In the language of Mr. Justice Brown: There are a few case which hold

37. Mallett *v.* North Carolina, 181 U. S. 589, 592, 45 L. Ed. 1015; Missouri, etc., R. Co. *v.* Elliott, 184 U. S. 530, 534, 46 L. Ed. 673.

38. Murdock *v.* Memphis, 20 Wall. 590, 633, 22 L. Ed. 429; Gross *v.* United States Mortgage Co., 108 U. S. 447, 27 L. Ed. 795; Philadelphia Fire Ass'n *v.* New York, 119 U. S. 110, 115, 30 L. Ed. 342; Egan *v.* Hart, 165 U. S. 188, 41 L. Ed. 680; Sayward *v.* Denny, 158 U. S. 180, 184, 39 L. Ed. 941; Mallett *v.* North Carolina, 181 U. S. 589, 45 L. Ed. 1015, overruling Williams *v.* Norris, 12 Wheat. 117, 6 L. Ed. 571; Rector *v.* Ashly, 6 Wall. 142, 18 L. Ed. 733; Gibson *v.* Chouteau, 8 Wall. 314, 19 L. Ed. 317; San Jose Land, etc., Co. *v.* San Jose Ranche Co., 189 U. S. 177, 179, 47 L. Ed. 765; Wedding *v.* Meyler, 192 U. S. 573, 581, 48 L. Ed. 570.

An opinion may be resorted to for the purpose of showing that a court actually dealt with a question presented by the record, or that a right asserted in general terms was maintained and dealt with on federal grounds. Missouri, etc., R. Co. *v.* Elliott, 184 U. S. 530, 534, 46 L. Ed. 673; San Jose Land, etc., Co. *v.* San Jose Ranche Co., 189 U. S. 177, 179, 180, 47 L. Ed. 765; German Savings Society *v.* Dormitzer, 192 U. S. 125, 48 L. Ed. 373; Burt *v.* Smith, 203 U. S. 129, 134, 51 L. Ed. 121.

A motion to dismiss will not be granted on the grounds that a federal question was not set up in the court below, where the court has dealt expressly with the constitutional rights of the parties, and one of the parties has insisted on those rights at the earliest opportunity. Tullock *v.* Mulvane, 184 U. S. 497, 503, 504, 46 L. Ed. 657; German Saving Society *v.* Dormitzer, 192 U. S. 125, 127, 48 L. Ed. 373.

Where it does not appear that the federal character of the question was presented to the supreme court of the state, although in the opinions of the supreme court the questions themselves were fully discussed, jurisdiction of a writ of error to the state court will not be conferred on the supreme court of the United States. Howard *v.* Fleming, 191 U. S. 126, 48 L. Ed. 121; Burt *v.* Smith, 203 U. S. 129, 51 L. Ed. 121.

39. Miller *v.* Nicholls, 4 Wheat. 311, 4 L. Ed. 578; Wilson *v.* Black Bird Creek Marsh Co., 2 Pet. 245, 7 L. Ed. 412; Satterlee *v.* Mathewson, 2 Pet. 380, 410, 7 L. Ed. 458; Fisher *v.* Cockerell, 5 Pet. 248, 8 L. Ed. 114; Crowell *v.* Randell, 10 Pet. 368, 9 L. Ed. 458; Harris *v.* Dennie, 3 Pet. 292, 7 L. Ed. 683; Farney *v.* Towle, 1 Black 350, 17 L. Ed. 216; Hoyt *v.* Shelden, 1 Black 518, 17 L. Ed. 65; Railroad *v.* Rock, 4 Wall. 177, 18 L. Ed. 381; Furman *v.* Nichol, 8 Wall. 44, 19 L. Ed. 370; Kaukauna Water Power Co. *v.* Green Bay, etc., Co., 142 U. S. 254, 35 L. Ed. 1004; Columbia Water Power Co. *v.* Columbia Street Railway Co., 172 U. S. 475, 488, 43 L. Ed. 521; Telluride, etc., Co. *v.* Rio Grande, etc., R. Co., 175 U. S. 639, 647, 44 L. Ed. 305.

40. Fowler *v.* Lamson, 164 U. S. 252, 41 L. Ed. 424; Clarke *v.* McDade, 165 U. S. 168, 172, 41 L. Ed. 673; Harding *v.* Illinois, 196 U. S. 78, 86, 49 L. Ed. 394, reaffirmed in Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Chicago, etc.,

that, where the validity of a treaty or statute or authority of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, and the federal question appears in the record, and was decided, or such decision was necessarily involved in the case, the fact that it was not specially set up and claimed is not conclusive against a review of such question here.[41] But where the validity of no statute, state or federal, or authority thereunder, is called in question here, this rule does not apply.[42] The true and rational rule is that this court must be able to see clearly, from the whole record, that a certain provision of the constitution or act of congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.[43]

Binding Effect of State Practice.—In this connection it may be stated that the rules of practice prevailing in the state will generally be recognized.[44]

cc. *Assignment of Reasons for Rehearing or New Trial.*—This court can exercise no appellate power over the supreme court of a state except in a few specified cases; and the ground of jurisdiction must be stated with precision, and the ruling of the court to bring the case under the 25th section of the judiciary act must appear on the record to have been against the right claimed. Any reason assigned for a rehearing or a new trial is not sufficient.[45]

dd. *In Briefs of Counsel and Oral Argument.*—Under the rule that this court has no jurisdiction if it nowhere appears in the record that the plaintiff in error at any time in the state court claimed a right, title, privilege or immunity under the constitution and laws or treaties of the United States, or in any manner specially set up or claimed the protection of any clause of the constitution of the United States, it is held, that where there is printed in the record, as filed in this court, what purports to be an extract from the closing brief of counsel presented to the supreme court of the state, in which such a federal question is discussed, and it is asserted orally at bar that in the oral argument made in the supreme court of the state a claim under the federal constitution was presented, this is insufficient to show that there was a federal question raised below. Because the matters referred to form no part of the record and are not adequate to create a federal question when no such question was necessarily decided below, and the record does not disclose that such issues were set up or claimed in any proper manner in the courts of the state.[46] Although reference may have

R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171; Seale *v.* Georgia, 201 U. S. 642, 50 L. Ed. 902.

Where no definite issue as to the validity of a state statute is distinctly deducible from the record, no decision in favor of its validity appears therefrom, and the judgment might have rested on grounds not involving its validity, the supreme court has no jurisdiction to review the judgment of the highest state court upon the ground that the validity of a state statute was drawn in question therein and its validity sustained. Caro *v.* Davidson, 197 U. S. 197, 49 L. Ed. 723; Seale *v.* Georgia, 201 U. S. 642, 50 L. Ed 902.

41. Columbia Water Power Co. *v.* Columbia Street Railway Co., 172 U. S. 475, 488, 43 L. Ed. 521; Chicago, etc., R. Co. *v.* McGuire, 196 U. S. 128, 132, 49 L. Ed. 413, reaffirmed in Skaneateles Paper Co. *v.* Syracuse, 201 U. S. 642, 50 L. Ed. 901.

42. Chicago, etc., R. Co. *v.* McGuire, 196 U. S. 128, 132, 49 L. Ed. 413, reaffirmed in Skaneateles Paper Co. *v.* Syracuse, 201 U. S. 642, 50 L. Ed. 901.

43. Bridge Proprietors *v.* Hoboken, etc., Co., 1 Wall. 116, 143, 17 L. Ed. 571; Chicago, etc., R. Co. *v.* McGuire, 196 U. S. 128, 133, 49 L. Ed. 413, reaffirmed in Skaneateles Paper Co. *v.* Syracuse, 201 U. S. 642, 50 L. Ed. 901.

44. Hulbert *v.* Chicago, 202 U. S. 275, 281, 50 L. Ed. 1026, citing Erie R. Co. *v.* Purdy, 185 U. S. 148, 46 L. Ed. 847.

Where by the state practice, errors not assigned, and errors assigned but not noticed or relied on in the brief or argument of counsel, will not be reviewed by the highest court of the state, such rule of practice will be recognized by the supreme court of the United States, and where such errors relate to federal questions, the decision of the state court is not reviewable by the supreme court of the United States. Hulbert *v.* Chicago, 202 U. S. 275, 50 L. Ed. 1026, citing Erie R. Co. *v.* Purdy, 185 U. S. 148, 46 L. Ed. 847.

45. La Lande *v.* Treasurer of Louisiana, 18 How. 192, 15 L. Ed. 350.

46. Zadig *v.* Baldwin, 166 U. S. 485, 41 L. Ed. 1087, citing Pim *v.* St. Louis, 165

been made in the briefs of counsel in the supreme court of the state to a treaty, yet if those references did not specially set up or claim any right as secured by the treaty, nor were the briefs made part of the record by any certificate or entry duly made, and the attention of this court is not called to a statute or rule of court in the state making them such, this is not sufficient.[47]

ee. *Certificate of Presiding Judge of State Court*—aaa. *Office of Certificate.*—The office of the certificate, as it respects the federal question, is to make more specific and certain that which is too general and indefinite in the record.[48]

U. S. 273, 41 L. Ed. 714; Chicago, etc., R. Co. *v.* Chicago, 164 U. S. 454, 457, 41 L. Ed. 511; Dibble *v.* Bellingham Bay Land Co., 163 U. S. 63, 70, 41 L. Ed. 72; Ansbro *v.* United States, 159 U. S. 695, 40 L. Ed. 310; Sayward *v.* Denny, 158 U. S. 180, 39 L. Ed. 941, reaffirmed in Gates *v.* Commissioners, 183 U. S. 693, 46 L. Ed. 393; Ross *v.* King, 172 U. S. 641, 43 L. Ed. 1180; Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 309, 47 L. Ed. 480. Compare New York, etc., R. Co. *v.* New York, 186 U. S. 269, 46 L. Ed. 1158; Onandaga Nation *v.* Thacher, 189 U. S. 306, 47 L. Ed. 826.

47. Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 47 L. Ed. 480, reaffirmed in Huber *v.* Jennings-Heywood Oil Syndicate, 201 U. S. 641, 50 L. Ed. 901; Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

48. Office of certificate.—Brown *v.* Atwell, 92 U. S. 327, 330, 23 L. Ed. 511; Commercial Bank *v.* Buckingham, 5 How. 317, 341, 12 L. Ed. 169; Lawler *v.* Walker, 14 How. 149, 154, 14 L. Ed. 364; Railroad *v.* Rock, 4 Wall. 117, 180, 18 L. Ed. 381; Parmelee *v.* Lawrence, 11 Wall. 36, 38, 20 L. Ed. 48; Powell *v.* Brunswick County, 150 U. S. 433, 37 L. Ed. 1134; Dibble *v.* Bellingham Bay Land Co., 163 U. S. 63, 69, 41 L. Ed. 72; Marvin *v.* Trout, 199 U. S. 212, 50 L. Ed. 157.

Suit to quiet title.—In Dibble *v.* Bellingham Bay Land Co., 163 U. S. 63, 41 L. Ed. 72, a suit was brought in a state court claiming a decree quieting the plaintiff's title to certain lands therein described and establishing the existence and validity of a certain power of attorney alleged to have been lost without having been recorded. In its opinion the supreme court of the state, after stating the case, said: "The proof of two facts was attempted by the respondent, the establishment of either of which would be fatal to appellant's claim. The facts attempted to be proved were as follows: 1st. That plaintiff's title to the land in controversy had been acquired by adverse possession; 2d. That the wife had executed a power of attorney to her husband authorizing him to sell the disputed premises." After overruling a contention by the appellant that under the pleadings as framed no testimony tending to prove adverse holding was admissible, the court took up the first proposition and held that the plaintiff had established a title by adverse possession during the statutory period; that the adverse possession was actual, notorious, exclusive and continuous, under claim or color of title. Having reached this result the court added: "This renders an investigation of the second proposition unnecessary." Thus it appears that the decision of the court rested on a ground that it did not involve the question of the validity of the power of attorney and deed. This second proposition which was duly certified to by the chief justice of the state supreme court was whether the said power of attorney and the deed made under it, which, by the law at the time of its making were absolutely void, were made valid by subsequent act of the legislature and whether if so made valid, it was not in violation of the fourteenth amendment of the constitution. But the court held, that although the record might disclose that a question had been raised and decided adversely to a party claiming the benefit of a provision of the United States constitution, yet, as another question not federal had also been raised and decided against such party, and the decision of the latter question was sufficient notwithstanding the federal question to sustain the decision, this court would not review the judgment. Nor can this result be in any respect controlled by the certificate of the presiding judge, for the office of the certificate, as respects the federal question, is to make more certain and specific what is too general and indefinite on the record, but is incompetent to originate the question.

Impairment of obligation of contract.—Where the statutes complained of do not appear in the record, the omission cannot be supplied by the certificate of the chief justice of the supreme court of the state that upon the arguments of the case the validity of subsequent legislation of the state was drawn in question, upon the ground of its repugnancy to the constitution of the United States. The court said: "We have repeatedly held that such certificate is insufficient to give us jurisdiction where it does not appear in the record and that its office is to make more certain and specific what is too general and indefinite in the record. Lawler *v.* Walker, 14 How. 149, 14 L. Ed. 364; Gross *v.* United States Mortgage Co., 108 U. S.

bbb. *Necessity of Certificate.*—The certificate is not necessary to give this court jurisdiction, where the proceedings upon their face show that these questions arose, and how they were decided.[49]

ccc. *Form and Sufficiency of Certificate.*—Where the supreme court of a state certified that there was "drawn in question the validity of statutes of the state of Ohio," etc., without naming the statutes, this certificate is not sufficiently definite to give jurisdiction to this court under the 25th section of the judiciary act.[50] A certificate from the supreme court of Iowa (lately a territory) that in a case brought here from its final judgment, the validity of the partition law of Iowa territory, approved January 4th, 1839, was drawn in question, on the ground that the same was in conflict with the ordinance of 1787, the constitution of the United States, the treaties and laws thereof, the objections thereto overruled, and the statute held to be valid against the rights and interests of the defendant, as claimed by them, presents the constitutional objection in too general a form to give this court jurisdiction under the 25th section of the judiciary act.[51] Where a certificate, coming up with the record from the highest court of law or equity of a state, certifies only that on the "hearing" of the case a party "relied upon" such and such provisions of the constitution of the United States, "insisting" that the effect was to render an act of congress void, as unconstitutional, which said claim, the record went on to say, "was overruled and disallowed by this court," and the record itself shows nothing except that the statute which it was argued contravened these provisions, was drawn in question, and that the decision was in favor of the statute, and of the rights set up by the party relying on it; no writ of error lies from this court to such highest state court under the twenty-fifth section of the judiciary act of 1789.[52]

ddd. *Weight and Sufficiency.*—**In General.**—This court must determine for itself whether the suit really involves any federal question which will entitle it to review the judgment of the state court under § 709 of the Revised Statutes.[53]

477, 27 L. Ed. 795. It is said in Lawler's case that 'the statutes complained of in this case should have been stated. Without that the court cannot apply them to the subject matter of litigation to determine whether or not they have violated the constitution or laws of the United States.' See, also, Railroad *v.* Rock, 4 Wall. 177, 18 L. Ed. 381; Parmelee *v.* Lawrence, 11 Wall. 36, 20 L. Ed. 48; Powell *v.* Brunswick County, 150 U. S. 433, 37 L. Ed. 1134." Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 41, 45 L. Ed. 415.

Interstate commerce clause.—A certificate of the chief justice of the supreme court of a state, given when the writ of error was applied for, to the effect that the supreme court of the state was of opinion "that the statutes and laws of Tennessee were not in conflict with the act of congress regulating interstate commerce, and that the act of congress did not control the shipments in controversy," does not come within the rule that the certificate of the presiding judge of a state court can make more certain and specific what is too general and indefinite in the record, where there is nothing in the record to specialize, and it is less open to conjecture than the certificate. Louisville, etc., R. Co. *v.* Smith, etc., Co., 204 U. S. 551, 561, 51 L. Ed. 612.

49. Ableman *v.* Booth, 21 How. 506, 509, 16 L. Ed. 169.

Where, after judgment in the supreme court of Wisconsin, and before writ of error was sued out, the state court entered on its record that, in such final judgment the validity of certain acts of congress were drawn in question, and the decision of the court was against their validity respectively; held, that this certificate was not necessary to give this court jurisdiction, because the proceedings upon their face show that these questions arose, and how they were decided. Ableman *v.* Booth, 21 How. 506, 16 L. Ed. 169.

50. Lawler *v.* Walker, 14 How. 149, 14 L. Ed. 364, following Commercial Bank *v.* Buckingham, 5 How. 317, 12 L. Ed. 169.

51. Messenger *v.* Mason, 10 Wall. 507, 19 L. Ed. 1028, citing Lawler *v.* Walker, 14 How. 149, 14 L. Ed. 364; Hoyt *v.* Sheldon, 1 Black 518, 17 L. Ed. 65; Commercial Bank *v.* Buckingham, 5 How. 317, 12 L. Ed. 169; Porter *v.* Foley, 24 How. 415, 16 L. Ed. 740; Maxwell *v.* Newbold, 18 How. 511, 15 L. Ed. 506.

52. Roosevelt *v.* Meyer, 1 Wall. 512, 17 L. Ed. 500, citing Gordon *v.* Caldcleugh, 3 Cranch 268, 2 L. Ed. 436; Fulton *v.* McAffee, 16 Pet. 149, 10 L. Ed. 918; Strader *v.* Baldwin, 9 How. 261, 13 L. Ed. 130; Linton *v.* Stanton, 12 How. 423, 13 L. Ed. 1050.

53. Parmelee *v.* Lawrence, 11 Wall. 36, 20 L. Ed. 48; Brown *v.* Atwell, 92 U. S. 327, 23 L. Ed. 511; Gross *v.* United States Mortgage Co., 108 U. S. 477, 27 L. Ed. 795; Felix *v.* Scharnweber, 125 U. S. 54,

And the certificate of the presiding judge of the state court, as to the existence of grounds upon which our interposition might be successfully invoked, while always regarded with respect, cannot confer jurisdiction upon this court to re-examine the judgment below.[54] A certificate of the presiding judge of a state supreme court, given after a decision certifying that a federal question was duly considered and decided adversely to the plaintiff in error, cannot per se give jurisdiction to this court, where on the face of the record proper and from the opinions, the reasonable inference is that the court may have denied the application for a rehearing in the mere exercise of its discretion, or declined to pass on the alleged constitutional question, in terms, because it was suggested too late.[55]

31 L. Ed. 687; Roby *v.* Colehour, 146 U. S. 153, 36 L. Ed. 922; Powell *v.* Brunswick County, 150 U. S. 433, 37 L. Ed. 1134; Newport Light Co. *v.* Newport, 151 U. S. 527, 536, 38 L. Ed. 259.

54. Certificate cannot confer jurisdiction.—Powell *v.* Brunswick County, 150 U. S. 433, 439, 37 L. Ed. 1134; Sayward *v.* Denny, 158 U. S. 180, 183, 39 L. Ed. 941, reaffirmed in Texas, etc., R. Co. *v.* Gay, 167 U. S. 745, 42 L. Ed. 1209; Allen *v.* Arguimbau, 198 U. S. 149, 49 L. Ed. 990; Lawler *v.* Walker, 14 How. 149, 14 L. Ed. 364; Railroad *v.* Rock, 4 Wall. 177, 18 L. Ed. 381; Parmelee *v.* Lawrence, 11 Wall. 36, 20 L. Ed. 48; Caperton *v.* Bowyer, 14 Wall. 216, 20 L. Ed. 882; Brown *v.* Atwell, 92 U. S. 327, 23 L. Ed. 511; Gross *v.* United States Mortgage Co., 108 U. S. 477, 27 L. Ed. 795; Felix *v.* Scharnweber, 125 U. S. 54, 31 L. Ed. 687; Roby *v.* Colehour, 146 U. S. 153, 36 L. Ed. 922.

The certificate of the chief justice of the court of appeals of Kentucky, while entitled to respectful consideration, does not in itself establish the existence of a federal question and confer jurisdiction upon this court to re-examine the judgment complained of. Newport Light Co. *v.* Newport, 151 U. S. 527, 536, 38 L. Ed. 259.

The fact that the transcript contains a certificate of the chief justice of the highest court of a state certifying that federal questions were raised in a state court, is not sufficient to give the supreme court of the United States jurisdiction to review the judgment of the state court, where it does not appear that the certificate was made by order of that court while the case was before it or under its control, and it does not elsewhere appear in the record that the federal questions were raised in the state court. Home for Incurables *v.* New York City, 187 U. S. 155, 47 L. Ed. 117, reaffirmed in St. Louis Expanded Metal, etc., Co. *v.* Standard Fireproofing Co., 195 U. S. 627, 49 L. Ed. 351; Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328.

The chief justice of the supreme court of Ohio made and signed a certificate that the question whether a special assessment was in violation of the fourteenth amendment was submitted to the court, and that the court decided that it was not. The record did not show that any federal question was raised prior to judgment, but it appeared in the petition for the writ of error from the supreme court of the United States, and accompanying assignment of errors. It was held, that the certificate of the chief justice could not confer jurisdiction. Henkel *v.* Cincinnati, 177 U. S. 170, 44 L. Ed. 720, citing, with approval, Parmelee *v.* Lawrence, 11 Wall. 36, 20 L. Ed. 48; Powell *v.* Brunswick Co., 150 U. S. 433, 439, 37 L. Ed. 1134; Dibble *v.* Bellingham Bay Land Co., 163 U. S. 63, 69, 41 L. Ed. 72.

55. Henkel *v.* Cincinnati, 177 U. S. 170, 44 L. Ed. 720; Dibble *v.* Bellingham Bay Land Co., 163 U. S. 63, 41 L. Ed. 72; Fullerton *v.* Texas, 196 U. S. 192, 49 L. Ed. 443; Western Tie, etc., Co. *v.* Brown, 196 U. S. 502, 507, 49 L. Ed. 571.

It is well settled, in this court, that a certificate from a presiding judge of the state court, made after the decision of the case in that court, to the effect that a federal question was considered and decided by the court adversely to the plaintiff in error, cannot confer jurisdiction on this court, where the record does not otherwise show it to exist; that the effect of such a certificate is to make more certain and specific what is too general and indefinite in the record itself, but it is incompetent to originate the federal question. Marvin *v.* Trout, 199 U. S. 212, 223, 50 L. Ed. 157; Dibble *v.* Bellingham Bay Land Co., 163 U. S. 63, 41 L. Ed. 72; Henkel *v.* Cincinnati, 177 U. S. 170, 44 L. Ed. 720; Fullerton *v.* Texas, 196 U. S. 192, 49 L. Ed. 443.

Allowance of writ by chief judge of state court.—The allowance of a writ of error from the highest state court to the supreme court of the United States, by the chief justice of the state court, upon the ground that federal questions are involved, is not sufficient to give the supreme court of the United States jurisdiction to review the judgment of the state court, where the record does not show that the federal questions were properly raised in the state court. Hulbert *v.* Chicago, 202 U. S. 275, 50 L. Ed. 1026, citing Marvin *v.* Trout, 199 U. S. 212, 50 L. Ed. 157.

Mr. Justice Harlan states the rule as follows: While a certificate of the chief justice of the highest court of a state is entitled to great respect, its office being to make that more certain and specific which is too general and indefinite in the record, it is insufficient in itself to give the supreme court jurisdiction, or to authorize it to determine federal questions that do not appear, in any form, from the record, to have been brought to the attention of the state court.[56]

Cannot Supply Want of Proof of Jurisdiction.—A certificate of the chief justice of the state court that a federal question arose and was decided against the plaintiff in error, cannot supply the want of all evidence to that effect in the record. As has been more than once observed by this court, the office of the certificate, as it respects the federal question, is to make more certain and specific what is too general and indefinite in the record, but is incompetent to originate the question.[57]

Construction of Certificate.—When a certificate of the presiding justice of the highest court of a state mentions that a certain federal question was raised and decided in his court, and does not state that any other was, this silence justifies the conclusion that none other was; especially when a decision

56. Powell *v.* Brunswick County, 150 U. S. 433, 439, 37 L. Ed. 1134; Newport Light Co. *v.* Newport, 151 U. S. 527, 537, 38 L. Ed. 259; Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 41, 47, 45 L. Ed. 415; Felix *v.* Scharnweber, 125 U. S. 54, 59, 31 L. Ed. 687; Home for Incurables *v.* New York City, 187 U. S. 155, 158, 47 L. Ed. 117, reaffirmed in St. Louis Expanded Metal, etc., Co. *v.* Standard Fireproofing Co., 195 U. S. 627, 49 L. Ed. 351; Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328.

57. Parmelee *v.* Lawrence, 11 Wall. 36, 20 L. Ed. 48; Brown *v.* Atwell, 92 U. S 327, 23 L. Ed. 511; Adams County *v.* Burlington, etc., R. Co., 112 U. S. 123, 28 L. Ed. 678; Felix *v.* Scharnweber, 125 U. S. 54, 31 L. Ed. 687.

Although a certificate of the presiding justice of the highest court of a state, that there was drawn in question the validity of an act of the state, on the ground that it was repugnant to the constitution of the United States, and that the decision was in favor of its validity, is entitled to much weight, yet where evidently that court had nothing before it but an exception taken and signed in the subordinate court which was clearly insufficient to raise such a question, or to show that it was decided in a way to give this court jurisdiction, such certificate is not conclusive to show that a federal question was raised in the case. Caperton *v.* Bowyer, 14 Wall. 216, 20 L. Ed. 882.

Where no question of a conflict of a state law with the constitution of the United States was made in the pleadings, nor in the evidence, nor at the hearing in the court where the suit was brought; and the question was first made in the supreme court where the certificate of the presiding judge showed only that it was taken in argument and overruled, the writ was dismissed. Parmelee *v.* Lawrence, 11 Wall. 36, 20 L. Ed. 48.

And in Parmelee *v.* Lawrence, 11 Wall. 36, 38, 20 L. Ed. 48—where the question arose as to the effect to be given to the certificate of the chief justice of the state court, showing that a federal question was raised and decided adversely to the party bringing the case here for review—it was said: "If this court should entertain jurisdiction upon a certificate alone, in the absence of any evidence of the question in the record, then the supreme court of the state can give the jurisdiction in every case where the question is made by counsel in argument." To the same effect are Lawler *v.* Walker, 14 How. 149, 14 L. Ed. 364, and Railroad *v.* Rock, 4 Wall. 177, 18 L. Ed. 381; Gross *v.* United States Mortgage Co., 108 U. S. 477, 484, 27 L. Ed. 795.

The 25th section of the act to establish the judicial courts of the United States, requires something more definite than a certificate that there was drawn in question the validity of the statutes of a state, to give to this court jurisdiction. The conflict of a state law with the constitution of the United States, and a decision by a state court in favor of its validity, must appear on the face of the record, before it can be re-examined in this court. It must appear in the pleadings of the suit, or from the evidence in the course of trial, in the instructions asked for, or from exceptions taken to the ruling of the court. It must be that such a question was necessarily involved in the decision, and that the state court would not have given a judgment without deciding it. The language of the section is that no other cause can be assigned, or shall be regarded as a ground of reversal, than such as appears on the face of the record. This certificate is, that the supreme court of Ohio held that certain statutes of Ohio were valid, which had been alleged to be in violation of the constitution of the United States, without naming what those statutes were. This is neither within the letter nor spirit of

on the matter where a second federal question is alleged to have been passed on may have been well decided on many other grounds not federal.[58]

Qualifications of Rule.—But while the certificate from the chief justice of the state court is, in itself, and without reference to the record, insufficient to confer jurisdiction upon this court to re-examine the judgment below,[59] it is entitled to much weight.[60] It is elementary that the certificate of a court of last resort of a state may not import a federal question into a record where otherwise such question does not arise. It is equally elementary that such a certificate may serve to elucidate the determination whether a federal question exists.[61] While a certificate from the state court that the validity of state legislation was drawn in question upon the ground of its impairing the obligation of contracts, and that the decision was in favor of the validity of such legislation, is insufficient to give the supreme court jurisdiction, where such jurisdiction does not appear in the record, it may be resorted to, in the absence of opinion by the state court, to show that a federal question which was otherwise raised in the record, was actually passed upon by the court.[62]

Where Certificate Is Made Part of Record.—Where the certificate is made by the court and is ordered by it to be attached to and form part of the record, it may, perhaps, be sufficient to show that questions of a federal nature were before that court and decided by it.[63]

ff. *Time of Claiming Federal Question*—aaa. *In General.*—It is also well

the act. If permitted it would make the state courts judges of the jurisdiction of this court, and might cause them to take jurisdiction in cases in which conflicts between the state laws and the constitution and the laws of the United States did not exist. The statutes complained of should be stated. Without that, the court cannot apply them to the subject matter of litigation, to determine whether or not they violated the constitution or laws of the United States. This court has already passed upon a certificate of a like kind from Ohio, in the case of the Commercial Bank *v.* Buckingham, 5 How. 317, 12 L. Ed. 169. Lawler *v.* Walker, 14 How. 149, 152, 14 L. Ed. 364.

58. Caperton *v.* Bowyer, 14 Wall. 216, 20 L. Ed. 882.

59. Roby *v.* Colehour, 146 U. S. 153, 159, 36 L. Ed. 922.

60. "In view of the certificate by the chief justice of the state court, the office of which, as said in Parmelee *v.* Lawrence, 11 Wall. 36, 38, 20 L. Ed. 48, was, as respects the federal question, "to make more certain, and specific what is too general and indefinite in the record," we are not disposed to construe the pleadings so strictly as to hold that they did not sufficiently set up and claim the federal rights which that certificate states were claimed by Roby, but were withheld, and were intended to be withheld, from him by the court below." Roby *v.* Colehour, 146 U. S. 153, 160, 36 L. Ed. 922.

The certificate of the highest court of the state that a federal question was involved and decided, will not in itself confer jurisdiction upon the supreme court of the United States over a writ of error to the state court, but it may properly be referred to. Winous Point Shooting Club *v.* Caspersen, 193 U. S. 189, 48 L. Ed. 675.

61. Rector *v.* City Deposit Bank Co., 200 U. S. 405, 412, 50 L. Ed. 527; S. C., 200 U. S. 420, 50 L. Ed. 527; Marvin *v.* Trout, 199 U. S. 212, 223, 50 L. Ed. 157; Illinois Central R. *v.* McKendree, 203 U. S. 514, 525, 51 L. Ed. 298, reaffirmed in Illinois Central R. Co. *v.* Edwards, 203 U. S. 531, 51 L. Ed. 305.

Where an asserted claim in virtue of the power and authority conferred by a law of the United States is brought up by a certificate, and the certificate makes clear the fact, if it were otherwise doubtful, the fact that a right under a law of the United States was relied upon and passed upon below gives this court jurisdiction under § 709, Rev. Stat. Nutt *v.* Knut, 200 U. S. 12, 50 L. Ed. 348, reaffirmed in Rector *v.* City Deposit Bank Co., 200 U. S. 405, 50 L. Ed. 527; Rector *v.* Commercial National Bank, 200 U. S. 420, 50 L. Ed. 533.

The certificate of a court of last resort may be used to show or elucidate the question whether in an action brought by a trustee in bankruptcy, rights under the bankrupt law were relied upon and passed upon below. Rector *v.* City Deposit Bank Co., 200 U. S. 405, 50 L. Ed. 527, reaffirmed in Rector *v.* Commercial Nat. Bank, 200 U. S. 420, 50 L. Ed. 533.

62. Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 46 L. Ed. 86, citing Armstrong *v.* The Treasurer, 16 Pet. 281, 10 L. Ed. 965; Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 41, 48, 45 L. Ed. 415; Railroad *v.* Rock, 4 Wall. 177, 18 L. Ed. 381; Parmelee *v.* Lawrence, 11 Wall. 36, 20 L. Ed. 48; Gross *v.* United States Mortgage Co., 108 U. S. 477, 27 L. Ed. 795.

63. Marvin *v.* Trout, 199 U. S. 212, 50

settled that where our jurisdiction depends upon the denial by a state court of a title, right, privilege, or immunity claimed under the constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege, or immunity was specially set up or claimed at the proper time and in the proper way, and that the decision was against the right so set up or claimed.[64]

Mr. Justice Harlan has stated the rule as follows: "If our jurisdiction is invoked on the ground that the judgment of the state court has denied a right, title, privilege or immunity secured by the constitution of the United States, it is essential, under existing statutes, that such right, title, privilege or immunity shall have been specially set up or claimed in the state court."[65]

L. Ed. 157; Armstrong *v.* The Treasurer, 16 Pet. 286, 10 L. Ed. 965.

Where matter certified is made part of record.—Where the matter certified by the supreme court of a state is made by that court a part of the record, and if it be considered as having the force of an opinion of that court, or as a mere certificate, this would establish the fact that the court had considered and decided a federal question, which, apart from other considerations, would give us jurisdiction to review the state court's decision. Rector *v.* City Deposit Bank Co., 200 U. S. 405, 50 L. Ed. 527, reaffirmed in Rector *v.* Commercial Nat. Bank, 200 U. S. 420, 50 L. Ed. 533, citing Nutt *v.* Knut, 200 U. S. 12, 50 L. Ed. 348.

A showing at every stage of the litigation in the state court of the intention of a national bank to rely upon the United States banking laws for immunity against liabilities arising out of its ownership of shares in a partnership is sufficient to sustain the appellate jurisdiction of the supreme court of the United States, although the bank did not, in the first instance, anticipate the specific and qualified form in which the immunity finally was denied—especially where the highest state court, by a certificate, made part of its record and judgment, stated that the federal question was involved. Merchants' Nat. Bank *v.* Wehrmann, 202 U. S. 295, 50 L. Ed. 1036, citing Marvin *v.* Trout, 199 U. S. 212, 223, 50 L. Ed. 157; Cincinnati, etc., Packet Co. *v.* Bay, 200 U. S. 179, 50 L. Ed. 428.

64. Brown *v.* Massachusetts, 144 U. S. 573, 579, 36 L. Ed. 546; Schuyler Bank *v.* Bollong, 150 U. S. 85, 88, 37 L. Ed. 1008; California Powder Works *v.* Davis, 151 U. S. 389, 393, 38 L. Ed. 206; Chemical Nat. Bank *v.* City Bank, 160 U. S. 646, 40 L. Ed. 568; Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 308, 47 L. Ed. 480, reaffirmed in Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kipley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921; Beals *v.* Cone, 188 U. S. 184, 188, 47 L. Ed. 435, reaffirmed in Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328; Jacobi *v.* Alabama, 187 U. S. 133, 47 L. Ed. 106, citing Spies *v.* Illinois, 123 U. S. 131, 31 L. Ed. 80; Brooks *v.* Missouri, 124 U. S. 394, 31 L. Ed. 454; Baldwin *v.* Kansas, 129 U. S. 52, 32 L. Ed. 640; Miller *v.* Texas, 153 U. S. 535, 38 L. Ed. 812; Morrison *v.* Watson, 154 U. S. 111, 115, 38 L. Ed. 927; Sayward *v.* Denny, 158 U. S. 180, 183, 39 L. Ed. 941; Texas, etc., R. Co. *v.* Gay, 167 U. S. 745, 42 L. Ed. 1209; Chappell *v.* Bradshaw, 128 U. S. 132, 32 L. Ed. 369; Leeper *v.* Texas, 139 U. S. 462, 467, 35 L. Ed. 225; Texas, etc., R. Co. *v.* Southern Pac. Co., 137 U. S. 48, 53, 34 L. Ed. 614.

Nothing is better settled than that to enable us to take jurisdiction on the ground of the denial by a state court of a right claimed under a statute of the United States, the record must show that the right was specially set up or claimed at the proper time and in the proper way, and that the decision was against the right so set up or claimed. Spies *v.* Illinois, 123 U. S. 131, 31 L. Ed. 80; Chappell *v.* Bradshaw, 128 U. S. 132, 32 L. Ed. 369; Northern Pac. R. Co. *v.* Austin, 135 U. S. 315, 318, 34 L. Ed. 218.

In order to give this court jurisdiction of a writ of error to review a judgment of the highest court of a state, on the ground that it decided against a title, right, privilege, or immunity claimed under the constitution or a treaty or statute of the United States, such title, right, privilege, or immunity must have been "specially set up or claimed" at the proper time and in the proper way. If it was not claimed in the trial court, and therefore, by the law and practice of the state, as declared by its highest court, could not be considered by that court; or if it was not claimed in any form before judgment in the highest court of the state; it cannot be asserted in this court. Rev. Stat., § 709; Spies *v.* Illinois, 123 U. S. 131, 181, 31 L. Ed. 80; Brooks *v.* Missouri, 124 U. S. 394, 31 L. Ed. 454; Chappell *v.* Bradshaw, 128 U. S. 132, 134, 32 L. Ed. 369; Brown *v.* Massachusetts, 144 U. S. 573, 36 L. Ed. 546; Schuyler Bank *v.* Bollong, 150 U. S. 85, 37 L. Ed. 1008; Miller *v.* Texas, 153 U. S. 535, 38 L. Ed. 812; Morrison *v.* Watson, 154 U. S. 111, 115, 38 L. Ed. 927.

65. Rev. Stat., § 709; Armstrong *v.* The

bbb. *Prior to Judgment in State Court.*—Where a case is brought to this court on error or appeal from a judgment of a state court, unless it appears in the record that a federal question was raised in the state court before the entry of final judgment in the case, this court is without jurisdiction.[66] The failure to "specially set up or claim" the federal question prior to the decision in the highest state court, prevents this court, as has been frequently held, from acquiring jurisdiction.[67] Where no federal question is specially set up or claimed in the highest state court, until after judgment, a writ of error, whether a federal question is or is not involved, will be dismissed.[68] A federal defense which could not be availed of unless raised before judgment, is not efficacious, although not raised, to avoid the judgment when rendered.[69]

An objection not taken until after verdict in the state court that the plaintiff in error has been deprived of his liberty without due process of law, in violation of the 14th amendment of the constitution of the United States, because the grand jury by which he was indicted and the traverse jury by which he was tried and convicted were wholly composed of the inhabitants of the town and

Treasurer, 16 Pet. 281, 285, 10 L. Ed. 965; Railroad *v.* Rock, 4 Wall. 177, 180, 18 L. Ed. 381; Powell *v.* Brunswick County, 150 U. S. 433, 439, 37 L. Ed. 1134; Roby *v.* Colehour, 146 U. S. 153, 159, 36 L. Ed. 922; Oxley *v.* Stave Co. *v.* Butler County, 166 U. S. 648, 654, 41 L. Ed. 1149; Levy *v.* San Francisco, 167 U. S. 175, 177, 42 L. Ed. 126; Home for Incurables *v.* New York City, 187 U. S. 155, 158, 47 L. Ed. 117, reaffirmed in St. Louis Expanded Metal, etc., Co. *v.* Standard Fireproofing Co., 195 U. S. 627, 49 L. Ed. 351; Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328.

66. Simmerman *v.* Nebraska, 116 U. S. 54, 29 L. Ed. 535; Fowler *v.* Lamson, 164 U. S. 252, 255, 41 L. Ed. 424; Telluride, etc., Co. *v.* Rio Grande, etc., R. Co., 175 U. S. 639, 44 L. Ed. 305; Blackburn *v.* Portland Gold Min. Co., 175 U. S. 571, 44 L. Ed. 276.

We have repeatedly decided that an appeal to the jurisdiction of this court must not be a mere afterthought, and that if any right, privilege or immunity is asserted under the constitution or laws of the United States it must be specially set up and claimed before the final adjudication of the case in the court from which the appeal is sought to be maintained. Bolln *v.* Nebraska, 176 U. S. 83, 91, 44 L. Ed. 382.

California Bank *v.* Kennedy, 167 U. S. 362, 42 L. Ed. 198, is not to the contrary. There the question was whether a national bank could purchase or subscribe to the stock of another corporation, and the answer averred that if the stock in question appeared to have been issued to the national bank, it was "issued without authority of this corporation defendant, and without authority of law." The grounds presented on motion for new trial, and in the specifications of error which formed the basis of the appeal to the supreme court of the state, asserted the want of power under the laws of the United States; and the California supreme court said in its opinion that the bank appealed on the ground "that, by virtue of the statutes under which it is organized, it had no power to become a stockholder in another corporation." The general rule was not questioned that if the alleged right was not claimed before judgment in the highest court of the state, it could not be asserted in this court. Lincoln Nat. Bank *v.* Cadiz Nat. Bank, 172 U. S. 425, 231, 43 L. Ed. 502.

67. Winona, etc., Land Co. *v.* Minnesota, 159 U. S. 540, 39 L. Ed. 252, citing Spies *v.* Illinois, 123 U. S. 131, 181, 31 L. Ed. 80; Brooks *v.* Missouri, 124 U. S. 394, 31 L. Ed. 454; Chappell *v.* Bradshaw, 128 U. S. 132, 32 L. Ed. 369; Brown *v.* Massachusetts, 144 U. S. 573, 36 L. Ed. 546; Schuyler Bank *v.* Bollong, 150 U. S. 85, 37 L. Ed. 1008; Powell *v.* Brunswick County, 150 U. S. 433, 37 L. Ed. 1134; Miller *v.* Texas, 153 U. S. 535, 38 L. Ed. 812; Morrison *v.* Watson, 154 U. S. 111, 38 L. Ed. 927; Sayward *v.* Denny, 158 U. S. 180, 39 L. Ed. 941; Bolln *v.* Nebraska, 176 U. S. 83, 44 L. Ed. 382; Telluride, etc., Co. *v.* Rio Grande, etc., R. Co., 175 U. S. 639, 643, 47 L. Ed. 305, 307.

68. California Nat. Bank *v.* Thomas, 171 U. S. 441, 43 L. Ed. 231; Lynde *v.* Lynde, 181 U. S. 183, 45 L. Ed. 810, reaffirmed in Jones *v.* Vane, 200 U. S. 614, 50 L. Ed. 621; Scudder *v.* Comptroller of New York, 175 U. S. 32, 44 L. Ed. 62; Miller *v.* Texas, 153 U. S. 535, 38 L. Ed. 812; Loeber *v.* Schroeder, 149 U. S. 580, 37 L. Ed. 856; Citizens' Savings Bank *v.* Owensboro, 173 U. S. 636, 643, 43 L. Ed. 840.

69. Manley *v.* Park, 187 U. S. 547, 552, 47 L. Ed. 296.

A judgment of a state court is not void merely because it denies to a party a right, title, privilege or immunity under the constitution of the United States, where such right is not set up or claimed in the proceedings in which the judgment is rendered. Manley *v.* Parks, 187 U. S. 547, 549, 47 L. Ed. 296.

county which the indictment charged him with intending to defraud, comes too late.[70]

ccc. *Where Question Was Not Existent at Time of Judgment.*—Likewise, the supreme court cannot retain jurisdiction on the ground of the assertion of a federal right which did not exist when the judgment was rendered in the trial court, and which was not brought to the attention of the highest state court in any way.[71]

ddd. *In Motion to Set Aside Judgment and Transfer Cause.*—The federal question is not specially set up or claimed at the proper time and in the proper way, where it appears that after the decision in a trial court in a state in which no federal question was raised, there was a motion to set aside the judgment and transfer the cause to a higher court on the ground that the state statute, as construed by the state court in its opinion, was invalid and in violation of the federal constitution.[72]

eee. *In Assignment of Errors in Highest State Court.*—It has never been decided that a presentation to the lower court of a federal question at some stage of the proceedings and in accordance with its procedure, and a presentation to the higher court before judgment in the assignment of errors, would not be sufficient. Therefore, where the right under the constitution of the United States is claimed by the plaintiff in error after verdict and in a motion to set aside the verdict and grant a new trial, and is reasserted in the assignment of errors to the higher court, a right under the constitution of the United States is specially set up in time.[73]

Where it is only in the assignment of errors, filed in the supreme court of the state four months after its judgment of affirmance, that the defendant sets up the denial of a jury trial, as a denial of federal right, it comes too late.[74] But a question raised in the state supreme court and decided not on the ground that it had not been raised in the lower court, but on the merits, is not raised too late for review by this court.[75]

fff. *In Motion for New Trial.*—This court will not review a federal question from a state court, where the question is raised on a motion for a new trial and alleges that a certain statute takes property without due process of law, and hence is unconstitutional; even though this may be taken as an assertion of a claim or right under the federal constitution, where in the supreme court of the state so far as the record discloses, there was neither authority cited, nor argu-

70. Brown *v.* Massachusetts, 144 U. S. 573, 36 L. Ed. 546.

71. Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 313, 47 L. Ed. 480, reaffirmed in Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

72. Louisville, etc., R. Co. *v.* Louisville, 166 U. S. 709, 41 L. Ed. 1173, reaffirmed in Baltimore, etc., R. Co. *v.* Ocean City, 179 U. S. 681, 45 L. Ed. 384; Cruli *v.* Rodriguez, 198 U. S. 581, 49 L. Ed. 1172; Gates *v.* Parmly, 191 U. S. 557, 48 L. Ed. 301.

73. Meyer *v.* Richmond, 172 U. S. 82, 43 L. Ed. 374, following Chicago, etc., R. Co. *v.* Chicago, 164 U. S. 454, 41 L. Ed. 511; Loeber *v.* Schroeder, 149 U. S. 580, 37 L. Ed. 856.

In Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 41 L. Ed. 979, the right under the constitution of the United States was claimed by plaintiff in error after verdict and in a motion to set aside the verdict and to grant a new trial. Meyer *v.* Richmond, 172 U. S. 82, 93, 43 L. Ed. 374.

74. Bolln *v.* Nebraska, 176 U. S. 83, 44 L. Ed. 382.

If it is nowhere alleged in the record that a denial to defendant of a jury trial has violated the constitution of the United States, and in the opinion of the court discussing this question, no allusion is made to the denial of the jury trial being in conflict with the 14th amendment, but it is only in the assignment of error, filed in the supreme court of a state four months after its judgment of affirmance, that the defendant sets it up as a denial of federal right, upon this state of the record this court is unable to say that the decision of the court below was against the title, right, privilege or immunity, specially set up and claimed by either party under the constitution of the United States. Bolln *v.* Nebraska, 176 U. S. 82, 44 L. Ed. 382.

75. Sully *v.* American Nat. Bank, 178 U. S. 289, 44 L. Ed. 1072.

ment advanced in support of the constitutional objection, and it is clear from the opinion cited that the state court based its decision upon others than federal grounds and did not decide the constitutional question sought to be made here.[76]

ggg. *After Remand by State Court.*—A federal question is raised too late to sustain a writ of error from the supreme court of the United States to a state court, where the special pleas setting up distinctly the federal question were filed after the case had been decided by the supreme court of the state, its mandate had gone down to the trial court, and the case was ready for a new trial.[77]

76. Harding *v.* Illinois, 196 U. S. 78, 49 L. Ed. 394, reaffirmed in Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171; Seale *v.* Georgia, 201 U. S. 642, 50 L. Ed. 902, distinguishing Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 41 L. Ed. 979.

Case distinguished.—"The only authority called to the attention of this court by counsel for plaintiff in error as supporting the view that a federal question was properly raised in this case is Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 41 L. Ed. 979; in which case it was contended that a statute of the state of Illinois, under which condemnation proceedings were had, was in violation of the fourteenth amendment to the constitution of the United States. In that case it was distinctly asserted, in the motion for a new trial in the trial court, that the statute and rulings of the court and the verdict and judgment based thereon were contrary to the fourteenth amendment, declaring that no state should deprive any person of life, liberty or property without due process of law nor deny to any person within its limits the equal protection of the laws. In the assignment of errors in the supreme court of the state, it was distinctly reasserted that these federal rights had been denied by the proceedings in the trial court, and it was held, in this court, that while the supreme court of Illinois did not in its opinion expressly refer to the federal constitutional rights asserted, the same were necessarily included in the judgment of the court, and therefore the case was reviewable here." Harding *v.* Illinois, 196 U. S. 78, 87, 49 L. Ed. 394, reaffirmed in Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171; Seale *v.* Georgia, 201 U. S. 642, 50 L. Ed. 902.

77. Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 1, 45 L. Ed. 395, reaffirmed in Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 26, 45 L. Ed. 408.

In the Mutual Life Ins. Co. *v.* Kirchoff, 169 U. S. 103, 42 L. Ed. 677: "The insurance company had loaned money to Kirchoff and had filed a bill to foreclose the trust deed. Pending this bill an agreement was entered into for the release to Kirchoff of two of the lots embraced in the foreclosure proceedings, but it was agreed that these proceedings should be prosecuted, and as soon as the company obtained a deed from the master, it would convey to Kirchoff. No defense was made to the foreclosure, and the case went to a decree and the property was sold. The case went to the supreme court of Illinois, which found the agreement between Mrs. Kirchoff and the insurance company as claimed by her; determined that she was entitled to the release sought, and remanded the case for the purpose of an accounting. As stated by the chief justice: 'The record does not disclose that any right or title was specially set up or claimed under any statute of, or authority exercised under, the United States in the courts below, or in the supreme court of Illinois prior to the decision of the latter court on the first appeal. * * * The errors there assigned nowhere in terms raised a federal question. And in affirming the judgment of the appellate court the supreme court did not consider or discuss any federal question as such in its opinion.' It appears to have turned upon questions of fact. 'It is now contended that it then appeared that defendant claimed to hold an absolute title to the lots in question by virtue of the foreclosure proceedings and of the master's deed obtained thereunder, and hence that the title was claimed under an authority exercised under the United States; that a federal question was thereby raised on the record; and that the decision of the case necessarily involved passing on the claim of title.' Upon the second appeal, it was assigned as a federal question that the circuit court erred in entering a decree which would in effect nullify the decree of foreclosure of the circuit court of the United States, and in refusing to the defendant leave to file the proposed amendment to its answer. 'The appellate court on the second appeal held itself bound by the previous decision, and declined to enter on matters of defense which might have been availed of. The supreme court was of the same opinion, for it ruled that where a case which once had been reviewed by the court, and remanded with directions as to the decree to be entered, error could not be assigned on a subsequent appeal for any cause existing at the time of the prior judgment.' This court dismissed the writ of error, holding that, as the supreme court did not reopen the case as

hhh. *On Second Hearing in State Court.*—Where an objection that a state statute is inconsistent with the federal constitution, is not raised until the case comes on for a second hearing, the state court may, in its discretion, treat it as coming too late for its decision. Had the objection been raised in the first instance and been disposed of, the case would be different.[78]

iii. *On Second Appeal.*—Where no federal question was raised or considered on an appeal to the supreme court of a state, and a decision was rendered which determined the rights of the parties, the case being remanded for an accounting, the fact that on a second appeal the party insisted that a federal question was involved, which claim the court refused to consider on the ground that it had been waived by a failure to present it on the former hearing, does not give the United States supreme court jurisdiction to review such decision.[79]

jjj. *In Petition for Writ of Error to State Court.*—A federal question is sufficiently raised for review by this court, if it is raised on writ of error to the supreme court of the state, and it is not necessary that it should have been raised in the lower or trial court.[80] On the other hand, where it is attempted to transfer a cause to the supreme court of a state, but the petition contains no reference to the constitution of the United States and a mere suggestion of the violation of a federal right and the petition is denied without opinion, this court will infer that the petition was denied because the point of constitutionality was not made in either of the courts below, and if the supreme court did in fact consider the federal question, the burden is upon the plaintiff to show it, and under such circumstances we decline to review the constitutional question here.[81] And a petition containing a mere suggestion of a violation of a federal right, and no distinct presentation of a federal question, and no distinct reference to the constitution of the United States, presents no question reviewable by the court on writ of error.[82]

kkk. *In Petition for Writ of Error to This Court.*—In order for the supreme

to matters previously adjudicated, and as the federal question was not set up upon the first appeal, there was no action of that court in relation to it which we were called upon to revise. See, also, Northern Pac. R. *v.* Ellis, 144 U. S. 458, 36 L. Ed. 504; Great Western Tel. Co. *v.* Burnham, 162 U. S. 339, 40 L. Ed. 991." Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 1, 7, 8, 45 L. Ed. 415.

78. Western Electric Supply Co. *v.* Abberville Electric, etc., Co., 197 U. S. 299, 49 L. Ed. 765.

Where jurisdiction of a state court over a foreign corporation is objected to upon the ground of defects in the service of process, and, on appeal, it is decided that the court has jurisdiction, on the second trial of the case a demurrer on the ground that the statutory mode of service is in contravention of the constitution of the United States, may be treated by the supreme court of the state as coming too late, and a decision of the supreme court of the state is not reviewable by the supreme court of the United States. Western Electric Supply Co. *v.* Abberville Electric, etc., Co., 197 U. S. 299, 49 L. Ed. 765.

79. Mutual Life Ins. Co. *v.* Kirchoff, 169 U. S. 103, 42 L. Ed. 677.

80. Meyer *v.* Richmond, 172 U. S. 82, 43 L. Ed. 374; Arrowsmith *v.* Harmoning, 118 U. S. 194, 30 L. Ed. 243, reaffirmed in New York, etc., R. Co. *v.* McHeon, 189 U. S. 509, 47 L. Ed. 922; Sully *v.* American National Bank, 178 U. S. 289, 44 L. Ed. 1072; Rothchild *v.* Knight, 184 U. S. 334, 46 L. Ed. 573.

81. Jacobi *v.* Alabama, 187 U. S. 133, 47 L. Ed. 106; Layton *v.* Missouri, 187 U. S. 356, 47 L. Ed. 214; Spies *v.* Illinois, 123 U. S. 131, 31 L. Ed. 80; Chicago, etc., R. Co. *v.* McGuire, 196 U. S. 128, 49 L. Ed. 413, reaffirmed in Skaneatles Paper Co. *v.* Syracuse, 201 U. S. 642, 50 L. Ed. 901.

82. Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 41 L. Ed. 1149; Chicago, etc., R. Co. *v.* McGuire, 196 U. S. 128, 131, 49 L. Ed. 413, reaffirmed in Skaneatles Paper Co. *v.* Syracuse, 201 U. S. 642, 50 L. Ed. 901.

The fact that in a writ of error and petition for citation it was stated that certain rights and privileges were claimed under the constitution of the United States, and that the supreme court of the state decided against such rights and privileges, is not sufficient to give the United States supreme court jurisdiction to review the judgment of the state court, where the decision of neither the trial court nor the highest court of the state, was invoked upon a right claimed under the constitution of the United States. Hulbert *v.* Chicago, 202 U. S. 275, 50 L. Ed. 1026, citing Marvin *v.* Trout, 199 U. S. 212, 222, 50 L. Ed. 157.

court of the United States to review the decision of a state court upon the ground that it denies a title, right, privilege or immunity claimed under the constitution of the United States, the right must be set up or claimed either upon a motion for new trial, or in the assignments of error filed in the supreme court of the state, and where it first appears in the petition for a writ of error from the supreme court of the United States, this is insufficient.[83] A federal question set up at length in the petition filed in the appellate court of the state for a writ of error from this court is clearly too late.[84]

lll. *In Briefs of Counsel.*—The right, title, privilege or immunity relied on is not properly claimed when made for the first time in the briefs of counsel not made part of the record.[85]

mmm. *In Petition for Rehearing*—aaaa. *In General.*—It has been repeatedly decided by this court that to suggest or set up a federal question for the first time in a petition for a rehearing in the highest court of a state is not in time.[86] It

83. Johnson *v.* New York Life Ins. Co., 187 U. S. 491, 495, 47 L. Ed. 273; Wabash R. Co. *v.* Pearce, 192 U. S. 179, 48 L. Ed. 397, reaffirmed in Iron Bridge Co. *v.* Brennan, 194 U. S. 630, 48 L. Ed. 1158; Watkins *v.* American Nat. Bank, 199 U. S. 599, 50 L. Ed. 327; Delahanty *v.* Pitkin, 199 U. S. 602, 50 L. Ed. 328; Henkel *v.* Cincinnati, 177 U. S. 170, 44 L. Ed. 720, dismissed on the authority of Sayward *v.* Denny, 158 U. S. 180, 183, 39 L. Ed. 941; Ansbro *v.* United States, 159 U. S. 695, 40 L. Ed. 310; Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 41 L. Ed. 1149; Miller *v.* Cornwall R. Co., 168 U. S. 131, 42 L. Ed. 409; Keokuk, etc., Bridge Co. *v.* Illinois, 175 U. S. 626, 44 L. Ed. 299; Corkran Oil Co. *v.* Arnaudet, 199 U. S. 182, 193, 50 L. Ed. 143; California Powder Works *v.* Davis, 151 U. S. 389, 38 L. Ed. 206; Clark *v.* Pennsylvania, 128 U. S. 395, 32 L. Ed. 487; Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 47 L. Ed. 480; Detroit, etc., R. Co. *v.* Osborn, 189 U. S. 383, 47 L. Ed. 860; Harding *v.* Illinois, 196 U. S. 78, 84, 49 L. Ed. 394. See Kennard *v.* Nebraska, 186 U. S. 304, 46 L. Ed. 1175.

The decision of the state court is not reviewable by the supreme court of the United States upon the ground that a state statute is invalid because in contravention of the constitution of the United States, where the invalidity of the statute is not raised in the trial court, nor assigned as a ground of error upon appeal to the highest court of the state, but appears for the first time in the petition for the writ of error from the supreme court of the United States. Telluride, etc., Co. *v.* Rio Grande, etc., R. Co., 187 U. S. 569, 47 L. Ed. 307, reaffirmed in Dakota, etc., R. Co. *v.* Crouch, 203 U. S. 582, 51 L. Ed. 327.

A claim that the construction given by state courts to its constitution impaired the obligation of a contract in violation of the federal constitution cannot be considered by this court where it appears for the first time in petition for a writ of error from this court, and the accompanying assignment of errors. This is not sufficient to give this court jurisdiction of any federal question, even though another federal question has been properly raised and brought here by the same writ of error. Haire *v.* Rice, 204 U. S. 291, 51 L. Ed. 490, citing Corkran Oil Co. *v.* Arnaudet, 199 U. S. 182, 50 L. Ed. 143; Dewey *v.* Des Moines, 173 U. S. 193, 43 L. Ed. 665.

If a case is carried through the state courts upon arguments drawn from the state constitution alone, the defeated party cannot try his chances here merely by suggesting for the first time when he takes his writ of error that the decision is wrong under the constitution of the United States. Crowell *v.* Randell, 10 Pet. 368, 398, 9 L. Ed. 458; Simmerman *v.* Nebraska, 116 U. S. 54, 29 L. Ed. 535; Hagar *v.* California, 154 U. S., appx., 639, 24 L. Ed. 1044; Erie R. Co. *v.* Purdy, 185 U. S. 148, 153, 46 L. Ed. 847; Osborne *v.* Clark, 204 U. S. 565, 569, 51 L. Ed. 619.

84. Fowler *v.* Lamson, 164 U. S. 252, 41 L. Ed. 424; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 575, 40 L. Ed. 536; Ansbro *v.* United States, 159 U. S. 695, 40 L. Ed. 310; Chicago, etc., R. Co. *v.* McGuire, 196 U. S. 128, 132, 49 L. Ed. 413, reaffirmed in Skaneateles Paper Co. *v.* Syracuse, 201 U. S. 642, 50 L. Ed. 901.

85. Sayward *v.* Denny, 158 U. S. 180, 39 L. Ed. 941; Zadig *v.* Baldwin, 166 U. S. 485, 488, 41 L. Ed. 1087; Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 308, 47 L. Ed. 480; Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921; New York, etc., R. Co. *v.* New York, 186 U. S. 269, 272, 46 L. Ed. 1158; Harding *v.* Illinois, 196 U. S. 78, 84, 49 L. Ed. 394.

86. Corkran Oil Co. *v.* Arnaudet, 199 U. S. 182, 50 L. Ed. 143; Fullerton *v.* Texas, 196 U. S. 192, 49 L. Ed. 443; Texas, etc., R. Co. *v.* Southern Pac. Co., 137 U. S. 48, 54, 34 L. Ed. 614; Butler *v.* Gage, 138 U. S. 52, 34 L. Ed. 869; Wi-

is too late to raise a federal question by a petition for rehearing in the supreme court of a state after that court has pronounced its final decision, although if

nona, etc., R. *v.* Plainview, 143 U. S. 371, 36 L. Ed. 520; Leeper *v.* Texas, 139 U. S. 462, 35 L. Ed. 225; Loeber *v.* Schroeder, 149 U. S. 580, 37 L. Ed. 856; Meyer *v.* Richmond, 172 U. S. 82, 92, 43 L. Ed. 374; Harding *v.* Illinois, 196 U. S. 78, 84, 49 L. Ed. 394; McMillen *v.* Ferrun Min. Co., 197 U. S. 343, 347, 49 L. Ed. 784; Susquehanna Boom Co. *v.* West Branch Boom Co., 110 U. S. 57, 27 L. Ed. 69; Texas, etc., R. Co. *v.* Southern Pac. Co., 137 U. S. 48, 54, 34 L. Ed. 614; Bushnell *v.* Crooke Min. Co., 148 U. S. 682, 689, 37 L. Ed. 610; Bobb *v.* Jamison, 155 U. S. 416, 39 L. Ed. 206, following Duncan *v.* Missouri, 152 U. S. 377, 38 L. Ed. 485; Barrington *v.* Missouri, 205 U. S. 483, 51 L. Ed. 890; Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 47 L. Ed. 480; Turner *v.* Richardson, 180 U. S. 87, 92, 45 L. Ed. 438, reaffirmed in St. Louis Expanded Metal, etc., Co. *v.* Standard Fireproofing Co., 195 U. S. 627, 49 L. Ed. 351; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Huber *v.* Jennings-Heywood Oil Syndicate, 201 U. S. 641, 50 L. Ed. 901; Sayward *v.* Denny, 158 U. S. 180, 183, 39 L. Ed. 941, reaffirmed in Texas, etc., R. Co. *v.* Gay, 167 U. S. 745, 42 L. Ed. 1209; French *v.* Taylor, 199 U. S. 274, 50 L. Ed. 189; South Carolina *v.* Jennings, 204 U. S. 667, 668, 51 L. Ed. 671; Lincoln Nat. Bank *v.* Cadiz Nat. Bank, 172 U. S. 425, 431, 43 L. Ed. 502; Caldwell *v.* Texas, 137 U. S. 692, 698, 34 L. Ed. 816; Miller *v.* Texas, 153 U. S. 535, 539, 38 L. Ed. 812; Weber *v.* Rogan, 188 U. S. 10, 47 L. Ed. 363.

The attempt to raise for the first time a federal question in a petition for rehearing, after judgment, even assuming that the petition presented any such question, is clearly too late. It has been repeatedly decided by this court that a federal question, when suggested for the first time in a petition for rehearing after judgment, is not properly raised so as to authorize this court to review the decision of the highest court of the state. Texas, etc., R. Co. *v.* Southern Co., 137 U. S. 48, 34 L. Ed. 614.

"Upon inspecting the record, we find that no federal right was set up or claimed, in any form, until after the final decision of the case by the supreme court of Missouri, and then by a petition for rehearing. That petition was overruled by that court without any determination of the alleged federal question, indeed without any allusion to it. The claim of a federal right came too late, so far as the revisory power of this court is concerned." Loeber *v.* Schroeder, 149 U. S. 580, 585, 37 L. Ed. 856; Sayward *v.* Denny, 158 U. S. 180, 183, 39 L. Ed. 941; Pim *v.* St. Louis, 165 U. S. 273, 274, 41 L. Ed. 714.

It was not until after the supreme court of the state construed the mortgage contract in accord with the claim of the plaintiffs, and had affirmed the judgment of the trial court and remitted the case to that court, that, in an application for a rehearing, numerous grounds were set forth in which were contained assertions that the adverse decision of the supreme court of the state was in conflict with several clauses of the constitution of the United States. It was held that these grounds were set up too late. Eastern Bldg. Ass'n *v.* Welling, 181 U. S. 47, 48, 45 L. Ed. 739, citing and approving Bobb *v.* Jamison, 155 U. S. 416, 39 L. Ed. 206; Winona, etc., Land Co. *v.* Minnesota, 159 U. S. 540, 39 L. Ed. 252.

It is not enough that the claim of a federal right arose upon the facts. It must also appear affirmatively that the right was "specifically set up." No reference was made to any federal right in the petition for the writ of mandamus, the demurrer, or the motion to quash, and the petition for a rehearing, where the federal question was first brought forward by the plaintiff in error, so far as the record discloses, was denied by the court. It is not enough that the federal question was first presented by a petition for a rehearing, unless that question was thereupon considered, and passed on adversely by the court. Corkran Oil Co. *v.* Arnaudet, 199 U. S. 182, 50 L. Ed. 143; Haire *v.* Rice, 204 U. S. 291, 298, 51 L. Ed. 490.

Where a federal question is raised for the first time on application for reargument, nearly a year after the judgment of the trial court was affirmed by the supreme court of the state, the suggestion comes too late. Miller *v.* Cornwall R. Co., 168 U. S. 131, 42 L. Ed. 409; Charleston, etc., Bridge Co. *v.* West Virginia, 168 U. S. 704, 42 L. Ed. 1212; Texas, etc., R. Co. *v.* Southern Pac. Co., 137 U. S. 48, 34 L. Ed. 614; Loeber *v.* Schroeder, 149 U. S. 580, 37 L. Ed. 853; Pim *v.* St. Louis, 165 U. S. 273, 41 L. Ed. 714; Lufkin *v.* Lufkin, 192 U. S. 601, 48 L. Ed. 583.

Quære, whether a party who failed to set up a federal question in his original pleadings, or upon his first appeal to the supreme court (of a state) and subsequently declines to amend, and only sets such question up in an assignment of errors on a second appeal, after the question had been practically disposed of by the supreme court (of a state), does not lay himself open to the objection so often sustained by the supreme court of the United States that a party cannot raise a federal question for the first time on a

the state court entertains the petition and disposes of the federal question, that will be sufficient.[88]

Louisiana.—A title, right, privilege or immunity is not specifically set up or claimed at the proper time and in the proper way, where it does not appear that any of these propositions were presented to the trial court in any way, or advanced in the supreme court, until urged in the petition for a rehearing. And this rule is the same in Louisiana, although under their law a judgment of the supreme court does not become final until after six judicial days from the rendering of the judgment have passed, within which time a dissatisfied party may apply for a new hearing of the cause.[89]

Where on a writ of error to the supreme court of the state of Missouri, it appears that the federal question was not raised before or at the hearing on the merits, nor on the application for rehearing, but was first taken, after judgment affirmed and application denied, on a motion to transfer the cause to the full court for decision in accordance with the constitutional provision in that state which provides for the separation of the supreme court into two divisions for the transaction of business, and that when a federal question is involved, the cause, on the application of the losing party, should be transferred to the full court for decision, it comes too late.[90]

motion for a rehearing. Mutual Life Ins. Co. *v.* Kirchoff, 169 U. S. 103, 113, 42 L. Ed. 677; Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 41, 45 L. Ed. 415; Hale *v.* Lewis, 181 U. S. 473, 479, 45 L. Ed. 959.

Motion for oral argument.—Where the state went to judgment without any suggestion that a federal question was presented for its determination, and not even in the petition for rehearing was any such question brought to the attention of the court, the disposition of a motion that oral argument be permitted, after the petition for rehearing is denied, in which motion a suggestion that a federal question was involved is first made, does not, in itself necessarily involve the decision of a federal question. Butler *v.* Gage, 138 U. S. 52, 34 L. Ed. 869.

Cases reconciled.—"It is contended that the cases of Huntington *v.* Attrill, 146 U. S. 657, 36 L. Ed. 1123; Marchant *v.* Pennsylvania R. Co., 153 U. S. 380, 38 L. Ed. 751, and Scott *v.* McNeal, 154 U. S. 34, 38 L. Ed. 896, recognized some exceptions to this general rule. But an examination of the first and last named of those cases, as reported, will show that a federal right was specially claimed in and was passed upon by the state court. In Marchant *v.* Pennsylvania Railroad it does not distinctly appear from the opinion of the court that the federal right alleged to have been violated was specially claimed in the state court. But the record of that case shows not only that such was the fact, but that the jurisdiction of this court in that case was beyond question." Pim *v.* St. Louis, 165 U. S. 273, 41 L. Ed. 714.

88. Mallett *v.* North Carolina, 181 U. S. 589, 45 L. Ed. 1015; Fullerton *v.* Texas, 196 U. S. 192, 193, 49 L. Ed. 443.

89. Texas, etc., R. Co. *v.* Southern Pac. Co., 137 U. S. 48, 34 L. Ed. 614.

In Louisiana, as elsewhere, a title, right, privilege or immunity is not properly claimed, under the act of congress, when suggested for the first time in a petition for a rehearing, after judgment. Texas, etc., R. Co. *v.* Southern Pac. Co., 137 U. S. 48, 54, 34 L. Ed. 614.

The case of Stewart *v.* Kahn, 11 Wall. 493, 20 L. Ed. 176, cited for plaintiff in error, is not to the contrary. The petition referred to there seems to have been simply one for review on appeal, and not a petition filed after the case had been decided by the supreme court, and the record showed the decision of the federal question by both tribunals. Texas, etc., R. Co. *v.* Southern Pac. Co., 137 U. S. 48, 54, 34 L. Ed. 614.

90. Duncan *v.* Missouri, 152 U. S. 377, 38 L. Ed. 485, reaffirmed in Bobb *v.* Jamison, 155 U. S. 416, 39 L. Ed. 206.

To give jurisdiction to this court, the title, right, privilege, or immunity relied on must be specially set up or claimed at the proper time and in the proper way, and the decision must be against it; whereas, in this case, the question was not suggested until after judgment, and after an application for rehearing had been overruled, and only then in the form of a motion to transfer the cause. Whether that motion was held to come too late for the purposes of transfer, we are not informed, but its denial was in no aspect equivalent to a decision against a right under the constitution of the United States specially set up or claimed at the proper time and in the proper way. Texas, etc., R. Co. *v.* Southern Pac. Co., 137 U. S. 48, 34 L. Ed. 614; Caldwell *v.* Texas, 137 U. S. 692, 698, 34 L. Ed. 816; Butler *v.* Gage, 138 U. S. 52, 34 L. Ed. 869; Leeper *v.* Texas, 139 U. S. 462, 35 L. Ed. 225; Duncan *v.* Missouri, 152 U. S. 377, 383, 38 L. Ed. 485, reaffirmed in Bobb *v.* Jamison, 155 U. S. 416, 39 L. Ed. 206.

bbbb. *Qualifications of General Rule.*—**When Urged While Case Is Pending and before Its Decision.**—But in all of these cases, the federal question was not presented in any way to the lower court nor to the higher court until after judgment. It is not, therefore, decided that a presentation to the lower court at some stage of the proceedings and in accordance with its procedure, and a presentation to the higher court before judgment, would not be sufficient.[91] So, also, if the highest court of a state entertains a petition for rehearing, which presents federal questions, and decides them, that will be sufficient to sustain the jurisdiction of the supreme court of the United States to review the judgment of the state court on writ of error.[92] In other words, where no federal question appears to have been raised in the state court until a petition is filed in the supreme court for a rehearing, the question is too late, unless the court grants the rehearing and then proceeds to consider the question.[93]

In the language of Mr. Justice White: So controlling as to the existence of the federal question is the fact that it was actually considered and decided by the state court, that it has been held, although the general rule is that the raising of a federal question in a petition for rehearing in the highest court of the state is too late, yet when a question is thus raised and it is actually con-

91. Meyer *v.* Richmond, 172 U. S. 82, 92, 43 L. Ed. 374, distinguishing those cases holding that it comes too late for the first time in petition for rehearing.

92. Mallett *v.* North Carolina, 181 U. S. 589, 45 L. Ed. 1015; Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 308, 47 L. Ed. 480; Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921; Jacobi *v.* Alabama, 187 U. S. 133, 136, 47 L. Ed. 106; Corkran Oil Co. *v.* Arnaudet, 199 U. S. 182, 193, 50 L. Ed. 143.

Where the claim that a state statute is repugnant to the constitution of the United States is first made on a motion for rehearing in the highest court of the state and the motion is entertained and the federal question thus raised decided against the contention of the plaintiff in error, the question is reviewable in the supreme court of the United States. Leigh *v.* Green, 193 U. S. 79, 48 L. Ed. 623, citing and approving Mallett *v.* North Carolina, 181 U. S. 589, 45 L. Ed. 1015.

Where the defendant below set up a claim of immunity from suit in the state court under the laws of the United States, and the right to the immunity so asserted under an act or acts of congress was expressely considered and denied by the state court, this court has jurisdiction although the immunity which was asserted was first claimed in a petition for rehearing, because the question was raised was necessarily involved and was considered and decided adversely by the state court. Leigh *v.* Green, 193 U. S. 79, 48 L. Ed. 623; McKay *v.* Kalyton, 204 U. S. 458, 463, 51 L. Ed. 566.

Cases distinguished.—It appeared from the first opinion filed by the supreme court of a state, that federal questions arising under the constitution and laws of the United States were not considered by that court, or, at all events, were not treated as federal questions, but as questions arising under state laws. But the record discloses that, after that opinion had been filed but before it had been certified down, the defendants filed a petition for reargument, and presented the federal questions on which they rely. The supreme court entertained the petition, and proceeded to discuss and decide the federal questions. In support of the motion to dismiss numerous decisions of this court are cited to the effect that it is too late to raise a federal question by a petition for a rehearing in the supreme court of a state after that court has pronounced its final decision. Loeber *v.* Schroeder, 149 U. S. 580, 37 L. Ed. 856; Sayward *v.* Denny, 158 U. S. 180, 39 L. Ed. 941; Pim *v.* St. Louis, 165 U. S. 273, 41 L. Ed. 714. But those were cases in which the supreme court of the state refused the petition for a rehearing, and dismissed the petition without passing upon the federal questions. In the present case, as already stated, the supreme court of North Carolina did not refuse to consider the federal questions raised in the petition, but disposed of them in an opinion found in this record. State *v.* Mallett, 125 N. C. 718. Had that court declined to pass upon the federal questions and dismissed the petition without considering them, we certainly would not undertake to revise their action. Mallett *v.* North Carolina, 181 U. S. 589, 592, 45 L. Ed. 1015.

93. McMillen *v.* Ferrum Min. Co., 197 U. S. 343, 49 L. Ed. 784, citing Mallett *v.* North Carolina, 181 U. S. 589, 45 L. Ed. 1015; Loeber *v.* Schroeder, 149 U. S. 580, 37 L. Ed. 856; Miller *v.* Texas, 153 U. S. 535, 38 L. Ed. 812.

sidered and decided by the state court, the right to review exists.[94]

Where Petition Is Denied without Opinion.—On the other hand, where in petition for rehearing a federal question is raised for the first time, even if that could be considered as a compliance with § 709, it comes too late where the petition was denied without opinion. If the supreme court of the state had seen fit on that petition to entertain the contention of plaintiff in error as asserting a federal right, and had then decided adversely, the case would have occupied a different position.[95]

nnn. *Upon Motion to Quash Execution.*—An attempt to raise for the first time a federal question upon a motion to quash an execution, comes too late for the same reason that an attempt to raise such a question on a petition for rehearing after judgment comes too late.[96]

ooo. *Raising Federal Question for First Time in This Court.*—It is too late to raise in this court for the first time a federal question; it must be set up and claimed in the state court.[97] It is hardly necessary to say that the raising of a

94. Mallett *v.* North Carolina, 181 U. S. 589, 592, 45 L. Ed. 1015; Missouri, etc., R. Co. *v.* Elliott, 184 U. S. 530, 534, 46 L. Ed. 673.

95. Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 47 L. Ed. 480, reaffirmed in Huber *v.* Jennings-Heywood Oil Syndicate, 201 U. S. 641, 50 L. Ed. 901; Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

96. Loeber *v.* Schroeder, 149 U. S. 580, 37 L. Ed. 856, reviewed in Meyer *v.* Richmond, 172 U. S. 82, 92, 43 L. Ed. 374.

97. Quimby *v.* Boyd, 128 U. S. 488, 32 L. Ed. 502; Marrow *v.* Brinkley, 129 U. S. 178, 181, 32 L. Ed. 654; Home for Incurables *v.* New York, 187 U. S. 155, 47 L. Ed. 117; Winous Point Shooting Club *v.* Caspersen, 193 U. S. 189, 48 L. Ed. 675.

On a writ of error to a state court no question will be considered here which was not called to the attention of the state court. National Bank *v.* Kentucky, 9 Wall. 353, 19 L. Ed. 701.

When it nowhere appears from the record, either in the application for a change of venue, or in the objections to the admissibility of evidence, to the charge of the court as given, or to the refusals to charge as requested, or in the motion for a new trial, the assignment of errors in the supreme court of the state, or the opinion filed in that court, that any federal question was actually presented for consideration or in any way relied on before the final judgment from which the writ of error has been taken, we cannot take jurisdiction. Detroit City R. Co. *v.* Guthard, 114 U. S. 133, 29 L. Ed. 118; Brown *v.* Colorado, 106 U. S. 95, 27 L. Ed. 132; Simmerman *v.* Nebraska, 116 U. S. 54, 29 L. Ed. 535.

If this court, on looking into the opinion of the case, finds that the only federal question there is in the record was not presented to the supreme court, "either in brief or oral argument," the writ of error will be dismissed for lack of jurisdiction. Weatherly *v.* Bowie, 131 U. S. 215, 25 L. Ed. 606.

In Spies *v.* Illinois, 123 U. S. 131, 181, 31 L. Ed. 80, this court said in regard to a question of this kind: "As the supreme court of the state was reviewing the decision of the trial court, it must appear that the claim was made in that court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more." Again: "If the right was not set up or claimed in the proper court below, the judgment of the highest court of the state in the action is conclusive, so far as the right of review here is concerned." Baldwin *v.* Kansas, 129 U. S. 52, 57, 32 L. Ed. 640.

Where a writ of error is sued out from this court on the ground that the jurors were not sworn according to the form of oath prescribed by the state statute, and therefore that the jury was not a legally constituted tribunal, and in consequence the defendant was deprived of his life without due process of law and denied the equal protection of the law, if no objection was taken to the form of the oath at the trial nor at the making of the motions for a new trial, and for an arrest of judgment before the trial court, the objection cannot be considered. The objection should be taken at the trial. Baldwin *v.* Kansas, 129 U. S. 52, 32 L. Ed. 640.

If the plaintiff in error intends to claim that a state statute is repugnant to the constitution of the United States, he must say so at the proper time and in the proper manner. If he claims in the state court that certain provisions of the state statute are repugnant to the constitution of the state, but does not in the state court draw in question any statute of the state upon the ground that it was repugnant to the constitution of the United States, nor specially set up or claim in that court, any right, title, privilege or immunity under the constitution of the United States, the writ of error

federal question for the first time in the assignments of error in this court is insufficient.[98] Where the contention that a decision of a state court impairs the obligation of a contract, is raised for the first time in this court, it comes too late. The records must show that such proposition was set up in, or considered by, the state court.[99]

ppp. *Binding Effect of State Practice.*—**In General.**—This court cannot interfere with the action of the highest court of a state in adhering to the usual course of its judgments. And accordingly where the supreme court of the state declines to pass upon a federal question, because of the rule repeatedly laid down by the supreme court of the state in disposing of questions of jurisdiction as between itself and intermediate courts of appeal that: "The appellate jurisdiction of the supreme court contemplates a review only of the matters submitted to, and examined and determined by the trial court. Hence, it is well settled that this court has no jurisdiction of an appeal, on the ground that a constitutional question is involved, unless the question was raised in and submitted to the trial court," the writ of error will be dismissed.[1] Where the supreme court of the state declines to pass on a federal question, because of its rule of practice, which is also the practice in this court, that the federal question not having been suggested in the court below, could not be made available on appeal, and the attempt is made to set up such federal question at some later stage of the proceeding in the state court, or for the first time in this court, a motion to dismiss on the ground that the federal question was not set up or claimed at the proper time will be allowed. And the rule that the federal question need not be especially set up and claimed where the state court must necessarily have considered and decided such a question, cannot avail the plaintiff in error.[2] In other words, the proper time for

will be dismissed. Levy *v.* San Francisco, 167 U. S. 175, 42 L. Ed. 126.

"In Dewey *v.* Des Moines, 173 U. S. 193, 43 L. Ed. 665, it was held, that where a federal question is raised in the state courts, the party who resorts to this court cannot raise another federal question, not connected with it, which was not raised in any of the courts below." Keokuk, etc., Bridge Co. *v.* Illinois, 175 U. S. 626, 633, 44 L. Ed. 299.

Where the defense of innocent purchaser for value was not set up in the state courts, it cannot be raised for the first time on writ of error from the supreme court of the United States to the highest court of a state. Clark *v.* Herington, 186 U. S. 206, 46 L. Ed. 1128.

When an objection that the obligation of a contract has been impaired by a state statute as construed, was not taken below, it is not open here. Northern Assur. Co. *v.* Building Association, 203 U. S. 106, 51 L. Ed. 109.

An objection that a statute did not provide for notice is untenable, where the objection is taken for the first time in this court, and it is shown by the record that notice was actually given. Detroit, etc., R. Co. *v.* Osborn, 189 U. S. 383, 47 L. Ed. 860.

98. New York, etc., R. Co. *v.* New York, 186 U. S. 269, 273, 46 L. Ed. 1158; Cox *v.* Texas, 202 U. S. 446, 451, 50 L. Ed. 1099, citing Chicago, etc., R. Co. *v.* McGuire, 196 U. S. 128, 49 L. Ed. 413.

Where the record discloses no question under the constitution or laws of the United States until we come to the assignment of errors in this court, then it is too late. Hulbert *v.* Chicago, 202 U. S. 275, 280, 50 L. Ed. 1026; Burt *v.* Smith, 203 U. S. 129, 135, 51 L. Ed. 121.

99. Winona, etc., R. Co. *v.* Plainview, 143 U. S. 371, 36 L. Ed. 191.

1. Layton *v.* Missouri, 187 U. S. 356, 47 L. Ed. 214, reaffirmed in St. Louis Expanded Metal, etc., Co. *v.* Standard Fireproofing Co., 195 U. S. 627, 49 L. Ed. 351; New York, etc., R. Co. *v.* Plymouth, 193 U. S. 668, 48 L. Ed. 839, citing Jacobi *v.* Alabama, 187 U. S. 133, 47 L. Ed. 106.

2. Chicago, etc., R. Co. *v.* McGuire, 196 U. S. 128, 49 L. Ed. 413; Jacobi *v.* Alabama, 187 U. S. 133, 47 L. Ed. 106; Layton *v.* Missouri, 187 U. S. 356, 47 L. Ed. 214; Spies *v.* Illinois, 123 U. S. 131, 31 L. Ed. 80.

In Spies *v.* Illinois, 123 U. S. 131, 31 L. Ed. 80, where objection to the admission of a certain letter, because obtained in violation of the constitution of the United States, was made in the supreme court of the state for the first time, and that court declined to consider the constitutional question supposed to be involved on the ground that it was not raised in the trial court, Mr. Chief Justice Waite said: "To give us jurisdiction under § 709 of the Revised Statutes because of the denial by a state court of any title, right, privilege or immunity claimed under the constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was 'specially set

setting up the right, title, privilege or immunity relied on is in the trial court, whenever that is required by the state practice, in accordance with which the highest court of a state will not revise the judgment of the court below on questions not therein raised.[3] Where the assignment of error before the highest state court and before the supreme court of the United States, states that a statute involved in the suit is in contravention of a particular provision of the constitution of the United States, but it does not appear that the highest court of the state dealt with the point, and probably refused to do so on the ground that the section was not relied upon before the trial court, the supreme court will not review its decision upon that ground.[4] Where a party—drawing in question in the supreme court of the United States a state enactment as invalid under the constitution of the United States, or asserting that the final judgment of the highest court of a state denied to him a right or immunity under the constitution of the United States—did not raise such question or specially set up or claim such right or immunity in the trial court, that court cannot review such final judgment and hold that the state enactment was unconstitutional or that the right or immunity so claimed had been denied by the highest court of the state, if that court did nothing more than decline to pass upon the federal question because not raised in the trial court as required by the state practice.[5] This court cannot review the final judgments of the state courts on the ground that the validity of state enactments under the constitution of the United States had been adjudged, where those courts "did nothing more than decline to pass upon the federal question because not raised in the trial court as required by the state practice."[6]

up or claimed' at the proper time and in the proper way. To be reviewable here the decision must be against the right so set up or claimed. As the supreme court of the state was reviewing the decision of the trial court, it must appear that the claim was made in the court, because the supreme court was only authorized to review the judgment for errors committed there, and we can do no more. This is not, as seems to be supposed by one of the counsel for the petitioners, a question of a waiver of a right under the constitution, laws or treaties of the United States, but a question of claim. If the right was not set up or claimed in the proper court below, the judgment of the highest court of the state in the action is conclusive, so far as the right of review here is concerned." And see Brooks *v.* Missouri, 124 U. S. 394, 31 L. Ed. 454; Baldwin *v.* Kansas, 129 U. S. 52, 32 L. Ed. 640; Jacobi *v.* Alabama, 187 U. S. 133, 136, 47 L. Ed. 106.

3. Spies *v.* Illinois, 123 U. S. 131, 31 L. Ed. 80; Jacobi *v.* Alabama, 187 U. S. 133, 47 L. Ed. 106; Layton *v.* Missouri, 187 U. S. 356, 47 L. Ed. 214; Erie R. Co. *v.* Purdy, 185 U. S. 148, 46 L. Ed. 847; Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 308, 47 L. Ed. 480, reaffirmed in Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

4. Cox *v.* Texas, 202 U. S. 446, 50 L. Ed. 1099, citing Jacobi *v.* Alabama, 187 U. S. 133, 47 L. Ed. 106; Erie R. Co. *v.* Purdy, 185 U. S. 148, 46 L. Ed. 847.

Claim of right under a treaty.—Where the plaintiffs in error by their specification of errors under Rule 21, assert the federal questions to be that the decision of the state court is against a title, right, privilege or immunity claimed by the plaintiff in error under treaty, but this court cannot find that any claim under the treaty was made in the trial court, and the rule of practice of the state court is that it will not pass on questions raised for the first time in that court, and which might and should have been raised in the trial court, a federal question is not specially set up and claimed, at the proper time and in the proper way. Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 47 L. Ed. 480, reaffirmed in Huber *v.* Jennings-Heywood Oil Syndicate, 201 U. S. 641, 50 L. Ed. 901; Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

5. Erie R. Co. *v.* Purdy, 185 U. S. 148, 154, 46 L. Ed. 847, reaffirmed in Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328; Carnahan *v.* Connolly, 187 U. S. 636, 47 L. Ed. 343; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Illinois *v.* Binns, 189 U. S. 505, 506, 47 L. Ed. 921; Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

6. Erie R. Co. *v.* Purdy, 185 U. S. 148,

It is the settled rule in Alabama in criminal cases, when specific grounds of objection to the admission of evidence are assigned, all others are waived.[7] Nor will the supreme court decide the question of objections to the admission of evidence not made and acted on in the trial court.[8]

The rule seems to be settled in Indiana, as in many other states that that matter assigned in the supreme court of the state as error must have been properly presented in the court below and there adjudicated.[9]

Practice in Illinois.—According to the practice of the supreme court of the state of Illinois an error not assigned is not open to review. Errors assigned, but not noticed or relied on in the brief or argument of counsel, will be regarded as waived or abandoned. Such rule of practice will be recognized by this court.[10]

Limitations of General Rules.—If the highest court of the state, by its final judgment, sustains the validity of a state enactment drawn in question there as repugnant to the constitution, treaties or laws of the United States, or denies a right, privilege or immunity specially set or claimed in that court for the first time under the constitution or any treaty, statute or authority exercised under the United States, this court could review that judgment, although no federal question was distinctly raised or insisted upon in the trial court.[11] If, upon

154, 46 L. Ed. 847; Layton *v.* Missouri, 187 U. S. 356, 361, 47 L. Ed. 214, reaffirmed in St. Louis Expanded Metal, etc., Co. *v.* Standard Fireproofing Co., 195 U. S. 627, 49 L. Ed. 351; New York, etc., R. Co. *v.* Plymouth, 193 U. S. 668, 48 L. Ed. 839.

7. Jacobi *v.* Alabama, 187 U. S. 133, 47 L. Ed. 106, citing Spies *v.* Illinois, 123 U. S. 131, 31 L. Ed. 80; Brooks *v.* Missouri, 124 U. S. 394, 31 L. Ed. 454; Baldwin *v.* Kansas, 129 U. S. 52, 32 L. Ed. 640.

8. Jacobi *v.* Alabama, 187 U. S. 133, 47 L. Ed. 106, citing Spies *v.* Illinois, 123 U. S. 131, 31 L. Ed. 80; Brooks *v.* Missouri, 124 U. S. 394, 31 L. Ed. 454; Baldwin *v.* Kansas, 129 U. S. 52, 32 L. Ed. 640.

The title, right, privilege or immunity must be set up or claimed in the trial court. If the right is not set up or claimed in the trial court, the judgment of the highest court of the state is conclusive, so far as the right of review by the supreme court of the United States is concerned. Jacobi *v.* Alabama, 187 U. S. 133, 47 L. Ed. 106, citing Spies *v.* Illinois, 123 U. S. 131, 31 L. Ed. 80; Brooks *v.* Missouri, 124 U. S. 394, 31 L. Ed. 454; Baldwin *v.* Kansas, 129 U. S. 52, 32 L. Ed. 640.

An objection to the admission of evidence, as being in violation of the fourteenth amendment, first set up in the supreme court of the state, and not passed upon by the state court, cannot be reviewed by the United States supreme court. Jacobi *v.* Alabama, 187 U. S. 133, 47 L. Ed. 106, citing Spies *v.* Illinois, 123 U. S. 131, 31 L. Ed. 80; Brooks *v.* Missouri, 124 U. S. 394, 31 L. Ed. 454; Baldwin *v.* Kansas, 129 U. S. 52, 32 L. Ed. 640.

9. Cornell *v.* Green, 163 U. S. 75, 80, 41 Ed. 76; Ansbro *v.* United States, 159 U. S. 695, 40 L. Ed. 310; Pine River Logging Co. *v.* United States, 186 U. S. 279, 46 L. Ed. 1164; Chicago, etc., R. Co. *v.* McGuire, 196 U. S. 128, 49 L. Ed. 413, reaffirmed in Skaneateles Paper Co. *v.* Syracuse, 201 U. S. 642, 50 L. Ed. 901.

10. Hulbert *v.* Chicago, 202 U. S. 275, 281, 50 L. Ed. 1026, citing Erie R. Co. *v.* Purdy, 185 U. S. 148, 153, 46 Ed. 847.

11. Erie R. Co. *v.* Purdy, 185 U. S. 148, 153, 46 L. Ed. 847, reaffirmed in Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328; Carnahan *v.* Connolly, 187 U. S. 636, 47 L. Ed. 343; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Illinois *v.* Binns, 189 U. S. 505, 47 L. Ed. 921; Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921; Jacobi *v.* Alabama, 187 U. S. 133, 47 L. Ed. 106, citing Spies *v.* Illinois, 123 U. S. 131, 31 L. Ed. 80; Brooks *v.* Missouri, 124 U. S. 394, 31 L. Ed. 454; Baldwin *v.* Kansas, 129 U. S. 52, 32 L. Ed. 640.

"As said in Carter *v.* Texas, 177 U. S. 442, 447, 44 L. Ed. 839, 'the question whether a right or privilege, claimed under the constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state. Neal *v.* Delaware, 103 U. S. 370, 396, 397, 26 L. Ed. 567; Mitchell *v.* Clark, 110 U. S. 633, 645, 28 L. Ed. 279; Boyd *v.* Nebraska, 143 U. S. 135, 180, 36 L. Ed. 103.'"

Erie R. Co. *v.* Purdy, 185 U. S. 148, 152, 153, 46 L. Ed. 847, reaffirmed in Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328; Carnahan *v.* Connolly, 187 U. S. 636, 47 L. Ed. 343; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Illinois *v.* Binns, 189 U. S. 506, 47 L. Ed. 921; Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

examining the record, the supreme court of the United States finds that a federal question was properly raised, or that a federal right or immunity was specially claimed in the trial court, then the jurisdiction of that court is not defeated by the mere failure of the highest court of the state to dispose of the question so raised or to pass upon the right or immunity so claimed.[12] An objection that the federal questions presented cannot be considered, "because they were not raised in time and the proper way," and that the supreme court of the state did nothing more than decline to pass on the questions because they had not been raised in the trial court, as required by the state practice, will be of no avail, where the plaintiff in error in the state court makes a motion to amend in which he claims a federal question, and on the trial asks an instruction based on his rights thereunder. If the rights asserted actually existed, the plaintiff in error was entitled to an instruction directing a verdict in his favor. The claim is therefore made in time.[13]

Where a state court has, in fact, decided the federal question adversely to the plaintiff, error will lie, notwithstanding the state court may have violated its own rules of practice in making such decision.[14]

(11) *Determination of Jurisdiction.*—It is not the province of a state court to determine the jurisdiction of the United States supreme court.[15] The jurisdiction of the supreme court of the United States to review a decision disposing of a federal question does not depend upon the conception of the state court or of some of the parties to the record as to the correctness of the decision rendered.[16] Moreover, whether this court has jurisdiction to review the decision of the state court is a question which this court has always looked into, whether the point be raised by counsel or not.[17] In the language of Mr. Justice Day: "In every case which comes to this court on writ of error or appeal the question of jurisdiction must be first answered, whether propounded by counsel or not."[18]

(12) *Federal Questions Raised Must Be Identical in Both Courts.*—If a federal question is raised in the state court, a party bringing the case to the supreme court of the United States cannot raise in that court another federal question not raised below.[19] "Parties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed."[20] But

12. Erie R. Co. *v.* Purdy, 185 U. S. 148, 154, 46 L. Ed. 847, reaffirmed in Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328; Carnahan *v.* Connolly, 187 U. S. 636, 47 L. Ed. 343; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Illinois *v.* Binns, 189 U. S. 505, 47 L. Ed. 921; Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

13. National Mutual Building, etc., Ass'n *v.* Brahan, 193 U. S. 635, 48 L. Ed. 823, reaffirmed in National Mutual Building Association *v.* Farnham, 194 U. S. 630, 48 L. Ed. 1158, citing Green Bay, etc., Canal Co. *v.* Patten Paper Co., 172 U. S. 58, 43 L. Ed. 364; Rothchild *v.* Knight, 184 U. S. 334, 46 L. Ed. 573; Meyer *v.* Richmond, 172 U. S. 82, 43 L. Ed. 374; Mallett *v.* North Carolina, 181 U. S. 589, 45 L. Ed. 1015; Dewey *v.* Des Moines, 173 U. S. 193, 43 L. Ed. 665.

14. Darrington *v.* Bank of Alabama, 13 How. 12, 14 L. Ed. 30.

15. Who determines jurisdiction.—Wabash R. Co. *v.* Pearce, 192 U. S. 179, 184, 48 L. Ed. 397.

16. Board of Liquidation *v.* Louisiana, 179 U. S. 622, 45 L. Ed. 347.

17. Bridge Proprietors *v.* Hoboken, etc., Co., 1 Wall. 116, 17 L. Ed. 571; Armstrong *v.* The Treasurer, 16 Pet. 281, 284, 10 L. Ed. 965.

18. Defiance Water Co. *v.* Defiance, 191 U. S. 184, 48 L. Ed. 140; Giles *v.* Teasley, 193 U. S. 146, 160, 161, 48 L. Ed. 655, reaffirmed in Delahanty *v.* Pitkin, 199 U. S. 602, 50 L. Ed. 328.

19. Chapin *v.* Fye, 179 U. S. 127, 45 L. Ed. 119, citing and approving Zadig *v.* Baldwin, 166 U. S. 485, 41 L. Ed. 1087; Miller *v.* Cornwall R. Co., 168 U. S. 131, 42 L. Ed. 409; Dewey *v.* Des Moines, 173 U. S. 193, 43 L. Ed. 665; and Keokuk, etc., Bridge Co. *v.* Illinois, 175 U. S. 626, 633, 44 L. Ed. 299, reaffirmed in Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Brewster *v.* Cahill, 194 U. S. 629, 48 L. Ed. 1158; Gates *v.* Commissioners, 183 U. S. 693, 46 L. Ed. 393; Huber *v.* Jennings-Heywood Oil Syndicate, 201 U. S. 641, 50 L. Ed. 901.

20. Dewey *v.* Des Moines, 173 U. S. 193, 198, 43 L. Ed. 665, reaffirmed in Indiana Power Co. *v.* Elkhart Power Co., 187 U. S. 636, 47 L. Ed. 343.

If the question were only an enlargement of the one mentioned in the assign-

where there is substantial identity between the federal question raised in the supreme court of the state and that raised in the supreme court of the United States, a motion to dismiss for want of jurisdiction upon the ground that the federal question raised in the supreme court of the United States was not that raised in the court below, must be denied.[21]

q. *Decisions Reviewable*—(1) *In General.*—Where a judgment or decree is brought to this court by a writ of error to a state court for review, the case to warrant the exercise of jurisdiction on our part must come within one of three categories: 1. There must have been drawn in question the validity of a treaty or statute of, or authority exercised under, the United States; and the decision must have been against the claim which either was relied upon to maintain. 2. Or there must have been drawn in question a statute of, or authority exercised under, a state, upon the ground of repugnance to the constitution, or a law or treaty of the United States; and the decision must have been in favor of the validity of the state law or authority in question. 3. Or a right must have been claimed under the constitution, or a treaty, or law of, or by virtue of a commission held or authority exercised under, the United States; and the decision must have been against the right so claimed.[22] There is no general right to a writ of error from

ment of errors, or if it were so connected with it in substance as to form but another ground or reason for alleging the invalidity of the personal judgment, we should have no hesitation in holding the assignment sufficient to permit the question to be now raised and argued. Dewey *v.* Des Moines, 173 U. S. 193, 197, 43 L. Ed. 665, reaffirmed in Indiana Power Co. *v.* Elkhart Power Co., 187 U. S. 636, 47 L. Ed. 343.

Having, however, raised only one federal question in the court below, a party cannot come into this court from a state court and argue the question thus raised, and also another not connected with it and which was not raised in any of the courts below and does not necessarily arise on the record, although an inspection of the record shows the existence of facts upon which the question might have been raised. Dewey *v.* Des Moines, 173 U. S. 193, 198, 43 L. Ed. 665, reaffirmed in Indiana Power Co. *v.* Elkhart Power Co., 187 U. S. 636, 47 L. Ed. 343.

Where it is objected in the state court that a statute is in conflict with a particular provision of the constitution of the United States and the decision of the state court is in favor of its validity, the supreme court of the United States will not consider objections based upon other clauses of the constitution which were not invoked in the state court. Cox *v.* Texas, 202 U. S. 446, 50 L. Ed. 1099.

21. Minneapolis, etc., R. Co. *v.* Gardner, 177 U. S. 332, 44 L. Ed. 793.

A railway company was incorporated by an act of the legislature of the territory of Minnesota in 1853. In 1858 the state of Minnesota by its constitution imposed liability for corporate debts upon stockholders. By the act of Minnesota of March 2, 1881, the consolidation of several railway companies was authorized. Suit was brought to enforce the stockholders' liability against the shareholders of the consolidated company. The protection of § 10, art. 1, and the fourteenth amendment of the constitution of the United States was invoked in the assignment of errors on appeal to the supreme court of Minnesota. The shareholders claimed the law of 1853 as the contract and not explicitly that of 1881; but they also claimed that the act of 1881 did not create a new corporation, and whether it did or not, that the act continued the immunity from liability for the corporate debts to the stock and stockholders of the consolidated corporation. It was contended that the state court did not decide the federal question, but decided that the act of 1881 created a new corporation which became subject to the constitutional provision imposing liability upon stockholders for corporate debts, and rested its judgment on that construction. It was held, that this makes substantial identity between the federal question in the supreme court of the state and in the supreme court of the United States. Minneapolis, etc., R. Co. *v.* Gardner, 177 U. S. 332, 44 L. Ed. 793.

22. Rev. Stat., 132, § 709; Sevier *v.* Haskell, 14 Wall. 12, 15, 20 L. Ed. 827; Weston *v.* Charleston, 2 Pet. 449, 7 L. Ed. 481; McGuire *v.* Massachusetts, 3 Wall. 382, 385, 18 L. Ed. 164; Daniels *v.* Tearney, 102 U. S. 415, 417, 26 L. Ed. 187; Home Ins. Co. *v.* Augusta Council, 93 U. S. 116, 23 L. Ed. 825; McKenna *v.* Simpson, 129 U. S. 506, 510, 32 L. Ed. 771.

This court has repeatedly declared that it is only under the 25th section of the judiciary act that it takes cognizance of error committed in the highest courts of a state. There must be a federal question, within the terms of that section, to enable us to review the decision of a state

the United States supreme court to the courts of a state. There is but a special right, a right to bring such cases, and such cases only, as disclose a federal question distinctly ruled adversely to the plaintiff in error.[23] The mere fact that the construction and the effect of Federal statutes were in a general way discussed and considered in the state court, will not justify the United States supreme court in taking jurisdiction.[24]

(2) *Criminal Cases*—aa. *In General.*—From the earliest organization of the courts of the United States, final judgments, whether in civil or in criminal cases, rendered by the highest court of a state in which a decision in the case could be had, against a right specially set up or claimed under the constitution, laws or treaties of the United States, may be re-examined and reversed or affirmed by this court on a writ of error.[25] So judgments of state courts in criminal as well as in civil cases may be reviewed under this section.[26] But when the highest court of

tribunal. Caperton *v.* Ballard, 14 Wall. 238, 341, 20 L. Ed. 885.

Section 709 of the Revised Statutes gives a review on writ of error to the judgments of the state courts whenever they sustain the validity of a state statute or of an authority exercised under a state, alleged to be repugnant to the constitution or laws of the United States. Carter *v.* Greenhow, 114 U. S. 317, 29 L. Ed. 202; Pleasants *v.* Greenhow, 114 U. S. 323, 29 L. Ed. 204; Holt *v.* Indiana Mfg. Co., 176 U. S. 68, 72, 44 L. Ed. 374.

Final judgments or decrees in any suit in the highest court of law or equity of a state, in which a decision in the suit could be had, may be removed here for re-examination if they involve some one or more of the questions specified in the section conferring the jurisdiction, and otherwise come within the rules which regulate that jurisdiction. Slaughter-House Cases, 10 Wall. 273, 298, 19 L. Ed. 915.

Controversies determined in a state court which are subject to re-examination in this court, are such, and such only, as involve some one or more of the questions enumerated and described in the twenty-fifth section of the judiciary act, and which have passed to final judgment or decree in the highest court of law or equity of a state in which a decision in a suit could be had, as provided by the constitution and laws of the state. Slaughter-House Cases, 10 Wall. 273, 290, 19 L. Ed. 915.

Recommendation to counsel.—In Hurley *v.* Street, 14 Wall. 85, 20 L. Ed. 786, the court dismissing, as involving no federal question, an appeal from the supreme court of a state taken on a false assumption that the case fell within the 25th section of the judiciary act of 1789, called the attention of the bar of the court generally to the fact that much expense would be saved to suitors, if before they advised them to appeal from decisions of the highest state courts to this one, they would see that the case was one of which this court had cognizance on appeal.

23. Beals *v.* Cone, 188 U. S. 184, 47 L. Ed. 435, reaffirmed in Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328.

24. Beals *v.* Cone, 188 U. S. 184, 47 L. Ed. 435, reaffirmed in Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328.

25. Acts of September 24, 1789, c. 20, § 25, 1 Stat. 85; February 5, 1867, c. 28, § 2, 14 Stat. 386; Rev. Stat., § 709; Martin *v.* Hunter, 1 Wheat. 304, 4 L. Ed. 97; Cohens *v.* Virginia, 6 Wheat. 264, 5 L. Ed. 257; Whitten *v.* Tomlinson, 160 U. S. 231, 238, 40 L. Ed. 406, reaffirmed in Washington State *v.* Coovert, 164 U. S. 702, 41 L. Ed. 1182; Rev. Stat., § 709; Tinsley *v.* Anderson, 171 U. S. 101, 105, 43 L. Ed. 91.

26. "Neither the act of 1789, nor the act of 1867, which in some particulars supersedes and replaces the act of 1789, makes any distinction between civil and criminal cases in respect to the revision of the judgments of state courts by this court; nor are we aware that it has even been contended that any such distinction exists. Certainly none has been recognized here. No objection, therefore, to the allowance of the writ of error asked for by the petition can arise from the circumstance that the judgment, which we are asked to review, was rendered in a criminal case." Twitchell *v.* Pennsylvania, 7 Wall. 321, 324, 10 L. Ed. 228.

A writ of error will not be allowed in a criminal case under the 25th section of the judiciary act of 1789, on the ground that the indictment, upon which the judgment of the state court was rendered, was framed under a statute of the state in disregard of the 5th and 6th amendments of the constitution of the United States, which statute is repugnant to the provision of the 6th amendment which declares "that in all criminal prosecutions the accused shall enjoy the right to be informed of the nature and cause of the accusation against him." Because the 5th and 6th amendments were not designed as limits upon the state governments in reference to their own citizens, but exclusively as restrictions upon federal power. Twitchell *v.* Pennsylvania, 7 Wall. 321, 19 L. Ed. 223.

Former jeopardy.—This court has juris-

a state holds that a judgment of one of its inferior courts imposing punishment in a criminal case is valid and binding to the extent in which the law of the state authorized the punishment, and only void for the excess, we cannot treat it as wholly void, there being no principle of federal law invaded in such ruling.[27]

Contempt proceedings.—The holding of a state court that the imprisonment for contempt was limited by the state statute to three days for a quasi criminal contempt as a punishment, and not to a civil contempt, where the authority of the court is exercised by way of compelling obedience, presents no federal question.[28]

Requisites and Sufficiency of Indictment.—Rulings of the state court, in respect of the sufficiency of an indictment, present no federal question.[29] An ob-

diction to review a judgment of a state court convicting a person of a criminal offense, when the defendant sets up at the trial, especially, an immunity from a second trial for the same offense by reason of the 5th amendment to the constitution of the United States. Bohanan *v.* Nebraska, 118 U. S. 231, 30 L. Ed. 71.

Denial of right to "speedy public trial."—A writ of error will not lie from this court to the highest court of a state to review its judgment in a criminal case, on the ground that the court barred various persons from the courtroom during the trial, and thereby denied the accused a public trial, where no reliance seems to be placed in the trial court upon any federal law, but only on the bill of rights in the state constitution which provides that in criminal prosecutions the accused shall have the right to a speedy public trial by an impartial jury of the county. Brooks *v.* Missouri, 124 U. S. 394, 31 L. Ed. 454.

27. In re Graham, 138 U. S. 461, 464, 34 L. Ed. 1051.

The conduct of a criminal trial in a state court cannot be reviewed by this court unless the trial is had under some statute repugnant to the constitution of the United States, or was so conducted as to deprive the accused of some right or immunity secured to him by that instrument. Mere error in administering the criminal law of a state or in the conduct of a criminal trial—no federal right being invaded or denied—is beyond the revisory power of this court under the statutes regulating its jurisdiction. See Andrews *v.* Swartz, 156 U. S. 272, 276, 39 L. Ed. 422; Bergemann *v.* Backer, 157 U. S. 655, 659, 39 L. Ed. 845. Indeed, it would not be competent for congress to confer such power upon this or any other court of the United States. Gibson *v.* Mississippi, 162 U. S. 565, 591, 40 L. Ed. 1075.

28. Tinsley *v.* Anderson, 171 U. S. 101, 43 L. Ed. 91.

29. Barrington *v.* Missouri, 205 U. S. 483, 51 L. Ed. 890, citing Howard *v.* Fleming, 191 U. S. 126, 135, 48 L. Ed. 121; In re Robertson, 156 U. S. 183, 39 L. Ed. 389, citing Leeper *v.* Texas, 139 U. S. 462, 35 L. Ed. 225; Duncan *v.* Missouri, 152 U. S. 377, 38 L. Ed. 485.

The sufficiency of the indictment, the degree of the offense charged, the admissibility of the testimony objected to, and the alleged disqualification of the juror because he is not a freeholder, are all matters with the disposition of which this court has nothing to do upon a writ of error to the state court. Leeper *v.* Texas, 139 U. S. 462, 35 L. Ed. 225; Caldwell *v.* Texas, 137 U. S. 692, 34 L. Ed. 816; Davis *v.* Texas, 139 U. S. 651, 652, 35 L. Ed. 300.

A decision of the highest court upon a writ of habeas corpus that the petitioner should be extradited, leaving the courts of the state from which he was a fugitive to decide whether the indictment was sufficient and whether the statute of that state was in violation of the constitution and laws of the United States, raises no federal question. Pearce *v.* Texas, 155 U. S. 311, 39 L. Ed. 164.

Where the state court has jurisdiction of the offense charged, and of the accused, it is for them to determine whether the indictment in the case sufficiently charged the crime of murder in the first degree. Kohl *v.* Lehlback, 160 U. S. 293, 40 L. Ed. 432, citing Caldwell *v.* Texas, 137 U. S. 692, 34 L. Ed. 816; Bergemann *v.* Backer, 157 U. S. 655, 39 L. Ed. 845.

Demurring to an indictment in a state court on the ground that by reason of the inconsistency, multiplicity, and repugnancy of the different counts in such indictment the defendant is being proceeded against in violation of the state and federal guaranty of due process of law, and in violation of his constitutional right to be specifically informed of the nature and cause of the accusation against him, does not raise a federal question of sufficient merit to sustain a writ of error from the supreme court of the United States. Barrington *v.* Missouri, 205 U. S. 483, 51 L. Ed. 890, citing Howard *v.* Fleming, 191 U. S. 126, 48 L. Ed. 121.

A decision of the highest state court that the defendant in a criminal case has been tried in accordance with the local procedure, although the names of all the witnesses were not indorsed on the indictment, cannot be reviewed in the supreme court of the United States on the theory that a meritorious federal question was involved in the claim that the accused was a subject of Great Britain, and, by virtue

jection that an indictment in a state court did not sufficiently inform the accused of the nature and cause of the accusation against him, and therefore denied him due process of law, raises no federal question, because the sufficiency of the indictment is clearly a matter for the state courts to determine.[30]

What Are Crimes under the State Laws.—A decision of the supreme court of the state that a conspiracy to defraud was a crime punishable under the laws of the state, does not present a federal question, and the decision of the state court is conclusive upon the matter in the supreme court of the United States.[31]

Reprieve, Amnesty and Pardon.—The power of a governor of a state to grant a reprieve to a condemned criminal is a state question, and not reviewable by this court on writ of error.[32]

Ex Post Facto Laws.—A decision of the highest court of a state that the plaintiff in error who had been convicted and sentenced to be hanged by the state court, was to be punished under the law as it existed at the time of the commission of the crime of which he was convicted, raises no federal question.[33]

Self-Incrimination.—No federal question which will sustain a writ of error from the supreme court of the United States to a state court is involved in the contention that the defendant in a criminal case was compelled to be a witness against himself, contrary to the 5th amendment to the federal constitution, since this amendment does not operate as a restriction of the powers of the state, but was intended to operate solely upon the federal government.[34] And if the admission of the testimony does not violate the rights of the plaintiff in error under the state constitution and laws, it cannot involve a question of due process of law of sufficient merit to sustain a writ from the supreme court of the United States.[35]

bb. *Habeas Corpus to State Courts.*—**In General.**—It is the settled doctrine of this court that although the circuit courts of the United States, and the several justices and judges thereof, have authority, under existing statutes, to discharge, upon habeas corpus, one held in custody by state authority in violation of the constitution or of any treaty or law of the United States, the court, justice or judge has a discretion as to the time and mode in which the power so conferred shall be exerted; and that in view of the relations existing, under our system of government, between the judicial tribunals of the Union and of the several states,

of treaties, the law of nations, the laws and constitution of the United States, and the laws of the state, was entitled to know who were the witnesses against him. Barrington *v.* Missouri, 205 U. S. 483, 51 L. Ed. 890.

30. Moore *v.* Missouri, 159 U. S. 673, 40 L. Ed. 301, citing Caldwell *v.* Texas, 137 U. S. 692, 34 L. Ed. 816.

31. Howard *v.* Fleming, 191 U. S. 126, 48 L. Ed. 121, following in Burt *v.* Smith, 203 U. S. 129, 135, 51 L. Ed. 121, citing and approving Caldwell *v.* Texas, 137 U. S. 692, 698, 34 L. Ed. 816; Davis *v.* Texas, 139 U. S. 651, 653, 35 L. Ed. 300; Bergemann *v.* Backer, 157 U. S. 655, 39 L. Ed. 845.

32. The contention that petitioner for a writ of habeas corpus cannot be made to pay the penalty for the crime of which he was adjudged guilty, because he was not executed at the time originally designated, by reason of the interposition of the governor at his instance, which petitioner alleges was, as matter of construction of the state constitution, unauthorized, was not sustained by the chief justice of the state nor by the associate justice of its supreme court, to whom, severally, he applied, and their action is not open to review here. With the disposition of state questions by the appropriate state authorities, it is not the province of this court to interfere, and there is no basis for the suggestion of any violation of the constitution of the United States; the denial of due process of law; or deprivation of any right, privilege, or immunity secured to him by the constitution or laws of the United States. Hallinger *v.* Davis, 146 U. S. 314, 36 L. Ed. 986; In re Kemmler, 136 U. S. 436, 34 L. Ed. 519; Caldwell *v.* Texas, 137 U. S. 692, 34 L. Ed. 816; In re Converse, 137 U. S. 624, 34 L. Ed. 796; McNulty *v.* California, 149 U. S. 645, 37 L. Ed. 882; Lambert *v.* Barrett, 157 U. S. 697, 699, 39 L. Ed. 865.

33. McNulty *v.* California, 149 U. S. 645, 37 L. Ed. 882.

34. Barrington *v.* Missouri, 205 U. S. 483, 51 L. Ed. 890, citing Brown *v.* New Jersey, 175 U. S. 172, 44 L. Ed. 119.

35. Barrington *v.* Missouri, 205 U. S. 483, 51 L. Ed. 890, citing Howard *v.* Fleming, 191 U. S. 126, 48 L. Ed. 121.

a federal court or a federal judge will not ordinarily interfere by habeas corpus with the regular course of procedure under state authority, but will leave the applicant for the writ of habeas corpus to exhaust the remedies afforded by the state for determining whether he is illegally restrained of his liberty. After the highest court of the state, competent under the state law to dispose of the matter, has finally acted, the case can be brought to this court for re-examination.[36] The proper remedy to review the judgments of a state court in criminal cases, because some right under the constitution of the United States is alleged to have been denied the accused, is by a writ of error, and not by habeas corpus proceedings.[37]

36. Ex parte Royall, 117 U. S. 241, 251, 29 L. Ed. 868; Ex parte Fonda, 117 U. S. 516, 29 L. Ed. 994; New York *v.* Eno, 155 U. S. 89, 39 L. Ed. 80; In re Wood, 140 U. S. 278, 35 L. Ed. 505; In re Frederich, 149 U. S. 70, 37 L. Ed. 653; Pepke *v.* Cronan, 155 U. S. 100, 39 L. Ed. 84; In re Chapman, 156 U. S. 211, 39 L. Ed. 401; Whitten *v.* Tomlinson, 160 U. S. 231, 40 L. Ed. 406; Baker *v.* Grice, 169 U. S. 284, 42 L. Ed. 748; Tinsley *v.* Anderson, 171 U. S. 101, 104, 43 L. Ed. 91; Markuson *v.* Doucher, 175 U. S. 184, 44 L. Ed. 124; Minnesota *v.* Brundage, 180 U. S. 499, 45 L. Ed. 639; Riggins *v.* United States, 199 U. S. 547, 50 L. Ed. 303; In re Lincoln, 202 U. S. 178, 50 L. Ed. 984; Urquhart *v.* Brown, 205 U. S. 179, 181, 51 L. Ed. 760, reaffirmed in Spaugh *v.* Fitts, 205 U. S. 540, 51 L. Ed. 921; In re Duncan, 139 U. S. 449, 35 L. Ed. 219; Cook *v.* Hart, 146 U. S. 183, 36 L. Ed. 934; Davis *v.* Burke, 179 U. S. 399, 401, 45 L. Ed. 249, reaffirmed in Wimbish *v.* Jamison, 199 U. S. 599, 50 L. Ed. 327; United States *v.* Sing Tuck, 194 U. S. 161, 168, 48 L. Ed. 917; Drury *v.* Lewis, 200 U. S. 1, 50 L. Ed. 343; Reid *v.* Jones, 187 U. S. 153, 47 L. Ed. 116; Appleyard *v.* Massachusetts, 203 U. S. 222, 225, 51 L. Ed. 161; Rogers *v.* Peck, 199 U. S. 425, 434, 50 L. Ed. 256; In re Shibuya Jugiro, 140 U. S. 291, 35 L. Ed. 510; Andrews *v.* Swartz, 156 U. S. 272, 39 L. Ed. 422; In re Lincoln, 202 U. S. 178, 50 L. Ed. 984, in which all the cases are collected.

Election of remedies.—It is said in Ex parte Royall, 117 U. S. 241, 29 L. Ed. 868, that after a prisoner is convicted of a crime in the highest court of the state in which a conviction could be had, if such conviction was obtained in disregard or in violation of rights secured to him by the constitution and laws of the United States, two remedies are open to him for relief in the federal courts—he may either take his writ of error from this court, under § 709 of the Revised Statutes, and have his case re-examined in that way on the question of whether the state court has denied him any right, privilege or immunity guaranteed him by the constitution and laws of the United States; or he may apply for a writ of habeas corpus to be discharged from custody under such conviction, on the ground that the state court had no jurisdiction of either his person or the offense charged against him, or had, for some reason, lost or exceeded its jurisdiction, so as to render its judgment a nullity; in which latter proceeding the federal courts could not review the action or rulings of the state court, which could be reviewed by this court upon a writ of error. It is certainly the better practice, in cases of this kind, to put the prisoner to his remedy by writ of error from this court, under § 709 of the Revised Statutes, than to award him a writ of habeas corpus. For, under proceedings by writ of error, the validity of the judgment against him can be called in question, and the federal court left in a position to correct the wrong, if any, done the petitioner, and at the same time leave the state authorities in a position to deal with him thereafter, within the limits of proper authority, instead of discharging him by habeas corpus proceedings, and thereby depriving the state of the opportunity of asserting further jurisdiction over his person in respect to the crime with which he is charged. In re Frederich, 149 U. S. 70, 77, 37 L. Ed. 653.

37. Markuson *v.* Doucher, 175 U. S. 184, 44 L. Ed. 124; Dreyer *v.* Pease, 176 U. S. 681, 44 L. Ed. 637; Tsukamoto *v.* Lackmann, 187 U. S. 635, 47 L. Ed. 343; Bissert *v.* Hagan, 183 U. S. 694, 46 L. Ed. 393; Moss *v.* Glenn, 189 U. S. 586, 47 L. E. 921; Day *v.* Conley, 179 U. S. 680, 45 L. Ed. 383; Look *v.* Ross, 198 U. S. 579, 49 L. Ed. 1171.

The circuit courts of the United States, while they have power to grant writs of habeas corpus for the purpose of inquiring into the cause of restraint of liberty of any person in custody under the authority of a state in violation of the constitution, a law or a treaty of the United States, yet, except in cases of peculiar urgency, ought not to exercise that jurisdiction by a discharge of the person in advance of a final determination of his case in the courts of the state, and even after such final determination, will leave him to his remedy to review it by writ of error from this court. Ex parte Royall, 117 U. S. 241, 29 L. Ed. 868; Ex parte Fonda, 117 U. S. 516, 29 L. Ed. 994; In re Frederich, 149 U. S. 70, 37 L. Ed. 653; Pepke *v.* Cronan, 155 U. S. 100, 39 L. Ed. 84; Bergemann *v.* Backer, 157 U. S. 655, 39 L. Ed. 845; Whitten *v.* Tomlinson, 160 U. S. 231, 40 L. Ed. 406; Baker *v.* Grice,

In the language of Mr. Justice Harlan: "One convicted in a state court for an alleged violation of the criminal statutes of the state, and who contends that he is held in violation of the constitution of the United States, must ordinarily first take his case to the highest court of the state, in which the judgment could be reviewed, and thence bring it, if unsuccessful there, to this court by writ of error; that only in certain exceptional cases, of which the present is not one, will a circuit court of the United States, or this court upon appeal from a circuit court, intervene by writ of habeas corpus in advance of the final action by the highest court of the state."[38]

The jurisdiction is more delicate, the reason against its exercise stronger, when a single judge is invoked to reverse the decision of the highest court of a state in which the constitutional right of a prisoner could have been

169 U. S. 284, 42 L. Ed. 748; Tinsley *v.* Anderson, 171 U. S. 101, 104, 43 L. Ed. 91.

"In Baker *v.* Grice, 169 U. S. 284, 42 L. Ed. 748, Mr. Justice Peckham said: 'Instead of discharging, they (the federal courts) will leave the prisoner to be dealt with by the courts of the state; that after a final determination of the case by the state court, the federal courts will even then generally leave the petitioner to his remedy by writ of error from this court. The reason for this course is apparent. It is an exceedingly delicate jurisdiction given to the federal courts by which a person under an indictment in a state court and subject to its laws may, by the decision of a single judge of the federal court, upon a writ of habeas corpus, be taken out of the custody of the officers of the state and finally discharged therefrom, and thus a trial by the state courts of an indictment found under the laws of a state be finally prevented.'" Markuson *v.* Doucher, 175 U. S. 184, 186, 44 L. Ed. 124, reaffirmed in Tsukamoto *v.* Lackmann, 187 U. S. 635, 47 L. Ed. 343; Dreyer *v.* Pease, 176 U. S. 681, 44 L. Ed. 637.

"It is not necessary to review the cases or to repeat or justify their reasoning. We lately stated the rule and the reasons for it in the case of Baker *v.* Grice, 169 U. S. 284, 42 L. Ed. 748, and in Tinsley *v.* Anderson, 171 U. S. 101, 104, 43 L. Ed. 91. In the latter, passing on an appeal from judgment dismissing a writ of habeas corpus, the chief justice said: 'The dismissal by the circuit court of the United States of its own writ of habeas corpus was in accordance with the rule, repeatedly laid down by this court, that the circuit courts of the United States, while they have power to grant writs of habeas corpus for the purpose of inquiring into the cause of restraint of liberty of any person in custody under the authority of a state in violation of the constitution, a law or a treaty of the United States, yet, except in cases of peculiar urgency, ought not to exercise that jurisdiction by a discharge of the person in advance of a final determination of his case in the courts of the state, and, even after such final determination, will leave him to his remedy to review it by writ of error from this court. Ex parte Royall, 117 U. S. 241, 29 L. Ed. 868; Ex parte Fonda, 117 U. S. 516, 29 L. Ed. 994; In re Frederick, 149 U. S. 70, 37 L. Ed. 653; Pepke *v.* Cronan, 155 U. S. 100, 39 L. Ed. 84; Bergemann *v.* Backer, 157 U. S. 655, 39 L. Ed. 845; Whitten *v.* Tomlinson, 160 U. S. 231, 40 L. Ed. 406; Baker *v.* Grice, 169 U. S. 284, 42 L. Ed. 748." Markuson *v.* Doucher, 175 U. S. 184, 186, 44 L. Ed. 124, reaffirmed in Tsukamoto *v.* Lackmann, 187 U. S. 635, 47 L. Ed. 343; Dreyer *v.* Pease, 176 U. S. 681, 44 L. Ed. 637.

In Reid *v.* Jones, 187 U. S. 153, 47 L. Ed. 116, it was said that one convicted for an alleged violation of the criminal statutes of a state, and who contended that he was held in violation of the constitution of the United States, "must ordinarily first take his case to the highest court of the state, in which the judgment could be reviewed, and thence bring it, if unsuccessful there, to this court by writ of error; that only in certain exceptional cases, of which the present is not one, will a circuit court of the United States, or this court upon appeal from a circuit court, intervene by writ of habeas corpus in advance of the final action by the highest court of the state." Urquhart *v.* Brown, 205 U. S. 179, 181, 51 L. Ed. 760, reaffirmed in Spaugh *v.* Fitts, 205 U. S. 540, 51 L. Ed. 921.

38. Ex parte Royall, 117 U. S. 241, 251, 29 L. Ed. 868; New York *v.* Eno, 155 U. S. 89, 39 L. Ed. 80; Minnesota *v.* Brundage, 180 U. S. 499, 502, 45 L. Ed. 639; Reid *v.* Jones, 187 U. S. 153, 154, 47 L. Ed. 116.

If an order of the court of criminal appeals of the state of Texas, being the highest court of the state having jurisdiction of a case, dismissing a writ of habeas corpus issued by one of its judges, and remanding the prisoner to custody, denies to him any right specially set up and claimed by him under the constitution, laws or treaties of the United States, it is reviewable by this court on writ of error. Newport Light Co. *v.* Newport, 151 U. S. 527, 542, 38 L. Ed. 259; Pepke *v.* Cronan, 155 U. S. 100, 101, 39 L. Ed. 84; Tinsley *v.* Anderson, 171 U. S. 101, 105, 43 L. Ed. 91.

claimed and may be were rightly decided, or if not rightly decided, could be reviewed and redressed by a writ of error from this court.[39]

Certain exceptional cases have arisen in which the federal courts have granted the writ in the first instance, as where a citizen or subject of a foreign state is in custody for an act done under the authority of his own government; or an officer of the United States has been arrested under state process for acts done under the authority of the federal government, and there were circumstances of urgency which seemed to demand prompt action on the part of the federal government to secure his release.[40] It is recognized, however, that the power to arrest the due and orderly proceedings of the state courts, or to discharge a prisoner after conviction, before an application has been made to the supreme court of the state for relief, is one which should be sparingly exercised, and should be confined to cases where the facts imperatively demand it.[41] The state courts are as much bound as the federal courts to see that no man is punished in violation of the constitution or laws of the United States; and ordinarily an error in this particular can better be corrected by this court upon a writ of error to the highest court of the state than by an interference, which is never less than unpleasant, with the procedure of the state courts before the petitioner has exhausted his remedy there.[42]

Merely because the petitioner alleges that he is in "straightened circumstances, and without means or power to prosecute a writ of error from the supreme court of the state to the supreme court of the United States, or to employ counsel to present or argue it there, and is informed and believes if he had such means it could not be brought on for hearing before the expiration of his sentence," presents no circumstances to justify a departure from the rule or to relieve from the application of its reasons.[43]

Limitations and Exceptions to General Rule.—But of course the same reasons do not apply when the petitioner is in custody by virtue of the process of a federal court.[44] And although the accused should generally prosecute a writ of error to the state court before invoking the jurisdiction of the circuit court of the United States upon habeas corpus, yet where the case is one which the public interests demand should be speedily determined, this court will proceed to a final

39. Markuson *v.* Doucher, 175 U. S. 184, 44 L. Ed. 124, reaffirmed in Dreyer *v.* Pease, 176 U. S. 681, 44 L. Ed. 637; Tsukamoto *v.* Lackmann, 187 U. S. 635, 47 L. Ed. 343; Bissert *v.* Warden, 183 U. S. 694, 46 L. Ed. 393; Moss *v.* Glenn, 189 U. S. 586, 47 L. Ed. 921; Day *v.* Keepers of State Prison of Montana, 179 U. S. 679, 680, 45 L. Ed. 383; Look *v.* Ross, 189 U. S. 579, 49 L. Ed. 1171.

40. Wildenhus' Case, 120 U. S. 1, 30 L. Ed. 565; In re Loney, 134 U. S. 372, 33 L. Ed. 949; In re Neagle, 135 U. S. 1, 34 L. Ed. 55; Davis *v.* Burke, 179 U. S. 399, 402, 45 L. Ed. 249, reaffirmed in Wimbish *v.* Jamison, 199 U. S. 599, 50 L. Ed. 327.

Some of these authorities also show that there are cases where it is proper to issue a writ of habeas corpus from the federal court instead of awaiting the slow process of a writ of error from this court to the highest court of the state where a decision could be had. Ohio *v.* Thomas, 173 U. S. 276, 284, 43 L. Ed. 699.

One of the grounds for making such a case as this an exception to the general rule laid down in Ex parte Royall, 117 U. S. 241, 29 L. Ed. 868; Whitten *v.* Tomlinson, 160 U. S. 231, 40 L. Ed. 405, and Baker *v.* Grice, 169 U. S. 284, 42 L. Ed. 748, consists in the facts that the federal officer proceeded against in the courts of the state may, upon conviction, be imprisoned as a means of enforcing the sentence of a fine, and thus the operations of the federal government might in the meantime be obstructed. This is such a case. Ohio *v.* Thomas, 173 U. S. 276, 284, 43 L. Ed. 699.

41. Davis *v.* Burke, 179 U. S. 399, 402, 45 L. Ed. 249, reaffirmed in Wimbish *v.* Jamison, 199 U. S. 599, 50 L. Ed. 327.

42. Davis *v.* Burke, 179 U. S. 399, 402, 45 L. Ed. 249, reaffirmed in Wimbish *v.* Jamison, 199 U. S. 599, 50 L. Ed. 327.

43. Markuson *v.* Doucher, 175 U. S. 184, 44 L. Ed. 124, reaffirmed in Dreyer *v.* Pease, 176 U. S. 681, 44 L. Ed. 637; Tsukamoto *v.* Lackmann, 187 U. S. 635, 47 L. Ed. 343; Bissert *v.* Warden, 183 U. S. 694, 46 L. Ed. 393; Moss *v.* Glenn, 189 U. S. 586, 47 L. Ed. 921; Day *v.* Keepers of State Prison of Montana, 179 U. S. 679, 680, 45 L. Ed. 383; Look *v.* Ross, 198 U. S. 579, 580, 49 L. Ed. 1171.

44. In re Lincoln, 202 U. S. 178, 50 L. Ed. 984, opinion of Mr. Justice Brewer in which he reviews the cases at length.

judgment on an appeal from the judgment of the circuit court denying relief on the application.[45]

(3) *Defenses Arising under Act of Congress.*—The question whether a plea sets up a sufficient defense, when the defense relied on arises under an act of congress, does present, and that necessarily, a question of federal law; for the question is and must be, does the plea state facts which under the act of congress constitute a good defense?[46]

(4) *Denial of Rights under National Bank Act*—aa. *In General.*—Where the question is whether the plaintiff in error has been denied by the judgment below any "title, right, privilege, or immunity specially set up or claimed" under the national banking act, this court has jurisdiction.[47]

45. Appleyard *v.* Massachusetts, 203 U. S. 222, 51 L. Ed. 161, distinguishing Ex parte Royall, 117 U. S. 241, 29 L. Ed. 868; Markuson *v.* Doucher, 175 U. S. 184, 44 L. Ed. 124; Minnesota *v.* Brundage, 180 U. S. 499, 502, 45 L. Ed. 639; Reid *v.* Jones, 187 U. S. 153, 47 L. Ed. 116.

46. Mitchell *v.* Clark, 110 U. S. 633, 645, 28 L. Ed. 279.

In Teal *v.* Felton, 12 How. 284, 13 L. Ed. 990, a postmaster relied on an act of congress in defense, and a writ of error was properly granted under the twenty-fifth section of the judiciary act. Distinguished from Bankers' Casualty Co. *v.* Minneapolis, etc., R. Co., 192 U. S. 371, 383, 48 L. Ed. 484.

47. Title, right, privilege or immunity claimed under national bank act.—Peck *v.* Jenness, 7 How. 612, 618, 12 L. Ed. 841; Miller *v.* Lancaster Bank, 106 U. S. 542, 27 L. Ed. 289; California Bank *v.* Kennedy, 167 U. S. 362, 42 L. Ed. 198; Merchants' Nat. Bank *v.* Wehrmann, 202 U. S. 295, 299, 50 L. Ed. 1036.

The decision of a state court denying to a national bank immunity from liability for bank bills issued by a state bank, it appearing that such state bank had subsequently become a national bank under the laws of the United States, presents a federal question. Metropolitan Bank *v.* Claggett, 141 U. S. 520, 35 L. Ed. 841, citing McNulta *v.* Lochridge, 141 U. S. 327, 35 L. Ed. 796.

This court has jurisdiction to review the judgment of a state court, which involves a question whether a national bank is exempted by its charter or an act of congress, from liability to account for bonds purchased by it. Logan County Nat. Bank *v.* Townsend, 139 U. S. 67, 35 L. Ed. 107.

Right to purchase notes secured by real estate.—This court has jurisdiction to re-examine the judgment of a state court involving the right of a national bank to purchase a promissory note secured by a deed of trust upon real estate. A motion to affirm will, however, be granted where that is the only federal question in the case and the decision below is in recognition of the right. Swope *v.* Leffingwell, 105 U. S. 3, 26 L. Ed. 939, citing National Bank *v.* Matthews, 98 U. S. 621, 25 L. Ed. 188; National Bank *v.* Whitney, 103 U. S. 99, 26 L. Ed. 443.

Penalties for taking usury.—Unless the decision of the state court is against a right, title, privilege or immunity set up or claimed under the United States imposing penalties upon national banks for knowingly contracting for and receiving usurious interest, the writ of error will be dismissed. Schuyler Bank *v.* Bollong, 150 U. S. 85, 37 L. Ed. 1008.

Where an action is brought in a state court against a national bank to recover the penalties imposed by the statutes of the United States for knowingly contracting for and receiving usurious interest, and the errors assigned are in substance that the complaint or petition is fatally defective in that it contains no averment negativing the exception to § 5197 of the Revised Statutes, under which national banks might charge the rate of interest permitted to banks of issue organized under state laws, and the questions raised upon the pleadings were disposed of in accordance with the statutory provisions and jurisprudence of the state, and there is nothing whatever to indicate that in passing upon the technical sufficiency of the complaint, its attention was invited to the proposition that by its judgment therein it might be depriving the defendant below of some title, right, privilege or immunity arising in virtue of the sections under which the liability accrued, the writ of error will be dismissed. Schuyler Bank *v.* Bollong, 150 U. S. 85, 37 L. Ed. 1008.

The plaintiff explicitly based his right of action upon §§ 5197 and 5198, U. S. Rev. Stat., authorizing a recovery back of usurious interest from a national bank. The judgment of the trial court, and that of the supreme court of the state, denied such right. It was held, that such judgment presents a federal question which confers jurisdiction upon the supreme court of the United States to review the judgment of the state court. Talbot *v.* Sioux City First National Bank, 185 U. S. 172, 46 L. Ed. 857, affirming Talbot *v.* Sioux City First National Bank, 185 U. S. 182, 46 L. Ed. 857, 862.

Right to make contracts.—Where the question upon which the case turned in

bb. *Showing as to Jurisdiction.*—A showing at every stage of the litigation in the state courts of the intention of a national bank to rely upon the United States banking laws for immunity against liabilities arising out of its ownership of shares in a partnership is sufficient to sustain the appellate jurisdiction of the supreme court of the United States, although the bank did not, in the first instance, anticipate the specific and qualified form in which the immunity finally

the state court was whether a national banking association which, after having duly made and filed its articles of association and organization certificate with the comptroller of the currency, but not having received from him a certificate authorizing him to do banking business, enters with the owner of real estate into a contract of lease, for a term of five years, determinable at the end of any year by either party, of an office to be occupied by the association as a banking office, is bound by the lease, according to its provisions, under the national banking association allowing it to make contracts but prohibiting it from transacting any business, except such as is incidental and necessarily preliminary to its organization until it has been authorized by the comptroller of the currency to commence the business of banking, and the highest state court adjudged that the contract of lease sued on was not incidental and necessarily preliminary to the organization of the corporation and therefore, by virtue of the last clause of § 5190 of the banking act having been executed by the defendant before being authorized by the comptroller of the currency to commence the business of banking, does not bind the defendant, is a decision against a right claimed by him under a statute of the United States, and is therefore reviewable by this court. "If the decision had been the other way, it would, as admitted at the bar, have been a decision against an immunity set up and claimed by the defendant under a statute of the United States, and therefore reviewable by this court on writ of error." Swope *v.* Leffingwell, 105 U. S. 3, 26 L. Ed. 939; Logan County Nat. Bank *v.* Townsend, 139 U. S. 67, 35 L. Ed. 107; Metropolitan Bank *v.* Claggett, 141 U. S. 520, 35 L. Ed. 841; Chemical Bank *v.* Hartford Deposit Co., 161 U. S. 1, 40 L. Ed. 595; McCormick *v.* Market Bank, 165 U. S. 538, 546, 41 L. Ed. 817, reaffirmed in Seeberger *v.* McCormick, 175 U. S. 274, 278, 44 L. Ed. 161; McCreery Realty Corp. *v.* Nat. Bank, 203 U. S. 584, 51 L. Ed. 328.

It was specially set up and claimed by the plaintiff, that, taking the whole section together, the defendant, from the date of filing with the comptroller of the currency its articles of association and its organization certificate, became a corporation empowered to make contracts appropriate to the business of banking; and that any such contracts were valid as between the parties to them, even if they violated the restriction in the last clause of the section, and therefore might afford a reason for which the United States could enforce a forfeiture of the charter. This position of the plaintiff was, in effect, that so far as he was concerned, the bank had power under the statute of the United States to make the contract sued on; and the decision of the highest court of the state, that the statute, rightly construed, did not give such power to the bank, was a decision against the right so specially set up and claimed by the plaintiff under a statute of the United States, and is therefore reviewable by this court. Rev. Stat., § 709; McCormick *v.* Market Bank, 165 U. S. 538, 547, 41 L. Ed. 817.

Penalties imposed on cashier by state law.—This is a writ of error to the supreme court of the state of Vermont, and, as is frequent in writs to the state courts, it is objected that there is no jurisdiction. The plaintiff in error was cashier of a national bank in that state; and the judgment which this writ brings here for review was rendered against him for penalties imposed by a statute of that state, for his refusal to transmit to the clerk of the town of Brattleboro a true list of the shareholders of the bank who resided in that town, with the number of shares held, and the amount paid on said shares. The record shows that "the defendant's counsel claimed in defense, that, as said bank was organized under the law of congress referred to in plaintiff's declaration, the defendant, as such cashier, was amenable to no law but said law of congress, and that the state legislature had not power to prescribe or define his duties as such cashier." Held, this proposition raises a federal question, within the meaning of the act of 1867. Waite *v.* Dowley, 94 U. S. 527, 532, 24 L. Ed. 181.

Transfer of shares.—A. sold to B. shares in a national bank, and signed a transfer on the books of the company, leaving the name of the transferee blank. After it was known that the bank was embarrassed, B. sold the shares to C., an irresponsible person, and filled his name in the blank. A., being subsequently adjudged liable as shareholder under the national banking law in a suit brought by the receiver, paid the judgment and brought suit in the supreme court of Louisiana against B. for neglect of duty in failing to insert his name in the transfer. Held, that the case did not arise under the national banking act, and that

was denied—especially where the highest state court, by a certificate, made part of its record and judgment, stated that the federal question was involved.[5] But where the question decided depends upon general principles of law,[51] or where the decision of the state court rests on two distinct grounds, one a federal ground and another not, and the latter is broad enough to sustain the judgment without deciding any federal question at all,[52] the writ of error will be dismissed.

therefore no federal question was involved. Le Sassier *v.* Kennedy, 123 U. S. 521, 31 L. Ed. 262.

Power to contract.—A decision of a state court that a national bank is forbidden by the national banking act from making a certain contract or agreement, raises a federal question. Logan County Nat. Bank *v.* Townsend, 139 U. S. 67, 35 L. Ed. 107.

Certification of checks.—A federal question is involved in a decision of a state court dealing with the certification of checks by an officer or agent of a national bank, where the person drawing the check has not on deposit an equivalent amount of money to meet the same. Thompson *v.* St. Nicholas Nat. Bank, 146 U. S. 240, 36 L. Ed. 956.

Right to purchase stock.—Where the supreme court of the state decides that a national bank has power under the laws of the United States to become a stockholder in a savings bank, in spite of the averment of the answer that if any stock of the savings bank appeared to have been issued to the national bank, it was issued without authority of law, in view of the fact that the defendant was a national bank, the case presents a federal question, and a motion to dismiss will be denied. California Bank *v.* Kennedy, 167 U. S. 362, 42 L. Ed. 198.

Limitation of action—Liability of stockholders.—A decision of a state court that the statute of limitation commences to run against the liability of a stockholder of a national bank before the amount of such liability has been ascertained and assessed by the comptroller of the currency, when there was delay in making the assessement, involves a federal question, and is reviewable by the supreme court of the United States. Rankin *v.* Barton, 199 U. S. 228, 50 L. Ed. 163.

Right to recover damages from bank directors.—Where the record plainly shows that, both in the trial and appellate courts of the state, an immunity was claimed under § 5239 of the Revised Statutes, prescribing the rules of liability governing the right to recover damages from directors of a national bank, and such immunity is expressly denied by the state court, a motion to dismiss for want of jurisdiction on the ground that no federal question was raised in or decided by the state court, will be denied. Yates *v.* Jones' Nat. Bank, 206 U. S. 158, 51 L. Ed. 1002, citing Schlemmer *v.* Buffalo, etc., R. Co., 205 U. S. 1, 51 L. Ed. 681; Tullock *v.* Mulvane, 184 U. S. 497, 46 L. Ed. 657; Metropolitan Bank *v.* Claggett, 141 U. S. 520, 35 L. Ed. 841; Logan County Nat. Bank *v.* Townsend, 139 U. S. 67, 35 L. Ed. 107.

On the other hand, the fact that the defendants have proposed, but have failed, to effect an organization as a banking association under the laws of the United States, does not bestow a federal character upon their transactions. Seeberger *v.* McCormick, 175 U. S. 274, 280, 44 L. Ed. 161.

50. Merchants' Nat. Bank *v.* Wehrmann, 202 U. S. 295, 50 L. Ed. 1036, citing Marvin *v.* Trout, 199 U. S. 212, 223, 50 L. Ed. 157; Cincinnati, etc., Packet Co. *v.* Bay, 200 U. S. 179, 50 L. Ed. 428.

51. Chemical Nat. Bank *v.* City Bank, 160 U. S. 646, 40 L. Ed. 568.

Gift of bank stock.—A decision by a state court that, as between donor and donee, a valid gift of national bank stock is made by the delivery thereof, without a transfer of the shares on the books of the bank or indorsement on the back of the certificates themselves, rests solely on principles of general law, and involves the disposition of no federal question, although by § 5139, of the Revised Statutes, shares of the capital stock of national banks are declared to be personal property, transferable on the books of the association in such manner as may be prescribed in the by-laws or articles of the association. It does not appear that any title, right, privilege or immunity was specially set up or claimed under a law of the United States and denied by the highest tribunal of the state. "The controversy was merely as to which of the claimants had the superior equity to these shares of stock, and the national banking act was only collaterally involved." Conde *v.* York, 168 U. S. 642, 42 L. Ed. 611; Union Nat. Bank *v.* Louisville, etc., R. Co., 163 U. S. 325, 41 L. Ed. 177; Eustis *v.* Bolles, 150 U. S. 361, 37 L. Ed. 1111; Leyson *v.* Davis, 170 U. S. 36, 42 L. Ed. 939, reaffirmed in Farmers' Nat. Bank *v.* Robinson, 176 U. S. 681, 44 L. Ed. 637.

52. Chemical Nat. Bank *v.* City Bank, 160 U. S. 646, 653, 40 L. Ed. 568; First Nat. Bank *v.* Anderson, 172 U. S. 573, 43 L. Ed. 558.

The individual note of the cashier of a national bank in Chicago, secured by a pledge of the bank's own stock, was sold to a bank in Portage, by authority of the directors of the bank. The note was not paid at maturity, and the Portage bank sued the Chicago bank in assumpsit, de-

(5) *Denial of Rights under Bankrupt Act.*—**In General.**—This court has jurisdiction to review the judgment or decree of a state court denying a right, title or immunity claimed under the bankruptcy act, where such claim was directly presented to and decided by the state court.[53]

claring specially on the note, alleging that it was made by the bank in the cashier's name, and also setting out the common counts. The bank set up as a defense that the purchase of its own stock was illegal, and that money borrowed to pay a debt contracted for that purpose was equally forbidden by Revised Statutes, § 5201. The trial court declined to rule several propositions of law as requested by the Chicago bank and judgment was entered for the Portage bank. The supreme court of Illinois held that the Portage bank was entitled to recover under the common counts, and that it was unnecessary to consider whether the trial court had ruled correctly on the propositions of law submitted to it. Held, that the writ of error would be dismissed, as that court, in rendering such judgment, denied no title, right, privilege, or immunity specially set up or claimed under the laws of the United States. Chemical Nat. Bank *v.* City Bank, 160 U. S. 646, 40 L. Ed. 568.

Although the decision of a state court may deny the right under the national banking act with respect to the right of such banks to charge interest, yet if another question, not federal, has also been raised and decided against such party, and the decision of the latter question is sufficient notwithstanding the federal question, to sustain the judgment, this court will not review the judgment. Union Nat. Bank *v.* Louisville, etc., R. Co., 163 U. S. 325, 41 L. Ed. 177.

Where an action is brought against a national bank and its receiver, to recover money belonging to the plaintiff, received by the defendant from notes transferred to it for collection and remittance, although the petition alleges that the bank was organized under the banking act, and that a receiver was appointed who took possession of the bank's assets and of all trusts and moneys held by it in a fiduciary capacity, and the answer admitted these averments, respecting which there was no controversy, yet if no right to appropriate trust funds was claimed by the defendant under any law of the United States, nor was it asserted that any judgment which might be rendered for plaintiff would be in contravention of any provisions of the banking act, the writ of error will be dismissed, because no federal right was specially set up or claimed at the proper time and in the proper way, nor was any such right in issue and necessarily determined; but the judgment rests on non-federal grounds entirely sufficient to support it. Capital Nat. Bank *v.* First Nat. Bank, 172 U. S. 425, 42 L. Ed. 502, distinguishing California Bank *v.* Kennedy, 167 U. S. 362, 42 L. Ed. 198.

53. Title or right claimed under bankrupt laws.—Mays *v.* Fritton, 131 U. S., appx. cxiv, 21 L. Ed. 127; O'Brien *v.* Weld, 92 U. S. 81, 23 L. Ed. 675; Factors' Ins. Co. *v.* Murphy, 111 U. S. 738, 28 L. Ed. 582; Jenkins *v.* International Bank, 127 U. S. 484, 32 L. Ed. 189; McKenna *v.* Simpson, 129 U. S. 506, 32 L. Ed. 771; Winchester *v.* Heiskell, 119 U. S. 450, 30 L. Ed. 462.

Whether such relations existed between the bankrupt and a third party as discharged him from his obligation to account for an interest in land growing out of a declaration of trust by the bankrupt, made before the bankruptcy, is not a federal question. Roby *v.* Colehour, 146 U. S. 153, 36 L. Ed. 922.

Denial of claim of set-off.—Under the bankrupt act of July 1st, 1898, authorizing appeals in bankruptcy to this court where the decision may have been reviewed by this court on writ of error to state court, the assertion of a claim of set-off in a bankruptcy proceeding, and a denial thereof, involves a federal right reviewable by the circuit court of appeals. Western Tie, etc., Co. *v.* Brown, 196 U. S. 502, 49 L. Ed. 571.

Where a party pleads his discharge in bankruptcy under the bankrupt law of the United States, and the highest court of the state denies him his exemption, the case may be brought to this court under the 25th section of the judiciary act. Linton *v.* Stanton, 12 How. 423, 13 L. Ed. 1050.

The decision of the highest court of the state refusing to enjoin the judgment on the ground that the defendant had been discharged in bankruptcy, raises a federal question. Palmer *v.* Hussey, 119 U. S. 96, 30 L. Ed. 362.

Warrant against marshal for wrongful levy.—This court has jurisdiction to reexamine the judgment of the state court, rendered in a suit against a marshal of the United States upon a warrant sued out in the bankruptcy court, for levying upon goods belonging to a third party, whereby it was held, in a suit against the marshal by reason of such possession, that he had no authority under the laws of the United States so to levy the warrant. Sharpe *v.* Doyle, 102 U. S. 686, 26 L. Ed. 277.

Stay of proceedings pending action in bankruptcy proceedings.—If the highest court of a state denies the application of a bankrupt under § 5106, Rev. Stat., to stay all proceedings in an action against him in

Showing as to Jurisdiction.—Although it does not appear from the opinion of the court of original jurisdiction, or from the opinion of the highest state court, that either court formally passed upon any question of a federal nature, yet if the necessary effect of the decision was to determine adversely to the plaintiff in error the rights and immunities claimed by him in the pleadings and proof, un-

a state court upon a debt provable in bankruptcy, to await the determination of the court in bankruptcy on the question of his discharge, and rendered final judgment against the bankrupt, a writ of error will lie from this court. Hill *v.* Harding, 107 U. S. 631, 27 L. Ed. 493.

Order of sale by bankrupt court.—W. & Co., having recovered judgment in a state court, sued out an execution thereon, which was levied upon the property of the defendant. He was subsequently declared a bankrupt, and an injunction issued by the district court of the United States restraining W. & Co. and the sheriff from disposing of that property. W. & Co. thereupon filed their petition in the latter court, praying that the injunction be so modified as to allow the sheriff to sell. An order was made granting the prayer of the petition, prescribing the time and manner of the sale, and directing that the proceeds should be brought into the district court. This order was served upon the sheriff, who, pursuant thereto, sold the property, and paid the proceeds into court. Held, the question, whether, under the bankrupt act, the district court had authority to make the order, and the decision of the highest state court adverse to that authority, are sufficient to sustain the federal jurisdiction. O'Brien *v.* Weld, 92 U. S. 81, 23 L. Ed. 675.

Effect of discharge in bankruptcy.—If it sufficiently appears that a determination of the question, as to the effect of the discharge in bankruptcy upon the right to enforce a lien upon the property in existence at the time of the commencement of the proceedings in bankruptcy, was necessarily involved in the decision of the supreme court which is here under review, and that this decision was adverse to the right set up by Long, we have jurisdiction. Long *v.* Bullard, 117 U. S. 617, 620, 29 L. Ed. 1004.

Revival of judgment.—Where the question presented to the inferior court of the state upon a petition for judgment of revival, was whether an assignee in bankruptcy was such a representative of the original judgment debtor that a citation might issue to the assignee under the statute of limitations of Louisiana, for the purpose of preventing a judgment, admitted to be valid, from being prescribed within ten years from the time of its rendition, is not reviewable by this court on the ground that it thereby denies a right and immunity claimed by the petitioner under the bankrupt act. "The true construction of the statute of limitations in this respect, as well as the proper manner of reviewing the decision of that question, if erroneous, was a matter of state law and practice, in no way depending upon the constitution of the United States or upon any act of congress." Ludeling *v.* Chaffe, 143 U. S. 301, 305, 36 L. Ed. 313.

Who are parties to bankruptcy proceedings.—This court has jurisdiction to review the judgment of a state court, deciding the question whether a person is a party to a bankruptcy proceeding, so as to be bound by a sale of the property under an order of the district court of the United States in bankruptcy. Factors' Ins. Co. *v.* Murphy, 111 U. S. 738, 28 L. Ed. 582.

Effect of sale under order of bankruptcy court.—This court has jurisdiction in error over the judgment of the supreme court of Louisiana in a suit between citizens of that state for the foreclosure of a mortgage, in which the only controversy related to the effect to be given a sale of property under an order of the bankruptcy court directing the mortgaged property of the bankrupt to be sold free of encumbrances. New Orleans, etc., R. Co. *v.* Delamore, 114 U. S. 501, 506, 29 L. Ed. 244, following Factors' Ins. Co. *v.* Murphy, 111 U. S. 738, 28 L. Ed. 582.

Authority of assignee in bankruptcy.—Jenkins *v.* International Bank, 127 U. S. 484, 32 L. Ed. 189; involved a question as to the authority of the assignee in bankruptcy to institute a suit touching any property or rights of property vested in him after the expiration of two years from the time when the cause of action accrued, and that was held sufficient to sustain the federal jurisdiction. This court has no jurisdiction, under the 25th section of the judiciary act, of a case like the following, namely: Where an assignee of some creditors of a person who had taken the benefit of the bankrupt act of the United States, filed a bill against the bankrupt to set aside the discharge as void upon the ground of fraud, and the defendant demurred to the bill upon the ground of staleness, want of equity, and the statute of limitations, it does not follow that the supreme court of the state, in dismissing the bill, placed any construction whatever upon the bankrupt act; and moreover, if they did, the decision must have been in favor of the privilege set up by the bankrupt and not against it. Calcote *v.* Stanton, 18 How. 243, 15 L. Ed. 348.

Denial of asserted right by trustee.—Where the action is brought by a trustee

der the proceeding in bankruptcy, this court has jurisdiction to review the decision under Revised Statutes, § 709, providing that: "A final judgment or decree in any suit in the highest court of a state where any title, right, privilege or immunity is claimed under the constitution, or any * * * authority exercised under, the United States, and the decision is against the title, right, privilege or immunity specially set up or claimed by either party, under such constitution,

appointed under the bankrupt law of the United States, seeking to recover what is asserted to be an asset of the bankrupt estate under that law, the denial of the asserted right is a denial of a right or title specially claimed under a law of the United States, and presents a federal question. Peck *v.* Jenness, 7 How. 612, 12 L. Ed. 841; Barton *v.* Geiler, 108 U. S. 161, 27 L. Ed. 687; Williams *v.* Heard, 140 U. S. 529, 35 L. Ed. 550; Dushane *v.* Beall, 161 U. S. 513, 40 L. Ed. 791; Stanley *v.* Schwalby, 162 U. S. 255, 40 L. Ed. 960; Rector *v.* City Deposit Bank, 200 U. S. 405, 411, 50 L. Ed. 527; S. C., 200 U. S. 420, 50 L. Ed. 527, 533, distinguishing Cramer *v.* Wilson, 195 U. S. 408, 49 L. Ed. 256.

Exemptions of bankrupt under state statutes.—This court is without authority to review on writ of error the judgment of a state court in accordance with the order of the court of bankruptcy, giving effect to a homestead exemption claimed by the bankrupt, under § 709, U. S. Rev. Stat., on the ground that plaintiff in error is denied a title, right, privilege or immunity under the constitution or authority of the United States specially set up or claimed in the state court. Smalley *v.* Laugenour, 196 U. S. 93, 49 L. Ed. 400, reaffirmed in Delahanty *v.* Pitkin, 199 U. S. 602, 50 L. Ed. 328.

What passes by assignment.—Where the question in a state court was whether, at the date of adjudication in bankruptcy, the claim of the defendant in error for war premiums, passed to their assignees in bankruptcy, as a part of their estate, raises the federal question. "Both parties claim the proceeds of the award, the defendants in error asserting that it did not pass to their assignees in bankruptcy under § 5044 of the Revised Statutes, and the plaintiff in error insisting that the claim was a part of their estate at the date of their adjudication in bankruptcy, and did pass to the assignees under that section of the Revised Statutes. The assignee's claim to the award is based on that section of the statutes; and as the state court decided against him, this court has jurisdiction under § 709, Rev. Stat., to review that judgment; for the decision of the state court was against a 'right' or 'title' claimed under a statute of the United States, within the meaning of that section." Williams *v.* Heard, 140 U. S. 529, 530, 35 L. Ed. 550, distinguished in Cramer *v.* Wilson, 195 U. S. 408, 416, 49 L. Ed. 256.

What passes at assignee's sale.—Whether a deed made by a person prior to his being adjudged a bankrupt left a residuary interest in him which passed to a purchaser at the assignee's sale, is not a federal question, but one arising under the state laws. Cramer *v.* Wilson, 195 U. S. 406, 416, 49 L. Ed. 256.

Promises by bankrupt after discharge.—Promises alleged to have been made by the bankrupt after his discharge are not the subject of jurisdiction under the 25th section. The decision of a state court upon their effect cannot be reviewed by this court. Linton *v.* Stanton, 12 How. 423, 13 L. Ed. 1050.

Refusal to set aside fraudulent sale.—A decree dismissing a bill in chancery brought to recover a debt and set aside an alleged fraudulent sale of property, was, on appeal, reversed, and a decree rendered by the supreme court of the state against the appellee for the amount of the debt, and an execution awarded. Thereupon the appellee who, pending the appeal, and more than three years before the date of the decree, had obtained a discharge in bankruptcy, petitioned the supreme court to set aside its decree, and either permit him to plead his discharge there, or remand the cause, so that he might plead it in the inferior court. The court upon the ground that no new defense could be made there, refused the petition, and permitted the decree to stand as entered. Held, 1. That upon the face of the record proper no federal question was raised. 2. That the action upon the subsequent petition did not place the petitioner in a better position to invoke the jurisdiction of this court. Wolf *v.* Stix, 96 U. S. 541, 24 L. Ed. 640.

What constitutes a fraudulent conveyance.—The question whether any conveyance, etc., made by a bankrupt was in fact made with intent to defraud creditors, when passed upon in the state court, is not one of a federal nature. McKenna *v.* Simpson, 129 U. S. 506, 32 L. Ed. 771; Cramer *v.* Wilson, 195 U. S. 408, 49 L. Ed. 256; Thompson *v.* Fairbanks, 196 U. S. 516, 523, 49 L. Ed. 577.

The decision of the state court as to what should be deemed a fraudulent conveyance does not present any federal question, nor does the application by the court of the evidence in reaching that decision raise one. McKenna *v.* Simpson, 129 U. S. 506, 512, 32 L. Ed. 771.

In McKenna *v.* Simpson, 129 U. S. 506, 32 L. Ed. 771, an assignee in bankruptcy

* * * or authority, may be re-examined and reversed or affirmed in the supreme court upon a writ of error?"[54]

Necessity for Adverse Decision.—But to give this court jurisdiction, under the 3d clause of the 25th section of the judiciary act, the suit must have drawn in question the construction of a statute, etc., of the United States, and the judgment of the state court must have been adverse to the claim set up under it. This court has no jurisdiction where the decision was in their favor.[54a]

resorted to a state court to set aside a conveyance by the bankrupt as in fraud of creditors; but as no question was raised there as to the power of the assignee under the acts of congress, or as to the rights vested in him as assignee, but only as to what should be deemed a fraudulent conveyance and as to the application of the evidence in reaching that decision, we held that the case presented no federal question, and the writ of error was dismissed. Per contra, in O'Brien *v.* Weld, 92 U. S. 81, 23 L. Ed. 675, the question arose whether, under the bankrupt law, the district court had authority to make a certain order, and as the decision of the state court was against such authority, jurisdiction was sustained. Such was also the case in Factors' Ins. Co. *v.* Murphy, 111 U. S. 738, 28 L. Ed. 582, where the effect to be given to a sale of property under an order of a district court was in question, the authority of the court to direct a sale free from incumbrances being denied.

Title of bankrupt.—When the question in a state court is not whether, if the bankrupt had title, it would pass to his assignee, but whether he had title at all, and the state court decided that he had not, no federal question is presented. Cramer *v.* Wilson, 195 U. S. 408, 416, 49 L. Ed. 256, citing Scott *v.* Kelley, 22 Wall. 57, 22 L. Ed. 729; McKenna *v.* Simpson, 129 U. S. 506, 32 L. Ed. 771.

Acts to prevent adjudication in bankruptcy.—Where the case, as presented by the pleadings is that the defendant in error owning stock in and having a debt against the corporation, commenced proceedings in bankruptcy to wind up its affairs, and the plaintiffs in error fearing that he would be successful in his application, and believing that their interests would be injuriously affected if he was, preferred to assume his debt and purchase his stock in the hope thereby of saving themselves, it was held, that this presented no federal question. Plaintiffs in error claimed no title, right, privilege or immunity, under the bankrupt law, but only that the defendant in error avails himself of his rights under that law to force them to execute the note sued upon in order to avoid an adjudication of bankruptcy against the corporation, in the existence and prosperity of which they were largely interested. Norden *v.* Washburn, 131 U. S. 145, 24 L. Ed. 247.

Where the dispute in the court below was as to the existence of the lien at the time of the commencement of the proceeding in bankruptcy, and that depends entirely on the state laws, as to which the judgment of the state court is final, this court has no jurisdiction. Long *v.* Bullard, 117 U. S. 617, 621, 29 L. Ed. 1004.

Jurisdiction as to questions of limitation as affected by fraud.—Where the record shows that the plaintiffs in error disputed the validity of a transfer to the defendant in error of the property in controversy, made to him by a trustee in bankruptcy, appointed under and deriving his authority from the bankrupt act, and where the question is made whether the suit is barred by the limitation prescribed by the same act, the jurisdiction of the supreme court to decide these questions is clear. Traer *v.* Clews, 115 U. S. 528, 29 L. Ed. 467, citing Factors' Ins. Co. *v.* Murphy, 111 U. S. 738, 28 L. Ed. 582; New Orleans, etc., R. Co. *v.* Delamore, 114 U. S. 501, 29 L. Ed. 244.

Limitation of suits between assignee and adverse claimant.—Where the state court decides that § 5057 of the Revised Statutes, which prescribes the two years limitation over suits between an assignee in bankruptcy and a person claiming any adverse interest touching any property or rights of property transferable to or vested in such assignee, does not preclude the assignees in bankruptcy from asserting rights against the plaintiff in error, but precludes him from asserting rights against them, this is a denial of a right under a statute of the United States claimed by the plaintiff in error, and therefore a motion to dismiss will be overruled. Hammond *v.* Whittredge, 204 U. S. 538, 51 L. Ed. 606.

54. Roby *v.* Colehour, 146 U. S. 153, 36 L. Ed. 922.

54a. Strader *v.* Baldwin, 9 How. 261, 13 L. Ed. 130; Calcote *v.* Stanton, 18 How. 243, 15 L. Ed. 348; Linton *v.* Stanton, 12 How. 423, 13 L. Ed. 1050.

Where the defendant pleaded his discharge under the bankrupt act of 1841 passed by congress, and the plea was allowed, the plaintiff cannot bring the case to this court to be reviewed, under the twenty-fifth section of the judiciary act. The defendant pleaded a privilege or exemption under a statute of the United

(6) *Denial of Right to Remove Causes to Federal Courts*—aa. *In General.*—Where a right of removal under the act of congress is claimed by the defendant and the decision is against the right, this presents a federal question and gives us jurisdiction.[55] Where a state court refuses to allow a removal, and the federal

States, and the decision was in favor of it. The case, must, therefore, be dismissed, for want of jurisdiction. Strader *v.* Baldwin, 9 How. 261, 13 L. Ed. 130.

Where the highest court of a state decided in favor of a defendant who pleaded his discharge under the bankrupt law of the United States, and the case was brought to this court under the 25th section of the judiciary act, this court has no jurisdiction. It would have been otherwise if the decision had been adverse to the exemption claimed under the law of congress. Promises alleged to have been made by the bankrupt after his discharge are not the subject of jurisdiction under the 25th section. The decision of a state court upon their effect cannot be reviewed by this court. Linton *v.* Stanton, 12 How. 423, 13 L. Ed. 1050.

Strader v. Baldwin criticised.—In Strader *v.* Baldwin, 9 How. 261, 13 L. Ed. 130, indeed, under the like provision of a former bankrupt act, where a bankrupt, being sued upon a debt, pleaded his discharge, and the plaintiff replied that the debt was contracted while acting in a fiduciary capacity, and the decision of the state court was in favor of the defendant, this court held, that it had no jurisdiction, because the decision below was in favor of the right set up by the defendant. But the court there failed to notice that the decision, while in favor of the right or immunity, set up by the defendant, of a discharge under the bankrupt act, was also against the right or immunity, set up by the plaintiff, under the clause excepting fiduciary debts, from the effect of that discharge. And the case has accordingly been overruled in similar cases arising under the recent bankrupt act, in which this court has taken jurisdiction, not only when the writ of error was sued out by the defendant—Neal *v.* Clark, 95 U. S. 704, 24 L. Ed. 586—but also when it was sued out by the plaintiff, because, as was said by Chief Justice Waite, in delivering judgment in the latest case upon this point, the plaintiff "specially set up and claimed an immunity, under § 5117 of the Revised Statutes from the operation of the discharge in bankruptcy, because of the fraudulent and fiduciary character of his debt, and the decision was against him. Hennequin *v.* Clews, 111 U. S. 676, 28 L. Ed. 565; Palmer *v.* Hussey, 119 U. S. 96, 98, 30 L. Ed. 362." McCormick *v.* Market Bank, 165 U. S. 538, 546, 41 L. Ed. 817.

55. Oakley *v.* Goodnow, 118 U. S. 43, 44, 30 L. Ed. 61; Kanouse *v.* Martin, 15 How. 198, 14 L. Ed. 660; Chappell *v.* Waterworth, 155 U. S. 102, 39 L. Ed. 85.

All issues of fact made upon the petition for removal must be tried in the circuit court, but the state court is at liberty to determine for itself whether, on the face of the record, a removal has been effected. If it decides against the removal and proceeds with the cause notwithstanding the petition, its ruling on that question will be reviewable here after final judgment under § 709 of the Revised Statutes. Removal Cases, 100 U. S. 457, 472, 25 L. Ed. 593; Railroad Co. *v.* Mississippi, 102 U. S. 135, 141, 26 L. Ed. 96; Kerr *v.* Huidekoper, 103 U. S. 485, 26 L. Ed. 354; Railroad Co. *v.* Koontz, 104 U. S. 5, 15, 26 L. Ed. 643; Chesapeake, etc., R. Co. *v.* White, 111 U. S. 134, 137, 28 L. Ed. 378, 379; Stone *v.* South Carolina, 117 U. S. 430, 432, 29 L. Ed. 962.

Where a motion was made under the 12th section of the judiciary act to remove a cause from a state court to the circuit court of the United States, notwithstanding which the state court retained cognizance of the case, and it was ultimately brought to this court under the 25th section of the judiciary act, a motion to dismiss it for want of jurisdiction cannot be sustained. The question will remain to be decided upon the full hearing of the case. Kanouse *v.* Martin, 15 How. 198, 14 L. Ed. 660.

The plaintiff in error claimed the right to remove this cause from the state court to the circuit court of the United States, under the 12th section of the judiciary act of 1789. The right claimed was denied by the state court, which retained the case, and proceeded to give a final judgment against him. It is therefore precisely one of the cases enumerated in the 25th section of the act of 1789, in which jurisdiction is conferred upon this court, and in which the judgment of the state court may be reviewed upon writ of error. For the construction of an act of congress was drawn in question, and the decision of the court was against the right claimed under it, by the plaintiff in error. Kanouse *v.* Martin, 15 How. 198, 14 L. Ed. 660.

A person was sued in the territorial court of Florida. After the admission of Florida as a state, the case was transferred to a state court. The defendant appeared, and pleaded the general issue. The verdict was given against him. He then moved in arrest of judgment, upon the ground that the case ought to have been transferred to the district court of

court on the other hand denies a motion to remand, the supreme court has jurisdiction and will determine whether there was error on the part of the state court in retaining the case.[56]

But where the defendant did not apply for the removal of the cause, no right claimed under an act of congress could have been denied him by the state court.[57]

the United States, instead of a state court. The motion was overruled, and judgment entered up against him. Upon an appeal to the supreme court of Florida, this judgment was affirmed. This court has no jurisdiction under the 25th section of the judiciary act, to review that decision. As it does not appear, therefore, that the supreme court of the state must have decided adversely to the party now claiming the interposition of this court, and decided so upon the construction of an act of congress, the writ of error must be dismissed for want of jurisdiction. Carter *v.* Bennett, 15 How. 354, 14 L. Ed. 727.

Where, in a suit pending before it a state court dissolves an injunction (previously granted by it on an allegation by the mortgagor, that the mortgagee had agreed to give him further time) against proceeding to sell mortgaged premises, under a foreclosure already had, and after such dissolution—the effect of which is, of course, to leave in force a final decree of sale—an alien defendant petitions for a removal into the circuit court under the act of July 27th, 1866, "for the removal of causes in certain cases from state courts," and the state court refuses to grant that petition, the defendant not excepting, and the case is afterwards taken to the supreme court on an appeal from the decree dissolving the injunction, no jurisdiction exists here to review the judgment of the supreme court under § 709 of the Revised Statutes, and on the ground that a right, title, privilege, or immunity has been claimed under a statute of the United States, and that a decision of the highest court of the state where a decision could be had has been against it. The refusal of the state court to grant a removal under the act of congress not having been excepted to, and that matter not having been involved in what was before the supreme court, its judgment cannot be held to have embraced it, nor indeed anything but the matter of the dissolution of the injunction; a matter which involved no federal question. Fashnacht *v.* Frank, 23 Wall. 416, 23 L. Ed. 81.

But merely because a suit against a railroad company to recover for personal injuries might have been brought in the circuit court of the United States, or removed thereto from the state court on the ground that it was one arising under the laws of the United States, in that the railroad company was a corporation organized under and by virtue of acts of congress, it does not follow that the state court decided against any title, right, privilege, or immunity in exercising its jurisdiction. Texas, etc., R. Co. *v.* Johnson, 151 U. S. 81, 38 L. Ed. 81.

The record.—The question whether, admitting the facts stated in the petition for removal to be true, it appears on the face of the record, which includes the petition, and the pleading and proceedings down to that time, that the petitioner is entitled to a removal of the suit, the state court has the right to decide for itself, and if it errs in keeping the case, and the highest court of the state affirms its decision, this court has jurisdiction to correct the error, considering, for that purpose, only the part of the record which ends with the petition for removal. Stone *v.* South Carolina, 117 U. S. 430, 29 L. Ed. 962.

But even though the state court should refuse to stop proceedings, the petitioning party may enter a copy of the record of that court, as it stood on the filing of his petition, in the circuit court, and have the suit docketed there. If the circuit court errs in taking jurisdiction, the other side may bring the decision here for review, after final judgment or decree, if the value of the matter in dispute is sufficient in amount. Railroad Co. *v.* Koontz, 104 U. S. 5, 15, 26 L. Ed. 643.

In that case, the same as in the writ of error to the state court, the question will be decided on the face of the part of the record of the state court which ends with the petition for removal; for the circuit court can no more take a case until its jurisdiction is shown by the record than the state court can be required to let it go until the record shows that its jurisdiction has been lost. The questions in the two courts will be identical, and will depend on the same record; namely, that in the state court ending with the petition for removal. The record remaining in the state court will be the original; that in the circuit court an exact copy. Burlington, etc., R. Co. *v.* Dunn, 122 U. S. 513, 516, 30 L. Ed. 1159.

56. Missouri, etc., R. Co. *v.* Com'rs, 183 U. S. 53, 46 L. Ed. 78, citing Removal Cases, 100 U. S. 457, 25 L. Ed. 593; Stone *v.* South Carolina, 117 U. S. 430, 29 L. Ed. 962; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 40 L. Ed. 536.

57. Northern Pac. R. Co. *v.* Austin, 135 U. S. 315, 34 L. Ed. 218.

Where Petition for Removal Was Defective.—Nor has this court jurisdiction to review the decision of the highest state court affirming the ruling of the trial court denying a petition for removal of the cause from a state to a federal court, where the petition for removal is clearly defective.[58]

Harmless Error.—Where the motion of a party to an action in a state court for its removal to the circuit court of the United States is denied, and the party, nevertheless, files the record in the circuit court, and the circuit court proceeds to final hearing, the state court suspending all action, and remands the case to the state court, the party is not prejudiced by the refusal, and the error in that regard, if any, is immaterial.[59]

And the denial by a state court of an application to amend a petition for removal is not the denial of any right secured by the constitution of the United States.[60]

Motion to Dismiss.—Where a motion was made, under the 12th section of the judiciary act, to remove a cause from a state court to the circuit court of the United States, notwithstanding which, the state court retained cognizance of the case, and it was ultimately brought to this court under the 25th section of the judiciary act, a motion to dismiss it for want of jurisdiction cannot be sustained. The question will remain to be decided upon the full hearing of the case.[61]

bb. *Effect of Act of March 3, 1887.*—As under the act of March 3, 1887, a remanding order of the circuit court is not reviewable by this court on appeal or writ of error from or to that court, so it would seem to follow that it cannot be reviewed on writ of error to a state court, the prohibition being that "no appeal or writ of error from the decision of the circuit court remanding such cause shall be allowed."[62] And it is entirely clear that a writ of error cannot be maintained under § 709 in respect of such an order where the state court has rendered no decision against a federal right but simply accepted the conclusion of the circuit court.[63] The action of a circuit court in remanding a cause to a state court after its removal on the first application is not open to revision on writ of error from this court to a state court.[64] But if a state court proceeds

58. Pennsylvania Co. *v.* Bender, 148 U. S. 225, 37 L. Ed. 441, distinguishing Kanouse *v.* Martin, 15 How. 198, 14 L. Ed. 660.

59. Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 40 L. Ed. 536.

60. Crehore *v.* Ohio, etc., R. Co., 131 U. S. 240, 33 L. Ed. 144; Pennsylvania Co. *v.* Bender, 148 U. S. 255, 37 L. Ed. 441; Stevens *v.* Nichols, 157 U. S. 370, 39 L. Ed. 736.

61. Kanouse *v.* Martin, 15 How. 198, 14 L. Ed. 660.

62. Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 582, 40 L. Ed. 536, reaffirmed in Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179; Nelson *v.* Moloney, 174 U. S. 164, 43 L. Ed. 934.

"Under the act of congress of March 3, 1887, c. 373, 24 Stat. 552, 553, as re-enacted for the purpose of correcting the enrollment, by the act of August 13, 1888, c. 866, 25 Stat. 433, 435, is the order of the circuit court remanding the cause to the state court open to review on this writ of error? If not, then we cannot take jurisdiction to revise the proceedings of the state court. Nor can the inquiry be affected by the fact that a motion to remand had been previously made and denied. That order was subject to reconsideration, as the question of jurisdiction always is, until final judgment, and, indeed, it was the duty of the circuit court under the statute, if it appeared at any time that jurisdiction was lacking, to dismiss or remand as justice might require. 18 Stat. 470, c. 137, § 5." Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 580, 40 L. Ed. 536, reaffirmed in Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179.

63. Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 583, 40 L. Ed. 536, reaffirmed in Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179; Nelson *v.* Moloney, 174 U. S. 164, 43 L. Ed. 934.

64. Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 40 L. Ed. 536; Whitcomb *v.* Smithson, 175 U. S. 635, 637, 44 L. Ed. 303; McGilvray *v.* Knott, 179 U. S. 680, 45 L. Ed. 383.

Where a petition for the removal of a cause from a state to a federal court is filed on the ground of diverse citizenship, and is denied by the state court, but it is not claimed that the state court denied the petition, but on the contrary it is conceded that the record was transmitted to the circuit court and that that court, on motion, remanded the cause to the state court because there was no separate controversy between citizens of different states, this being so, the proceedings in relation to the removal of the cause af-

to judgment in a cause notwithstanding an application for removal, its ruling in retaining the case will be reviewable here after final judgment under § 709 of the Revised Statutes.[65]

(7) Denial of Full Faith and Credit to Judgments, Records and Judicial Proceedings of Sister States.—**In General.**—The question whether due faith and credit has been denied by one state to the public acts, records and judicial proceedings of another state is a federal question of which this court has jurisdiction.[66]

forded no ground for the issue of a writ of error. Nelson *v.* Moloney, 174 U. S. 164, 43 L. Ed. 834, following Missouri, etc., R. Co. *v.* Fitzgerald, 160 U. S. 556, 40 L. Ed. 536.

Where a state court refuses to remove a case pending before it to the United States court, and upon denial of the motion, the movant files the record in the circuit court of the United States, which court remands the cause to the state court, if error is committed in the ruling of the state court, it becomes wholly immaterial. Telluride, etc., Co. *v.* Rio Grande, etc., R. Co., 187 U. S. 569, 47 L. Ed. 307, reaffirmed in Dakota, etc., R. Co. *v.* Crouch, 203 U. S. 582, 51 L. Ed. 327, citing Missouri Pac. Railway *v.* Fitzgerald, 160 U. S. 556, 40 L. Ed. 536.

65. Stone *v.* South Carolina, 117 U. S. 430, 29 L. Ed. 962; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 582, 40 L. Ed. 536, reaffirmed in Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179; Southern R. Co. *v.* Allison, 190 U. S. 326, 330, 47 L. Ed. 1078, reaffirmed in Southern R. Co. *v.* Beach, 193 U. S. 667, 668, 48 L. Ed. 839.

So far as the mere question of the forum was concerned, congress was manifestly of opinion that the determination of the circuit court that jurisdiction could not be maintained should be final, since it would be an uncalled for hardship to subject the party who, not having sought the jurisdiction of the circuit court, succeeded on their merits in the state court, to the risk of the reversal of his judgment, not because of error supervening on the trial, but because a disputed question of diverse citizenship had been erroneously decided by the circuit court; while as to application for removal on the ground that the cause arose under the constitution, laws, or treaties of the United States, that this finality was equally expedient, as questions of the latter character, if decided against the claimant, would be open to revision under § 709, irrespective of the ruling of the circuit court in that regard in the matter of removal. Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 583, 40 L. Ed. 536, reaffirmed in Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179.

66. Green *v.* Van Buskirk, 5 Wall. 307, 311, 18 L. Ed. 599; Crapo *v.* Kelly, 16 Wall. 610, 619, 21 L. Ed. 430; Dupasseur *v.* Rochereau, 21 Wall. 130, 134, 22 L. Ed. 588; Crescent City Live Stock Co. *v.* Butchers' Union Slaughter-House Co., 120 U. S. 141, 147, 30 L. Ed. 614; Cole *v.* Cunningham, 133 U. S. 107, 33 L. Ed. 538; Carpenter *v.* Strange, 141 U. S. 87, 103, 35 L. Ed. 640; Huntington *v.* Attrill, 146 U. S. 657, 666, 36 L. Ed. 1123; Laing *v.* Rigney, 160 U. S. 531, 40 L. Ed. 525; Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 44 L. Ed. 619; Jacobs *v.* Marks, 182 U. S. 583, 587, 45 L. Ed. 1241, citing and approving Green *v.* Van Buskirk, 5 Wall. 307, 314, 18 L. Ed. 599; Carpenter *v.* Strange, 141 U. S. 87, 103, 35 L. Ed. 640, and Huntington *v.* Attrill, 146 U. S. 657, 684, 36 L. Ed. 1123; Andrews *v.* Andrews, 188 U. S. 14, 47 L. Ed. 366; Eastern Bldg., etc., Ass'n *v.* Williamson, 189 U. S. 122, 125, 47 L. Ed. 735; Blount *v.* Walker, 134 U. S. 607, 33 L. Ed. 1036.

The refusal of the state court in which a suit growing out of a seizure and sale of personal property under an attachment issuing from a part of the state where the property is, may be tried, to give to the proceedings of the court, under which the property was sold, the same effect in their operation upon the title, as they have by law and usage in the state where they took place, constitutes a proper case for review in this court, under the 25th section of the judiciary act. Green *v.* Van Buskirk, 5 Wall. 307, 18 L. Ed. 599.

Where a state court denies full faith and credit to the insolvency proceedings had in another state, this court has jurisdiction to review its judgment. Crapo *v.* Kelly, 16 Wall. 610, 21 L. Ed. 430.

Judgments for penalties.—A bill in equity in one state to set aside a conveyance of property made in fraud of creditors, and to charge it with the payment of a judgment since recovered by the plaintiff against the debtor in another state upon his liability as an officer in a corporation under a statute of that state, set forth the judgment and the cause of action on which it was recovered; and also asserted, independently of the judgment, an original liability of the defendant as a stockholder and officer in that corporation before the conveyance. The highest court of the state declined to entertain the bill by virtue of the judgment, because it had been recovered in another state in an action for penalty; or to maintain the bill on the original liability, for various reasons. Held, that the question whether due faith and credit were thereby denied to the judgment was a federal question, of which

And where a state court refuses to give effect to the judgment of a court of another state, it refuses to give full faith and credit to that judgment, and gives the United States supreme court jurisdiction.[67]

Principles of General Law.—But when the decision of a state court holding a contract valid or void is made upon the general principles by which courts determine whether a consideration is good or bad on principles of public policy, no question arises under the provision of the constitution respecting the faith and credit to be given in each state to the public acts, records, and judicial proceedings of another state, and this court cannot review the decision.[68]

Violation of Rule of Precedents.—The fourth article of the constitution of the United States, which declares, that, "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," cannot, by any just construction of its words, be held to embrace an alleged error in a decree of a state court, asserted to be in collision with a prior decision of the same court, in the same case.[69]

Where a judgment of another state is pleaded in defense, and issue is made upon it, it may well be ruled that that sets up a right under the third subdivision, because the effect of the judgment is the only question in the case.[70]

Construction of State Statutes.—Where the validity of a state law is not drawn in question but merely its construction, no federal question arises, and even though the construction is erroneous, full faith and credit is not denied to the statute.[71] The mere construction by a state court of a statute of another

this court had jurisdiction on writ of error. Huntington *v.* Attrill, 146 U. S. 657, 36 L. Ed. 1123.

Title under judicial sale in another state.—Where the plaintiff in error in his complaint unquestionably sets up a right to recover as the result of a judicial sale made under decrees, both in courts of the United States and of a state, federal questions exist in the record, and a motion to dismiss will be denied. Commercial Pub. Co. *v.* Beckwith, 188 U. S. 567, 47 L. Ed. 598.

67. Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 311, 47 L. Ed. 480, reaffirmed in Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

68. Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615, 30 L. Ed. 519.

Suit was brought in a state court by a ferry company against a railroad to recover damages for not employing the ferry company for the transportation of persons and property across the river, as by its contract it was bound to do. The defendant pleaded that it had no power to make the contract; that the same was in violation of the laws of Illinois, contrary to the public policy thereof and was void. The statutes were put in evidence, but their construction and operative effect were disputed. The supreme court of the state held that the contract was interpreted correctly by the court below, and that it was not ultra vires, contrary to public policy, or in restraint of trade. It was argued here by the railroad company that by law and usage of Illinois, the charter of the company in that state made the contract ultra vires. Held, that no proof having been offered to support the averment that the contract was in violation of the laws of Illinois, the defense relying on the general claim that the contract was illegal, it was held, that no federal question was involved, and the case was dismissed. It should have appeared on the face of the record that the facts presented for adjudication made it necessary for the court to consider the act of incorporation in view of the peculiar jurisprudence in Illinois, rather than the general law of the land. Allen *v.* Alleghany Co., 196 U. S. 458, 463, 49 L. Ed. 551, following Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615, 30 L. Ed. 519.

69. Mitchell *v.* Lenox, 14 Pet. 49, 10 L. Ed. 349.

70. Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 311, 47 L. Ed. 480, reaffirmed in Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

71. Glenn *v.* Garth, 147 U. S. 360, 37 L. Ed. 203, reaffirmed in Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171; Lloyd *v.* Matthews, 155 U. S. 222, 38 L. Ed. 128; Banholzer *v.* New York Life Ins. Co., 178 U. S. 402, 406, 44 L. Ed. 1124; Johnson *v.* New York Life Ins. Co., 187 U. S. 491, 47 L. Ed. 273; Eastern Bldg., etc., Ass'n *v.* Williamson, 189 U. S. 122, 125, 47 L. Ed. 735.

state without questioning its validity, does not, with possibly some exceptions, deny to it the full faith and credit demanded by the statute in order to give this court jurisdiction.[72] Every decision regarding the proper construction of the statute of another state does not involve a federal question. Where the case turns upon the construction and not the validity of the statute, a decision of that question is not necessarily of a federal character.[73] It depends upon the particular facts of each case and the manner in which they are presented as to how far decisions of one state court regarding the construction and validity of the statutes of another state, present questions coming under the rule requiring one state to give full faith and credit to the public acts, records and judicial proceedings of another state, and hence presenting federal questions reviewable by the court.[74] "If every time the court of a state put a construction upon the statutes of another state, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated."[75]

Presumption as to Foreign Laws.—An assignment of error that full faith and credit has been denied to the laws of a sister state and to the construction

72. Glenn *v.* Garth, 147 U. S. 360, 37 L. Ed. 203; Lloyd *v.* Matthews, 155 U. S. 222, 38 L. Ed. 128; Banholzer *v.* New York Life Ins. Co., 178 U. S. 402, 44 L. Ed. 1124; Johnson *v.* New York Life Ins. Co., 187 U. S. 491, 47 L. Ed. 273; Finney *v.* Guy, 189 U. S. 335, 47 L. Ed. 839; Allen *v.* Alleghany Co., 196 U. S. 458, 464, 49 L. Ed. 551.

As was remarked in Glenn *v.* Garth, 147 U. S. 360, 368, 37 L. Ed. 203: "If every time the courts of a state put a construction upon the statutes of another state, this court may be required to determine whether that construction was or was not correct, upon the ground that if it were concluded that the construction was incorrect, it would follow that the state courts had refused to give full faith and credit to the statutes involved, our jurisdiction would be enlarged in a manner never heretofore believed to have been contemplated." Grand Gulf, etc., R. Co. *v.* Marshall, 12 How. 165, 13 L. Ed. 938; Cook County *v.* Calumet, etc., Canal Co., 138 U. S. 635, 34 L. Ed. 1110; Lloyd *v.* Matthews, 155 U. S. 222, 227, 38 L. Ed. 128.

A decision by the state court of Minnesota that the notice required by the laws of New York in order to justify a forfeiture for nonpayment of insurance premiums, is not required on the maturity of a premium note for an installment, does not deny the validity of the New York statute in regard to insurance, in order to give this court jurisdiction to review on writ of error to the state court; it only construes the statute. Banholzer *v.* New York Life Ins. Co., 178 U. S. 402, 406, 44 L. Ed. 1124.

The decision of a state court holding that contracts made by a corporation in another state which had failed to comply with the state regulations, were not ipso facto void, but may be enforced, is not reviewable by this court on writ of error to a state court. There is no denial of the validity of a statute involved, but only the construction placed thereon. Allen *v.* Alleghany Co., 196 U. S. 458, 49 L. Ed. 551.

A judgment of the highest court of a state, that a plea does not show that a note was given to a foreign corporation doing business in another state, in violation of the statutory conditions on which its right to do business there depended, presents a local question, and no federal question is involved therein, in order to give the court jurisdiction. Allen *v.* Alleghany Co., 196 U. S. 458, 49 L. Ed. 551.

73. Johnson *v.* New York Life Ins. Co., 187 U. S. 491, 496, 47 L. Ed. 273; Finney *v.* Guy, 189 U. S. 335, 340, 47 L. Ed. 839.

74. Finney *v.* Guy, 189 U. S. 335, 47 L. Ed. 839.

75. Glenn *v.* Garth, 147 U. S. 360, 368, 37 L. Ed. 203.

Where a state court fully considers statutes of another state and the decisions of that state construing them, but decides that the statute is not applicable to the case before it, it does not deny full faith and credit to the laws of such other state, and whether the construction placed upon the statutes is the correct one or not is not a federal question. "To hold otherwise would render it possible to bring to this court every case wherein the defeated party claimed that the statute of another state had been construed to his detriment." Johnson *v.* New York Life Ins. Co., 187 U. S. 491, 47 L. Ed. 273, citing Banholzer *v.* New York Life Ins. Co., 178 U. S. 402, 44 L. Ed. 1124; Glenn *v.* Garth, 147 U. S. 360, 37 L. Ed. 203; Lloyd *v.* Matthews, 155 U. S. 222, 38 L. Ed. 128.

of such laws by the highest court of that state, cannot be sustained where the court proceeded on the presumption that the rules of the common law prevailed in such state and decided accordingly, the plaintiff in error having failed to plead and prove such foreign laws.[76]

Liability Must Have Passed into Judgment.—If a suit on the original liability under the statute of one state is brought in a court of another state, the constitution and laws of the United States have not authorized its decision upon such a question to be reviewed by this court.[77] But if the original liability has passed into judgment in one state, the courts of another state, when asked to enforce it, are bound by the constitution and laws of the United States to give full faith and credit to the judgment, and if they do not, their decision may be reviewed and reversed by this court on writ of error. The essential nature and real foundation of a cause of action, indeed, are not changed by recovering judgment upon it.[78]

Determination of Question.—This court will determine for itself whether a judgment, order or decree of one state has the effect of denying full faith and credit to the public acts, records and judicial proceedings of another.[79]

Determination of Nature and Validity of Liability.—If a suit to enforce a judgment rendered in one state and which has not changed the essential nature of the liability, is brought in the courts of another state, this court, in order to determine, on writ of error, whether the highest court of the latter state has given full faith and credit to the judgment, must determine for itself whether the original cause of action is penal in the international sense.[80] The case, in this regard, is analogous to one arising under the clause of the constitution which forbids a state to pass any law impairing the obligation of contracts, in which, if the highest court of a state decides nothing but the original construction and obligation of a contract, this court has no jurisdiction to review its decision; but if the state court gives effect to a subsequent law, which is impugned as impairing the obligation of a contract, this court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is.[81] So if the state court, in an action to enforce the original liability under the law of another state, passes upon the nature of that liability and nothing else, this court cannot review its decision; but if the state court declines to give full faith and credit to a judgment of another state, because of its opinion as to the nature of the cause of action on which the judgment was recovered, this court, in determining whether full faith and credit have been

76. Lloyd *v.* Matthews, 155 U. S. 222, 38 L. Ed. 128.

77. New York Life Ins. Co. *v.* Hendren, 92 U. S. 286, 23 L. Ed. 709; Roth *v.* Ehman, 107 U. S. 319, 27 L. Ed. 499; Huntington *v.* Attrill, 146 U. S. 657, 683, 36 L. Ed. 1123.

78. Huntington *v.* Attrill, 146 U. S. 657, 683, 36 L. Ed. 1123.

79. Great Western Telegraph Co. *v.* Purdy, 162 U. S. 329, 40 L. Ed. 986, citing Armstrong *v.* The Treasurer, 16 Pet. 281, 285, 10 L. Ed. 965; Texas, etc., R. Co. *v.* Southern Pac. Co., 137 U. S. 48, 34 L. Ed. 614; Grover & Baker Sewing Machine Co. *v.* Radcliffe, 137 U. S. 287, 34 L. Ed. 670; Carpenter *v.* Strange, 141 U. S. 87, 35 L. Ed. 640; Huntington *v.* Attrill, 146 U. S. 657, 666, 683, 686, 36 L. Ed. 1123; Rogers *v.* Alabama, 192 U. S. 226, 130, 48 L. Ed. 417.

Where in an action brought by a corporation against a subscriber for shares, to recover an assessment thereon under an order of assessment made by a court of that state upon all the stockholders, the plaintiff in error relied on the order of assessment made by a court of another state, as being entitled to the effect of being conclusive evidence of the defendant in error's right to maintain an action against the plaintiff in error, but the state court denies it that effect, the question whether that court thereby declined to give full faith and credit to a judicial proceeding of a court of another state, as required by the constitution and laws of the United States, is necessarily involved in the decision. Great Western Telegraph Co. *v.* Purdy, 162 U. S. 329, 40 L. Ed. 986.

80. Huntington *v.* Attrill, 146 U. S. 653, 683, 36 L. Ed. 1123.

81. New Orleans Waterworks Co. *v.* Louisiana Sugar Co., 125 U. S. 18, 38, 31 L. Ed. 607; Huntington *v.* Attrill, 146 U. S. 653, 684, 36 L. Ed. 1123.

given to that judgment, must decide for itself the nature of the original liability.[82]

Showing as to Jurisdiction.—In order to give this court the power to revise the judgment of a state court on the ground that it has refused to give full faith and credit to the records and judicial proceedings of another state, as required by the federal constitution, it must appear from the transcript, filed by the plaintiff in error, that the point on which he relies was made in the state court, and decided against him; and that this section of the constitution was brought to the notice of the state court, and the right which he now claims he claimed under it.[83] It is a necessary and well-settled rule that the exercise of jurisdiction by the United States supreme court to protect constitutional rights cannot be declined when it is plain that the fair result of a decision is to deny the rights.[84] On the same ground, there can be no doubt that if full faith and credit were denied to a judgment rendered in another state upon a suggestion of want of jurisdiction, without evidence to warrant the finding, the United States supreme court would enforce the constitutional requirement.[85]

Authentication of Record.—To bring a case here under the 25th section of the judiciary act, on the ground that the provision of the constitution which ordains that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," has been violated by a refusal of the highest state court to give proper effect to a judicial record of another state, it is necessary that it appear that the record have been authenticated in the mode prescribed by the act of May 26th, 1790, "to prescribe the mode in which the public acts, records, and judicial proceedings in each state shall be authenticated, so as to take effect in every other state."[86]

(8) *Denial of Faith and Credit to Judgments and Decrees of Federal Courts*—aa. *In General.*—Whether due effect has been given by a state court to a judgment or decree of a court of the United States is a federal question within the jurisdiction of this court, on a writ of error to the highest state court in which a decision could be had;[87] or as the rule has otherwise been stated; where a state

82. Huntington *v.* Attrill, 146 U. S. 653, 684, 36 L. Ed. 1123.

83. Hoyt *v.* Sheldon, 1 Black 518, 17 L. Ed. 65; Maxwell *v.* Newbold, 18 How. 511, 515, 15 L. Ed. 506.

84. Rogers *v.* Alabama, 192 U. S. 226, 230, 48 L. Ed. 417.

85. Rogers *v.* Alabama, 192 U. S. 226, 231, 48 L. Ed. 417. See German Savings Society *v.* Dormitzer, 192 U. S. 125, 48 L. Ed. 373.

86. Caperton *v.* Ballard, 14 Wall. 238, 20 L. Ed. 885.

87. Rights or immunities claimed under judgments of federal courts.—Crescent City Live-Stock Co. *v.* Butchers' Union Slaughter-House Co., 120 U. S. 141, 30 L. Ed. 614; Phœnix Ins. Co. *v.* Tennessee, 161 U. S. 174, 185, 40 L. Ed. 660; Abraham *v.* Casey, 179 U. S. 210, 45 L. Ed. 156; Werlein *v.* New Orleans, 177 U. S. 390, 396, 44 L. Ed. 817; Pardee *v.* Aldridge, 189 U. S. 429, 47 L. Ed. 883; Central Nat. Bank *v.* Stevens, 169 U. S. 432, 460, 42 L. Ed. 807; Dupasseur *v.* Rochereau, 21 Wall. 130, 22 L. Ed. 588; Leather Manufacturers' Bank *v.* Cooper, 120 U. S. 778, 30 L. Ed. 816; San Francisco *v.* Scott, 111 U. S. 768, 28 L. Ed. 593; San Francisco *v.* Itsell, 133 U. S. 65, 33 L. Ed. 570; Giles *v.* Little, 134 U. S. 645, 649, 33 L. Ed. 1062; Embry *v.* Palmer, 107 U. S. 38, 27 L. Ed. 346; Dowell *v.* Applegate, 152 U. S. 327, 38 L. Ed. 463; Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 44 L. Ed. 619.

Where a state court refuses to give effect to the judgment of a court of the United States, rendered upon the point in dispute, and with jurisdiction of the case and the parties, a question is undoubtedly raised which, under the act of 1867, may be brought to this court for revision. The case would be one in which a title or right is claimed under an authority exercised under the United States, and the decision is against the title or right so set up. It would thus be a case arising under the laws of the United States, establishing the circuit court and vesting it with jurisdiction; and hence it would be within the judicial power of the United States, as defined by the constitution; and it is clearly within the chart of appellate power given to this court, over cases arising in and decided by the state courts. The refusal by the courts of one state to give effect to the decisions of the courts of another state is an infringement of a different article of the constitution, to wit, the first section of article four; and the right to bring such a case before us by writ of error under the twenty-fifth section of the judiciary

court refuses to give effect to the judgment of a court of the United States,

act, or the act of 1867, is based on the refusal of the state court to give validity and effect to the right claimed under that article and section. In either case, therefore, whether the validity or due effect of a judgment of the state court, or that of a judgment of a United States court, is disallowed by a state court, the constitution and laws furnish redress by a final appeal to this court. Dupasseur *v.* Rochereau, 21 Wall. 130, 134, 22 L. Ed. 588.

"The question whether a state court has given due effect to the judgment of a court of the United States is a question arising under the constitution and laws of the United States, and comes within the jurisdiction of the federal courts by proper process, although, as was said by this court in Dupasseur *v.* Rochereau, 21 Wall. 130, 135, 22 L. Ed. 588, "no higher sanctity or effect can be claimed for the judgment of the circuit court of the United States rendered in such a case, under such circumstances, than is due to the judgments of the state courts in a like case and under similar circumstances." Embry *v.* Palmer, 107 U. S. 3, 27 L. Ed. 346. It may be conceded, then, that the judgments and decrees of the circuit court of the United States, sitting in a particular state, in the courts of that state, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority. But it is within the jurisdiction of this court to determine, in this case, whether such due effect has been given by the supreme court of Louisiana to the decrees of the circuit court of the United States here drawn in question." Crescent City Live Stock Co. *v.* Butchers' Union Slaughter-House Co., 120 U. S. 141, 146, 30 L. Ed. 614.

As said in Crescent City Live-Stock Co. *v.* Butchers' Union Slaughter-House Co., 120 U. S. 141, 147, 30 L. Ed. 614, 617 citing Dupasseur *v.* Rochereau, 21 Wall. 130, 135, 22 L. Ed. 588; Embry *v.* Palmer, 107 U. S. 3, 27 L. Ed. 346: "It may be conceded, then, that the judgments and decrees of the circuit court of the United States, sitting in a particular state, in the courts of that state, are to be accorded such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority." See, also, Metcalf *v.* Watertown, 153 U. S. 671, 676, 38 L. Ed. 861; Pittsburg, etc., R. *v.* Long Island Trust Co., 172 U. S. 493, 43 L. Ed. 528; Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 645, 44 L. Ed. 619.

When, in a case in a state court, a right or immunity is set up under and by virtue of a judgment of a court of the United States, and the decision is against such right or immunity, the supreme court will examine and inquire whether or not due validity and effect have been accorded to the judgment of the federal court, and if they have not, and the right or immunity claimed has been thereby lost, it will reverse the judgment of the state court. Whether due validity and effect have or have not been accorded to the judgment of the federal court will depend on the circumstances of the case. If jurisdiction of the case was acquired only by reason of the citizenship of the parties, and the state law alone was administered, then only such validity and effect can be claimed for the judgment as would be due to a judgment of the state courts under like circumstances. Dupasseur *v.* Rochereau, 21 Wall. 130, 22 L. Ed. 588.

The judgments and decrees of the circuit courts of the United States, sitting in a particular state, are to be accorded in the courts of that state, whether as the foundation of an action, or of a defense, either by plea or in proof, such effect, and such effect only, as would be accorded in similar circumstances to the judgments and decrees of a state tribunal of equal authority; and whether such due effect has been given by a state court to a judgment or decree of a court of the United States, is a federal question within the jurisdiction of this court, on a writ of error to the supreme court of the state. Crescent City Live-Stock Co. *v.* Butchers' Union Slaughter-House Co., 120 U. S. 141, 30 L. Ed. 614.

Decree of supreme court of United States.—It has been held, in a number of cases: that the failure of the state court to give due faith and credit to the decree of this court, was a denial of a federal right. Homestead Company *v.* Valley Railroad, 17 Wall. 153, 21 L. Ed. 622; Stryker *v.* Goodnow, 123 U. S. 527, 31 L. Ed. 194; Chapman *v.* Goodnow, 123 U. S. 540, 31 L. Ed. 235; Litchfield *v.* Goodnow, 123 U. S. 549, 31 L. Ed. 199; Des Moines, etc., R. Co. *v.* Lowa Homestead Co., 123 U. S. 552, 31 L. Ed. 202; Plumb *v.* Goodnow, 123 U. S. 560, 31 L. Ed. 268.

Decree of court of appeals.—Where it is claimed that the highest court of a state, in maintaining a plea of res adjudicata founded on a decree of the circuit court of appeals, denies rights vested under a decree of the United States circuit court, a federal question is presented which it is the duty of the supreme court of the United States to determine. National Foundry, etc., Works *v.* Oconto Water Supply Co., 183 U. S. 216, 233, 46 L. Ed. 157, citing Jacobs *v.* Marks, 182 U. S. 583, 45 L. Ed. 1241; Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 44 L. Ed. 619;

rendered upon a point in dispute, and with jurisdiction of the case and the par-

Pittsburgh, etc., R. Co. *v.* Long Island Trust Co., 172 U. S. 493, 43 L. Ed. 528.

Judgment in suit to recover property.—A federal question exists when—in a suit by a person who seeks to recover property on the ground that a judgment and execution on it by a court of the United States, interpreting a statute of the United States, has deprived him of the property in violation of the first principles of law—the defendant sets up a title under that judgment and execution, and the decision is against the title so set up. Gregory *v.* McVeigh, 23 Wall. 294, 23 L. Ed. 156.

Judgment on levy.—Where the marshal of the United States had levied an execution upon certain property under a judgment in the circuit court, which was taken out of his custody by a writ of replevin issued by a state court, and the supreme court of the state decided adversely to the claim of the marshal, it is within the jurisdiction of this court to review that decision. Clements *v.* Berry, 11 How. 398, 13 L. Ed. 745.

Judgment on vendor's lien and privilege.—Judgment was rendered by the circuit court of the United states for Louisiana on a vendor's privilege and mortgage, declaring it to be the first lien and privilege on the land; and the marshal sold the property clear of all prior liens; and the mortgagee purchased, and paid into court for the benefit of subsequent liens, the surplus of his bid beyond the amount of his own debt. This judgment and sale were set up by way of defense to a suit brought in the state court by another mortgagee, who claimed priority to the first mortgage, and who had not been made a party to the suit in the circuit court. The state court held that the plaintiff was not bound by the former judgment on the question of priority, not being a party to the suit. The case was brought to the supreme court of the United States by writ of error, and this court held, that the state court did not refuse to accord due force and effect to the judgment; that such a judgment in the state courts would not be conclusive on the point in question, and the judgment of the circuit court could not have any greater force or effect than judgments in the state courts. "The same general rule of law and justice prevails in Louisiana as elsewhere, to the effect that no persons are bound by a judgment or decree except those who are parties to it, and have had an opportunity of presenting their rights." Dupasseur *v.* Rochereau, 21 Wall. 130, 22 L. Ed. 588.

Judgments affecting foreign corporations.—In order to give this court jurisdiction to review a decision of a state court respecting the power of a corporation of another state to make contracts, it is not sufficient to aver in the pleadings that whatever force might be given to it in the court of the forum, it was beyond the powers of the corporation under its act of incorporation as construed by the courts of the state incorporating it; but it must appear affirmatively in the record that the facts, as presented for adjudication, made it necessary for the court to consider and give effect to the act of incorporation in view of the peculiar jurisprudence of the state enacting it rather than the general law of the land. Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615, 30 L. Ed. 519.

Where an action is brought in a state court against a railroad receiver and the railway company to recover for personal injuries sustained by reason of defects in the road sustained during the receivership, and the receiver sets up his receivership and discharge, and the company denies liability for any injury sustained during the receivership, and also sets up in defense an order made by the circuit court requiring the receiver to transfer the property with its improvements to the company, and that it should be received by the company, charged with operation liabilities, and subject to judgments to be rendered in favor of intervenors, and that all claims against the receiver should be presented within a certain time or be barred, but the case is dismissed as to the receiver and judgment is given against the company, which judgment was sustained by the highest court of the state in which the decision could be had, it was held, that the overruling of the defense made that the plaintiff below was subject to the order of the court above recited, and must therefore resort to the court which entered it for the collection of his claim, and could not recover a judgment in personam collectible by the ordinary process; and moreover that his claim is thereby barred, may properly be held to have amounted to a decision against the validity of the order, or against a claim of right or immunity thereunder. Texas, etc., R. Co. *v.* Johnson, 151 U. S. 81, 38 L. Ed. 81.

Foreclosure proceedings.—According to the decisions and in view of the statute giving this court authority to re-examine the final judgment of the highest court of a state denying a right specially set up or claimed under an authority exercised under the United States, it is clear that we have jurisdiction to inquire whether due effect was accorded by a state court to the foreclosure proceedings in the circuit courts of the United States under which the plaintiff in error claims title to the lands and property in question. Pittsburgh, etc., R. Co. *v.* Long Island Trust Co., 172 U. S. 493, 510, 43 L. Ed. 528, citing Dupasseur *v.* Rochereau, 21 Wall.

ties, it denies the validity of an authority exercised under the United States.[88] In the case of a judgment of a state court, the constitution provides that full faith and credit shall be given it, and whether it has or has not been given it by a state court is a federal question, while if the state court erroneously decides a question of law regarding the weight to be given one of its own judgments in its own courts and among its own citizens, that error is not subject to review by this court, because it constitutes no federal question.[89]

Amount of Credit Due Its Judgments.—Although no higher sanctity or effect can be claimed for the judgment of a federal court than is due under the same circumstances to judgments of state courts in like cases,[90] yet it is equally well settled, that a right claimed under the federal constitution, finally adjudicated in the federal courts, can never be taken away or impaired by state decisions. The same reasoning which permits to the states the right of final adjudication upon purely state questions requires no less respect for the final decisions of the federal courts of questions of national authority and jurisdiction.[91]

Where a decree was entered by consent and in accordance with the agreement of the parties, in another state or territory, the courts merely exercise an

130, 22 L. Ed. 588; Crescent City Live-Stock Co. *v.* Butchers' Union Slaughter-House Co., 120 U. S. 141, 30 L. Ed. 614; Embry *v.* Palmer, 107 U. S. 3, 27 L. Ed. 340.

But where no statute, state or federal, or authority exercised thereunder, is called in question, the mere fact that plaintiff in error relied solely upon a decree of a foreclosure and sale in a federal court, would not necessarily show that a federal question was set up and an adverse decision rendered thereon, in order to give this court jurisdiction. Chicago, etc., R. Co. *v.* McGuire, 196 U. S. 128, 49 L. Ed. 413, reaffirmed in Skaneateles Paper Co. *v.* Syracuse, 201 U. S. 642, 50 L. Ed. 901.

Existence of probable cause.—Cresent Live Stock Co. *v.* Butchers' Union Slaughter-House Co., 120 U. S. 141, 146, 30 L. Ed. 614, was an action for malicious prosecution, the defense being that the existence of probable cause had been previously determined by a judgment in the circuit court of the United States. It was contended that the supreme court of the state failed to give proper effect to that judgment, and thereby denied to the defendant a right arising under the authority of the United States. The case came here upon writ of error, and the jurisdiction of this court to review the final judgment was sustained. Pittsburg, etc., R. Co. *v.* Long Island Trust Co., 172 U. S. 493, 509, 43 L. Ed. 528.

Where a suit was brought by the defendant in error in the United States circuit court to restrain the infringement of a registered trademark, and a preliminary injunction is granted in that suit, and after an appeal is taken to the circuit court of appeals, where the injunction is dissolved, the decree is entered by the circuit court, dismissing the bill upon the merits, it was held, that the decision of a state court finding probable cause for beginning the trademark infringement suit in the federal court could not be reviewed by this court on the ground that the state court by finding probable cause in its own opinion implies that the decree in the federal court was wrong, whereas not to assume it to be correct is to fail to give it the faith and credit required by Revised Statutes, § 905. Burt *v.* Smith, 203 U. S. 129, 51 L. Ed. 121.

88. Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 311, 47 L. Ed. 480, reaffirmed in Huber *v.* Jennings-Heywood Oil Syndicate, 201 U. S. 641, 50 L. Ed. 901; Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

89. Phœnix Ins. Co. *v.* Tennessee, 161 U. S. 174, 185, 40 L. Ed. 660.

90. Dupasseur *v.* Rochereau, 21 Wall. 130, 135, 22 L. Ed. 588; Embry *v.* Palmer, 107 U. S. 3, 27 L. Ed. 346; Phœnix Ins. Co. *v.* Tennessee, 161 U. S. 174, 185, 40 L. Ed. 660; Pittsburg, etc., R. Co. *v.* Long Island Trust Co., 172 U. S. 493, 510, 43 L. Ed. 528.

When is the state court obliged to give federal judgments only the force and effect it gives to state court judgments within its own jurisdiction? Such cases are distinctly pointed out in the opinion of Mr. Justice Bradley in Dupasseur *v.* Rochereau, 21 Wall. 130, 22 L. Ed. 588; Deposit Bank *v.* Frankfort, 191 U. S. 499, 515, 48 L. Ed. 276.

The fact that the judgment was rendered in a court of the United States, sitting within the state, instead of one of the state courts, is immaterial. Hancock Nat. Bank *v.* Farnum, 176 U. S. 640, 645, 44 L. Ed. 619.

91. Deposit Bank *v.* Frankfort, 191 U. S. 499, 517, 48 L. Ed. 276.

administrative function in recording what had been agreed to between the parties and therefore it is open to the state court to determine, upon general principles of law, that the validity of a certain article of the agreement was not in controversy or passed upon in the cause in which the decree was rendered. In doing so, that court does not refuse to give due effect to the final judgment of a court of the United States or of another state.[92]

bb. *Rights of Purchasers at Marshals' Sales.*—With respect to writs of error from this court to judgments of state courts in actions between purchasers under judicial proceedings in the federal courts and parties making adverse claims to the property sold, the true rule * * * is this: That the writ will lie, if the validity or construction of the judgment of the federal court, or the regularity of the proceedings under the execution, are assailed; but if it be admitted that the judgment was valid, and these proceedings were regular, that the purchaser took the title of the defendant in the execution, and the issue relates to the title to the property, as between the defendant in the execution or the purchaser under it, and the party making the adverse claim, no federal question is presented—in other words, it must appear that the decision was made against a right claimed under federal authority, in the language of Rev. Stat., § 709.[93] In short, the

92. Texas, etc., R. Co. *v.* Southern Pac. Co., 137 U. S. 48, 34 L. Ed. 614.

93. Avery *v.* Popper, 179 U. S. 305, 314, 45 L. Ed. 203, citing and reviewing at length the cases on the point.

Where the plaintiff in error in his complaint unquestionably sets up a right to recover as the result of a judicial sale made under decrees, both in courts of the United States and of a state, federal questions exist in the record, and a motion to dismiss will be denied. Commercial Pub. Co. *v.* Beckwith, 188 U. S. 567, 47 L. Ed. 598.

In Collier *v.* Stanbrough, 6 How. 14, 12 L. Ed. 324, Collier was the purchaser under a marshal's sale upon execution against one David Stanbrough of certain personal property which was claimed by Josiah Stanbrough, the defendant, who insisted that the property was not legally seized or levied upon, and that it was not legally appraised or advertised as required by law. Jurisdiction under the writ of error to the supreme court of Louisiana was sustained upon the obvious ground that the sale by the marshal was directly attacked, and the invalidity of plaintiff's title set up as a defense.

In Erwin *v.* Lowry, 7 How. 172, 12 L. Ed. 655, Erwin was the purchaser at a marshal's sale of certain land and negroes, and was sued by Lowry, who claimed as curator of the estate to which the property belonged. The question was the same as that in Collier *v.* Stanbrough, namely, whether the marshal's deed to Erwin was void for the reason that it was not supported by a lawful judgment, or for want of compliance with any legal requirement in conducting the seizure and sale. The jurisdiction was also sustained in this case.

In Clements *v.* Berry, 11 How. 398, 13 L. Ed. 745, the suit was by Daniel Berry against the marshal directly, in replevin, to recover property levied upon as the property of Charles F. Berry, and the sale was stopped by a writ of replevin issued from the state court. As the marshal was a party defendant to the suit, and his right to sell the property was directly attacked, the jurisdiction was sustained. For the same reason that the marshal was made a defendant to the suit in the state court, and justified under process from the federal court, jurisdiction was sustained in Freeman *v.* Howe, 24 How. 450, 16 L. Ed. 749; Buck *v.* Colbath, 3 Wall. 334, 18 L. Ed. 257; Etheridge *v.* Sperry, 139 U. S. 266, 35 L. Ed. 171; and Bock *v.* Perkins, 139 U. S. 628, 35 L. Ed. 314.

In Day *v.* Gallup, 2 Wall. 97, 17 L. Ed. 855, the suit was by Gallup against Derby and Day, execution creditors, Allis, their attorney, and Gear, marshal of the United States, who justified under a judgment of the federal court against one Griggs. The suit was discontinued as to the marshal before trial. The case turned on the ownership of the goods seized, and judgment went against Derby and Day, which was affirmed by the supreme court of Minnesota. The suit was not begun until after the execution from the federal court had been returned and the action completely terminated. Upon writ of error from this court, it was held, that at the time Gallup brought his action there was no case pending in the federal court respecting the goods which had been attached under process from that court; that it did not appear that the authority of Gear as marshal to take the goods was drawn in question, and that, from the return of the execution satisfied, the federal court had no control over the parties. The case between the plaintiffs in error against Griggs, the original defendant in the federal court, had been decided, the money made on the execution and

mere fact that the plaintiff in error was a purchaser at a marshal's sale of property sold under execution from a federal court does not entitle him to bring into the supreme court of the United States, upon writ of error to a state court, questions under the state law with respect to the validity and priority of a chattel

the debt paid. In commenting on that case in Buck *v.* Colbath, 3 Wall. 342, 18 L. Ed. 257, it was said: "It is only while the property is in possession of the court, either actually or constructively, that the court is bound or professes to protect that possession from the process of other courts. Whenever the litigation is ended, or the possession of the officer or court is discharged, other courts are at liberty to deal with it according to the rights of the parties before them, whether those rights require them to take possession of the property or not."

In Dupasseur *v.* Rochereau, 21 Wall. 130, 22 L. Ed. 588, Rochereau, a judgment creditor of one Sauve, brought an action in the state court against Dupasseur, alleging that he had taken possession of a plantation belonging to Sauve upon which he, Rochereau, held a mortgage, and charging that the plantation was bound for the debt, and that Dupasseur was bound either to pay the debt or give up the plantation. Dupasseur defended upon the ground that he had bought the property at a marshal's sale, upon an execution in his own favor against Sauve, "free of all mortgages and incumbrances, and especially from the alleged mortgage of the plaintiff," Rochereau. Upon writ of error from this court it was held that, as the question at issue was the effect to be given to the judgment of the federal court and to the proceedings under the execution in that court, and to the sale by the marshal free from all mortgages and incumbrances, jurisdiction should be sustained. Here the validity of the sale by the marshal was directly attacked. Notwithstanding the fact that Dupasseur purchased the property under the execution sale on May 5, 1876, and Rochereau did not begin his action until June 7, 1866, the jurisdiction was sustained, because Dupasseur's title under that purchase was attacked by the other party. Approved in Avery *v.* Popper, 179 U. S. 305, 45 L. Ed. 203; Tullock *v.* Mulvane, 184 U. S. 497, 507, 46 L. Ed. 657.

In Stanley *v.* Schwalby, 162 U. S. 255, 40 L. Ed. 960, the action in the state court was directly against officers of the United States, and ultimately against the government itself. Jurisdiction was sustained upon that ground.

In Pittsburg, etc., R. Co. *v.* Long Island Trust Co., 172 U. S. 493, 43 L. Ed. 528, the question arose whether due effect was accorded to certain foreclosure proceedings in circuit courts of the United States, under which plaintiff in error claimed title to the land and property in question. Under these proceedings a sale of railroad property had been made, subject to certain outstanding bonds prior in lien to the mortgage and to all other, if any, paramount liens thereon, and that the decree should not in any manner prejudice or preclude the holders of such paramount liens. Plaintiff in error contended that the state court did not give due effect to these decrees of the circuit courts of the United States, in that it did not recognize as paramount the rights acquired under those decrees by the purchasers of the property in question; but postponed or subordinated these rights to a lien upon such property, which, it was alleged, was created or attempted to be created while those suits were pending, and while the property was in the actual custody of those courts, by receivers, for the purposes of being administered. As the question concerned the effect to be given to a sale under process from the federal courts, and to the construction of the decree of those courts, jurisdiction was sustained.

Sale of bankrupt's estate.—In Factors' Ins. Co. *v.* Murphy, 111 U. S. 738, 28 L. Ed. 582, a court of the United States sitting in bankruptcy had ordered a sale of real property of the bankrupt free from encumbrances. The property was purchased at the sale on behalf of lienholders. Subsequently one who possessed a lien on the property at the time the order was entered and sale made, brought suit in a state court of Louisiana to foreclose such lien, claiming that she had not been a party to the bankruptcy proceedings, and that her lien was unaffected by the sale. The defendant, in whose name title had been taken, while averring that the plaintiff was interested in the purchase at the sale made under the order of the United States court, insisted that the lien of the mortgage of plaintiff had been extinguished by such sale. The state court having decreed in favor of plaintiff, a writ of error was prosecuted from this court.

In reversing the judgment of the state court, it was said: "Counsel for defendant in error deny the jurisdiction of this court and move to dismiss the writ. But it is apparent that the only controversy in the case relates to the effect to be given to the sale under the order of the district court of the United States, to sell the mortgaged property free from encumbrance. Both parties assert rights under this order and sale. Plaintiffs in error assert that the sale as made was valid, and, being sold free from incumbrances, ex-

mortgage covering the same property or a part thereof.[94] The mere fact the action in the federal court is no longer pending would not necessarily oust the jurisdiction of this court to re-examine the action of the state court, if the validity of the judgment of the federal court, or the proceedings by the marshal under that judgment, were directly attacked.[95]

cc. *Liability on Injunction Bond Executed under Order of Federal Court.*—A bond for injunction in an equity court of the United States given under the order of such court is a bond executed in and by virtue "of an authority exercised under the United States."[96] The defense specially set up that no liability on an injunction bond taken in a judicial proceeding could arise until the court of the

tinguished Mrs. Murphy's lien as well as others. Defendant asserts that it had the effect of discharging all other liens but hers, and thus gave her the exclusive, paramount lien on all the property so sold. Both the parties, therefore, rely upon rights under federal authority, and as the right of plaintiff in error was denied by the court the writ of error lies." Approved in Tullock *v.* Mulvane, 184 U. S. 497, 506, 46 L. Ed. 657; Avery *v.* Popper, 179 U. S. 305, 45 L. Ed. 203.

94. Avery *v.* Popper, 179 U. S. 305, 45 L. Ed. 203.

A purchaser at a marshal's sale of property sold under execution from a federal court is not entitled to bring into the supreme court of the United States by writ of error to the state court the question whether under the laws of Texas, a chattel mortgage upon property sold under execution is good which does not identify the particular property covered by it, but leaves such property to be subsequently identified by selection of a mortgagee. Avery *v.* Popper, 179 U. S. 305, 45 L. Ed. 203.

95. But "in Day *v.* Gallup, 2 Wall. 97, 17 L. Ed. 855, it appeared that not only had the proceedings in the federal court terminated, but that the real question was the ownership of the goods as between the attaching creditors and Gallup. Gallup claimed under a sale of the goods which the attaching creditors insisted was a fraud." Avery *v.* Popper, 179 U. S. 305, 312, 45 L. Ed. 203.

96. Rev. Stat., § 709. Tullock *v.* Mulvane, 184 U. S. 497, 504, 46 L. Ed. 657.

Probable cause.—In Cresent City Live-Stock Co. *v.* Butchers' Union Slaughter-House Co., 120 U. S. 141, 30 L. Ed. 614, the facts were briefly these: "Under a bill filed in a circuit court of the United States, a temporary injunction had been allowed after hearing, and a bond had been given under an order of the court, the injunction was perpetuated by the circuit court on the final hearing. The case was appealed to this court, and the decree of the circuit court was reversed. Suit was brought in a court of the state of Louisiana, upon the injunction bond given in the federal court, against the principal and surety in solido and against the principal alone, to recover damages for the malicious prosecution of the injunction suit in the federal court. It was claimed by the defendants that the final decree of the circuit court of the United States, although subsequently reversed by this court, constituted probable cause, and therefore there could be no recovery on the alleged cause of action for malicious prosecution. Both the state trial court by way of instructions to the jury and the supreme court of Louisiana decided that the decree of the circuit court of the United States did not constitute probable cause, because prior to the decision of the circuit court of the United States a contrary view to that which the circuit court adopted had been announced by the highest court of the state of Louisiana. The jurisdiction of this court to review the controversy was challenged upon the very grounds now relied upon, and the court said (p. 146): "It is argued by counsel for the defendant in error that this does not embrace any federal question; that the effect to be given to a judgment or decree of the circuit court of the United States sitting in Louisiana by the courts of that state is to be determined by the law of Louisiana, or by some principle of general law as to which the decision of the state court is final; and that the ruling in question did not deprive the plaintiffs in error of 'any privilege or immunity specially set up or claimed under the constitution or laws of the United States.' But this is an error. The question whether a state court has given due effect to the judgment of a court of the United States is a question arising under the constitution and laws of the United States." Approved in Tullock *v.* Mulvane, 184 U. S. 497, 507, 46 L. Ed. 657.

In Meyers *v.* Block, 120 U. S. 206, 30 L. Ed. 642, the case came to this court on error to a state court, and involved the correctness of the construction by that court of the terms of an injunction bond given in a court of the United States. This court treated the matter of jurisdiction as one of course, held that the parties signing the bond must be presumed to have been cognizant of the order under which the bond was given, and to have contracted in reference thereto, and that the bond should be read in the light of the order, and the court applied to the interpretation of the bond its own views of the applicable principles of law. Tul-

United States in which the controversy was pending had finally determined that the injunction should not have been granted, is the assertion of an immunity from liability depending on an authority exercised under the United States and therefore necessarily involves the decision of a federal question reviewable by this court.[97] A claim of immunity from liability for attorneys' fees, as one of the elements of damage under an injunction bond, presents a federal question reviewable by this court.[98]

dd. *Construction of Judgments and Decrees.*—Where a controversy in the state court presents a contention as to the validity or proper construction of an order or decree rendered by a court of the United States, a federal question is presented reviewable by this court.[99]

ee. *Showing as to Jurisdiction.*—**In General.**—To present a federal question on the ground that full faith and credit were not given by the state court to the judgments of the circuit court of the United States, it must appear that the state court denied to the plaintiff in error, within the terms of § 709 of the Revised Statutes, "some title, right, privilege or immunity" held by the plaintiff in error under the judgments of the circuit court of the United States in those cases, and claimed by it in the state court under the constitution or a statute of the United States; and that the decision of the state court was against the title, right, privilege or immunity specially set up or claimed by the plaintiff in error under such constitution or statute.[1] Therefore writ of error will not lie in this court to a state court merely because the state court disregarded the decision of this court, especially where no final judgment has been entered up in the case by this court.[2]

lock *v.* Mulvane, 184 U. S. 497, 508, 46 L. Ed. 657.

Cases distinguished.—"The cases of New York Ins. Co. *v.* Hendren, 92 U. S. 286, 23 L. Ed. 709; Provident, etc., Society *v.* Ford, 114 U. S. 635, 29 L. Ed. 261; Blackburn *v.* Portland Min. Co., 175 U. S. 571, 44 L. Ed. 276, and others of like character, do not conflict with the rule which we apply in this cause, and which was expounded in the cases to which we have previously referred. This results when it is observed that none of the cases just above referred to involved the construction or effect of a law of the United States or a judgment, decree or order or other act done under and by virtue of the authority of a court of the United States or a claim of immunity thereunder." Tullock *v.* Mulvane, 184 U. S. 497, 508, 46 L. Ed. 657.

97. Tullock *v.* Mulvane, 184 U. S. 497, 46 L. Ed. 657.

98. Tullock *v.* Mulvane, 184 U. S. 497, 46 L. Ed. 657; Missouri, etc., R. Co. *v.* Elliott, 184 U. S. 530, 46 L. Ed. 673.

A decision of a state court that attorneys' fees are damages on an injunction bond, and should be decided according to the rule prevailing in the courts of the United States, involves no federal question reviewable by this court on writ of error, since it involves no claim of immunity under an authority exercised under the United States. Missouri, etc., R. Co. *v.* Elliott, 184 U. S. 530, 46 L. Ed. 673, following Tullock *v.* Mulvane, 184 U. S. 497, 46 L. Ed. 657.

99. Avery *v.* Popper, 179 U. S. 305, 45 L. Ed. 203; Dupasseur *v.* Rochereau, 21 Wall. 130, 22 L. Ed. 588; Factors' Ins. Co. *v.* Murphy, 111 U. S. 738, 28 L. Ed. 582; Crescent City Live Stock Co. *v.* Butchers' Union Slaughter-House Co., 120 U. S. 141, 30 L. Ed. 614; Tullock *v.* Mulvane, 184 U. S. 497, 507, 46 L. Ed. 657.

1. Winona, etc., R. Co. *v.* Plainview, 143 U. S. 371, 390, 36 L. Ed. 191.

2. Giles *v.* Little, 134 U. S. 645, 33 L. Ed. 1062.

A writ of error will not lie to a state court on the ground that the supreme court of that state declines to follow a decision of this court in the same case, basing its judgment largely upon statutes of the state. As, for example, in Giles *v.* Little, 134 U. S. 645, 33 L. Ed. 1062, this court held that a widow took only an estate for life under the will of her husband determinable by her marrying again and no power to convey a greater estate than she had herself; while the supreme court of the state held that she took an estate in fee determinable upon her marriage, with power during her widowhood at her discretion to convey in fee any part of the land, and the devise over in case of her marrying again passed to the children only what remained unconveyed. Because the question of the construction of the will in this respect depends wholly upon general rules of law and upon local statutes, and in no degree upon the constitution, laws or treaties of the United States; and the disregard by the state court of the opinion of this court upon the question in a former suit does not give this court jurisdiction to review the judgment of a state court. Giles *v.* Little, 134 U. S. 645, 33 L. Ed. 1062, follow-

Nor does the fact that the supreme court of the state does not acquiesce in the correctness of the decision of the circuit court of the United States, constitute a federal question. Neither the constitution of the United States nor any act of congress guarantees to a suitor that the same rule of law shall be applied to him by a state court which would be applied if his citizenship were such that his suit might be brought in a federal court.[3]

Must Be Specially Set up and Claimed.—The mere fact that a defendant in a state court pleads a purchase of realty at foreclosure sale, under a decree of a federal court, as his source of title, does not constitute a special setting up or claiming of a right or title under authority exercised by the United States, such as will give the supreme court jurisdiction to review the decision of the state court, under Rev. Stat., § 709.[4] But the better rule is that where a state court refuses to give effect to the judgment of a court of the United States, rendered upon a point in dispute, and with jurisdiction of the case and the parties, the case falls within the first class of cases claimed under § 709.[5] Therefore, where this federal question as raised below by the pleadings, by the objections to evidence and by the requests for instructions, are expressly considered and directly passed upon by the supreme court of a state, this fact in and of itself suffices to present the federal question, even if it had been otherwise ambiguously raised on the record.[6]

Inquiry into Validity of Decision.—It is well settled that the judgments and decrees of a circuit court of the United States are to be accorded in the state courts the same effect as would be accorded to the judgments and decrees of a state tribunal of equal authority. It is within the jurisdiction of this court to consider and determine that question, that is, whether such effect was given in any particular case, whenever properly presented. But in determining that question, this court must, in the first instance, consider whether the federal court had jurisdiction to render the judgment or decree to which, it is contended, due effect was not given, for, as a matter of course, the jurisdiction of every court is open to inquiry when its judgments and decrees are produced in the court of a state, and it is there sought to give them effect.[7]

ing Leather Manufacturers' Bank *v.* Cooper, 120 U. S. 778, 30 L. Ed. 816; San Francisco *v.* Itsell, 133 U. S. 65, 33 L. Ed. 570; San Francisco *v.* Scott, 111 U. S. 768, 28 L. Ed. 593.

3. Dupasseur *v.* Rochereau, 21 Wall. 130, 22 L. Ed. 588; Brooks *v.* Missouri, 124 U. S. 394, 31 L. Ed. 454; French *v.* Hopkins, 124 U. S. 524, 31 L. Ed. 536; Chappell *v.* Bradshaw, 128 U. S. 132, 32 L. Ed. 369; Clark *v.* Pennsylvania, 128 U. S. 395, 32 L. Ed. 487; Hale *v.* Akers, 132 U. S. 554, 33 L. Ed. 442; Manning *v.* French, 133 U. S. 186, 33 L. Ed. 582; Giles *v.* Little, 134 U. S. 645, 33 L. Ed. 1062; Cook County *v.* Calumet, etc., Canal Co., 138 U. S. 635, 34 L. Ed. 1110; Winona, etc., R. Co. *v.* Plainview, 143 U. S. 371, 394, 36 L. Ed. 191.

4. Mutual Life Ins. Co. *v.* Kirchoff, 169 U. S. 103, 42 L. Ed. 677.

5. Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 47 L. Ed. 480, reaffirmed in Huber *v.* Jennings-Heywood Oil Syndicate, 201 U. S. 641, 50 L. Ed. 901; Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Wakefield *v.* Tassell, 192 U. S. 601, 48 L. Ed. 583; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

6. Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 41 L. Ed. 1149, reaffirmed in Karkins *v.* Ashville, 180 U. S. 635, 45 L. Ed. 709; Baldwin *v.* County Commissioners, 168 U. S. 705, 42 L. Ed. 1213; Tompkins *v.* Cooper, 170 U. S. 703, 42 L. Ed. 1217; Mutual Life Ins. Co. *v.* Kirchoff, 169 U. S. 103, 110, 42 L. Ed. 677; German Ins. Co. *v.* First Nat. Bank, 173 U. S. 701, 702, 43 L. Ed. 1177, 1185; Ross *v.* King, 172 U. S. 641, 43 L. Ed. 1177, 1180; Rodley *v.* State of California, 185 U. S. 693, 694, 46 L. Ed. 393; Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171; Seale *v.* Georgia, 201 U. S. 642, 50 L. Ed. 902; Chappell *v.* Stewart, 169 U. S. 733, 42 L. Ed. 1207, 1215; Fenwick Hall Co. *v.* Old Saybrook, 169 U. S. 734, 42 L. Ed. 1215; Baltimore, etc., R. Co. *v.* Ocean City, 179 U. S. 681, 45 L. Ed. 384; Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Tullock *v.* Mulvane, 184 U. S. 497, 46 L. Ed. 657.

7. Pendleton *v.* Russell, 144 U. S. 640, 644, 36 L. Ed. 574.

Whether a federal judgment has been given due force and effect in the state court is a federal question reviewable by this court, which will determine for itself whether such judgment has been given due weight or otherwise. Crescent City Live-Stock Co. *v.* Butchers' Union Slaughter-House Co., 120 U. S. 141, 30 L. Ed.

(9) *Denial of Rights under Clause Guaranteeing a Republican Form of Government.*—The provisions of the United States constitution guaranteeing a republican form of government to each state, does not give this court jurisdiction under § 709 of the Revised Statutes to review the judgment of the highest state court, affirming an election contest for the offices of governor and lieutenant governor, made by the legislature, to which tribunal the question was exclusively committed by the state court and laws, on the ground of deprivation of rights secured by the federal constitution.[8]

(10) *Denial of Religious Liberty.*—This court has no jurisdiction, under the 25th section of the judiciary act, of a question whether a statute or ordinance of a state does or does not impair religious liberty. The constitution of the United States makes no provision for protecting the citizens of the respective states in their religious liberties; this is left to the state constitutions and laws.[9]

(11) *Abridging the Freedom of Speech or of the Press.*—A writ of error to review a judgment upon an information for contempt will be dismissed, although the plaintiff relies upon the defense that the information complained of is true, and he claims a right to prove its truth under the first amendment of the federal constitution, which provides that congress shall make no law abridging the freedom of speech or of the press.[10]

(12) *Denial of Rights to Ambassadors and Consuls.*—Writ of error lies to review a judgment of a state court denying a foreign consul any right guaranteed to him by the constitution or laws of the United States, provided this sufficiently appears from the record.[11]

614; Pittsburg, etc., R. Co. *v.* Long Island Trust Co., 172 U. S. 493, 43 L. Ed. 528. In the latter case, Mr. Justice Harlan, after reviewing the cases upon this subject, thus states his conclusion: "According to these decisions and in view of the statute giving this court authority to reexamine the final judgment of the highest court of a state denying a right specially set up or claimed under an authority exercised under the United States, it is clear that we have jurisdiction to inquire whether due effect was accorded to the foreclosure proceedings in the circuit courts of the United States under which the plaintiff in error claims title to the lands and property in question." Deposit Bank *v.* Frankfort, 191 U. S. 499, 515, 48 L. Ed. 276.

8. Taylor *v.* Beckhan, 178 U. S. 548, 44 L. Ed. 1187.

9. Denial of religious liberty.—Permoli *v.* New Orleans, 3 How. 589, 11 L. Ed. 739.

10. Abridging the freedom of speech or of the press.—Patterson *v.* Colorado, 205 U. S. 454, 51 L. Ed. 879, Mr. Justice Harlan and Mr. Justice Brewer dissenting.

11. Denial of rights to ambassadors and consuls.—Davis *v.* Packard, 7 Pet. 276, 281, 8 L. Ed. 684.

The denial by the highest court of a state of the exemption from suit allowed to ambassadors and consuls of foreign nations under the constitution or the laws of the United States, may be reviewed by this court under the 25th section of the judiciary act. Davis *v.* Packard, 8 Pet. 310, 312, 8 L. Ed. 957.

Showing on the record.—Motion to dismiss a writ of error to "the court for the correction of errors in the state of New York." The case went up to that court upon a writ of error to the supreme court of New York, and in the court for the correction of errors, the plaintiff in error assigned for error, that he was, at the time of the commencement of the suit, and continued to be, consul-general in the United States, of the kings of Saxony; and so being consul-general, he ought to have been impleaded in some district court of the United States, and that the supreme court of New York had not jurisdiction of the case. The defendants answered that in the record of the proceedings of the supreme court, it nowhere appears that the plaintiff in error ever was consul of Saxony. The record states that the court for the correction of errors having fully understood the causes assigned for error, and inspected the record, did order and adjudge that the judgment of the supreme court should be affirmed. Affidavits of the proceedings in the highest court of the state of New York, and the opinion of the chancellor assigning his reasons for affirming the judgment of the supreme court, were laid before this court. "Whatever took place in the state court, which forms no part of the record sent up to this court, must be entirely laid out of view. This is the established course of the court. The question before this court is whether the judgment was correct, not whether the ground on which that judgment was given was correct." The fact that the plaintiff in error was the consul general of the King of Saxony, is not denied by the joinder

(13) *Denial of Rights Claimed under the Duty or Bounty Acts.*—The appellate jurisdiction of this court extends to a case where there is a claim of title or right under the duty act.[12] And where a controversy arises in the state court as to who is entitled to a bounty on sugar granted by the act of March 2, 1895, c. 189, "to producers and manufacturers of sugar in the United States," so far as the question of bounty depends upon the construction of state laws the decision of the state court is binding upon us, but so far as it depends upon the construction of the act of congress awarding such bounty, it is subject to re-examination here.[13]

(14) *Denial of Equal Privileges to Citizens of the Several States.*—Where a person's rights as a citizen have been infringed by a state court within the meaning of § 2, art. 4, of the federal constitution, declaring that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, the writ of error will lie.[14] Where a person is described as a "resident" of a certain state and city and no question as to citizenship appears to have arisen in any stage of the case up to the argument in this court, his citizenship sufficiently appears for a review by this court, on the ground that his constitutional rights as a citizen have been infringed by the decision of a state court.[15]

(15) *Denial of Right Claimed under the President's Proclamation.*—A title, right, privilege, or immunity claimed under a proclamation of the president gives this court jurisdiction.[16] The decision of a state court passing upon the effect produced by the act of the executive on a given contract in inaugurating the late civil war in the United States, is reviewable here by writ of error under the second section of the act of February 5th, 1867, to amend the judiciary act, § 709 of the Revised Statutes of the United States.[17]

(16) *Denial of Right under Naturalization Laws.*—Where a right or privilege is claimed under the naturalization laws of the United States, and the judgment of highest state court is adverse to the claim, a writ of error will lie to this court to review the ruling of the state court.[18]

(17) *Denial of Due Process of Law or Equal Protection of the Laws*—aa. *In General.*—This court has jurisdiction to review a judgment of a state court, necessarily involving a decision against a right claimed under the fourteenth amendment to the constitution of the United States.[19] But where the plaintiff in error

in error. The answer given is that it nowhere appears by the record, proceedings, or judgment of the supreme court, that he was such consul. The court of errors say, after having examined and fully considered the causes assigned for error, they affirm the judgment of the supreme court. This was deciding against the privilege set up under the act of congress which declares that the district courts of the United States shall have jurisdiction, exclusive of the courts of the several states, of all suits against consuls and vice-consuls. Davis *v.* Packard, 6 Pet. 41, 8 L. Ed. 312.

12. Denial of rights claimed under the duty or bounty act.—Where a suit is instituted in a state court under the 91st section of the duty act of 1799 by a late collector against the collector in office to recover his share of a forfeiture to which the collector of the district is entitled, and such right is denied by the highest court of the state, a writ of error will lie from this court. Buel *v.* Van Ness, 8 Wheat. 312, 5 L. Ed. 624. See Harris *v.* Dennie, 3 Pet. 292, 7 L. Ed. 683.

13. Allen *v.* Smith, 173 U. S. 389, 43 L. Ed. 741.

14. Denial of equal privileges to citizens of the several states.—Sully *v.* American Nat. Bank, 178 U. S. 289, 44 L. Ed. 1072.

15. Sully *v.* American Nat. Bank, 178 U. S. 289, 44 L. Ed. 1072.

16. Denial of right claimed under the president's proclamation.—Allen *v.* McVeigh, 107 U. S. 433, 27 L. Ed. 572.

17. Mathews *v.* McStea, 20 Wall. 646, 22 L. Ed. 448.

18. Denial of right under naturalization laws.—Missouri *v.* Andriano, 138 U. S. 496, 34 L. Ed. 1012; Boyd *v.* Nebraska, 143 U. S. 135, 36 L. Ed. 103.

19. Denial of due process of law or equal protection of the laws.—Holt *v.* Indiana Mfg. Co., 176 U. S. 68, 72, 44 L. Ed. 374.

The court can review the judgment of a state court on error upon the ground that, although the forms of law were observed, it necessarily operated to wrongfully deprive a party of his property without due process of law, and the giving effect in the circuit court to the state judgment does not change the character of the question. It is simply adding the force of a new determination to one

has sought in the state court, and is given opportunity, to litigate the rights claimed

wrongfully obtained, and adding it upon no new facts. Fayerweather *v.* Ritch, 195 U. S. 276, 49 L. Ed. 193, citing Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 41 L. Ed. 979.

Assessments for local improvements.—We have no power to correct the errors of state courts in respect to the details of assessments made by municipal corporations upon private property to defray the expenses of street improvements. Upon all such questions the action of the state court is final. There can be no doubt but that our jurisdiction is at an end if we find that sufficient provision has been made by law for contesting such a charge, when imposed, by an appropriate adversary proceeding in the ordinary courts of justice. Corry *v.* Campbell, 154 U. S. App. 629, 24 L. Ed. 926, following Davidson *v.* New Orleans, 96 U. S. 97, 24 L. Ed. 616.

Sale of decedents' estates.—This court has jurisdiction to review the judgment of a state court upholding a deed by an administrator to land, acting under an order of probate court, appointing an administrator of the estate of a person who is, in fact, alive, although he has been absent for seven years, and giving him authority to sell his estate, where such ruling is claimed to be a denial of due process of law under the federal constitution. Scott *v.* McNeal, 154 U. S. 34, 38 L. Ed. 896.

Denial of appellate review.—An appellant is not denied the equal protection of the laws because he has been deprived of a writ of error for the review of the record and proceedings in his case. Kohl *v.* Lehlback, 160 U. S. 293, 40 L. Ed. 432.

Ejection from places of public resort.—This court has jurisdiction to review the judgment of the state court, where the record shows that, in the supreme court of the state, the defendant questioned the validity of the state statute "relating to the admission of persons holding tickets of admission to places of public entertainment and amusement," under the fourteenth amendment, in that it "seeks to abridge the privileges and immunities of citizens of the United States, and to deprive them of liberty and property without due process of law, and to deny to them, being within its jurisdiction, the equal protection of the laws," and by the judgment below the validity of the statute was sustained, the court holding that it was a legitimate exertion of the police power of the state. Western Turf Ass'n *v.* Greenberg, 204 U. S. 359, 362, 51 L. Ed. 520.

Premature hearing.—Where the supreme court of California held that a statute of that state allowing the board of directors of an irrigation district, to secure a determination by the courts of the validity of the proceedings of the board concerning a proposed issue of the bonds of the district in advance of their issue, did not deprive the plaintiff in error of his property without due process of law, presents a federal question, and therefore a motion to dismiss will be overruled. Tregea *v.* Modesto Irrigation District, 164 U. S. 179, 41 L. Ed. 395.

Abolition of grade crossings.—An allegation that due process of law is denied plaintiff in condemnation of property under a special statute authorizing the abolition of a grade crossing since the statute authorizes an increase in the number of tracks, and an expenditure on the part of the municipality in aid of the railroad, in violation of the state constitution, presents a federal question reviewable by this court on writ of error to a state court. Wheeler *v.* New York, etc., R., 178 U. S. 321, 44 L. Ed. 1085, reaffirmed in New York, etc., R. Co. *v.* McKeon, 189 U. S. 508, 509, 47 L. Ed. 922.

Contempt.—"If the committing court has jurisdiction of the subject matter, and of the person, and power to make the order for disobedience to which a judgment in contempt was rendered, and to render that judgment, then the court of criminal appeals cannot do otherwise than discharge the writ of habeas corpus and remand the petitioner. The writ cannot be availed of as a writ of error or an appeal, and if the commitment is not void, petitioner is not deprived of his liberty without due process of law." Tinsley *v.* Anderson, 171 U. S. 101, 106, 43 L. Ed. 91.

Taxation.—By the law of Pennsylvania if a treasurer of a corporation fails to make return of its loans, as required by law, the auditor general may make out and file an account against the company, charging it with the taxes supposed to be due. If the corporation objects to the taxes, it is authorized to appeal to one of the state courts. In the case at bar, upon failure of the corporation to make return except under protest, the auditor general made an account out against it containing various items. The company appealed to the state courts and amongst the objections raised was that the assessment was in violation of the 14th amendment of the constitution in that it denied to them the equal protection of the laws. It was held, that a federal question was raised, and that the writ of error could not be dismissed. Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232, 33 L. Ed. 892.

Validity of assessments.—A judgment of the highest court of a state, sustaining the validity of an assessment upon lands under a statute of the state, which was alleged to be unconstitutional and void because it afforded to the owners no opportunity to be heard upon the whole

by him, he cannot complain that the guarantees of the constitution of the United

amount of the assessment, involves a decision against a right claimed under the provision of the fourteenth amendment to the constitution of the United States prohibiting the taking of property without due process of law, and may be reviewed by this court on writ of error, although the constitution of the state contains a similar provision, and no constitutional provision is specifically mentioned in the record of the state court. Spencer *v.* Merchant, 125 U. S. 345, 31 L. Ed. 763; Ulman *v.* Mayor, 165 U. S. 719, 41 L. Ed. 1184.

"The question submitted to the supreme court of the state was whether this assessment on the plaintiff's lot was valid. He contended that the statute of 1881 was unconstitutional and void, because it was an attempt by the legislature to validate a void assessment, without giving the owners of the lands assessed an opportunity to be heard upon the whole amount of the assessment. He thus directly, and in apt words, presented the question whether he had been unconstitutionally deprived of his property without due process of law, in violation of the first section of the fourteenth amendment to the constitution of the United States, as well as of art. 1, § 7, of the constitution of New York; and no specific mention of either constitutional provision was necessary in order to entitle him to a decision of the question by any court having jurisdiction to determine it. The adverse judgment of the supreme court, affirmed by the court of appeals of the state, necessarily involved a decision against a right claimed under the fourteenth amendment to the constitution of the United States, which this court has jurisdiction to review. Bridge Proprietors *v.* Hoboken, etc., Co., 1 Wall. 116, 142, 17 L. Ed. 571; Murray *v.* Charleston, 96 U. S. 432, 442, 24 L. Ed. 760; Furman *v.* Nichol, 8 Wall. 44, 56, 19 L. Ed. 370; Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574, 579, 28 L. Ed. 1084." Spencer *v.* Merchant, 125 U. S. 345, 352, 31 L. Ed. 763.

Whether the fact that the law gives tax assessors in the case of corporations two chances to arrive at a correct valuation of real estate owned by corporations and only one in the case of individuals, is a denial of the equal protection of the laws; is a federal question which confers upon the supreme court of the United States jurisdiction to review the judgment of the supreme court of a state affirming the judgments of courts below in a proceeding to review an assessment on that ground. New York State *v.* Barker, 179 U. S. 279, 45 L. Ed. 190.

Formality of tax assessments and tax sales.—A decision of the state court applying the statutory presumption of correctness arising from the tax collector's deed, and refusing to consider certain alleged defects in the assessment of taxes and sale for nonpayment of the taxes, does not give this court jurisdiction to review such decision on the ground that the plaintiff in error has been deprived of his property without due process of law. Castillo *v.* McConnico, 168 U. S. 674, 42 L. Ed. 622, reaffirmed in Fenwick Hall Co. *v.* Old Saybrook, 169 U. S. 734, 42 L. Ed. 1215; Warren *v.* Chandos, 169 U. S. 734, 42 L. Ed. 1216; Nester *v.* Church, 189 U. S. 505, 47 L. Ed. 921; Thomas *v.* Kansas, 205 U. S. 535, 51 L. Ed. 919.

There is an important distinction between the essentials of due process of law under the fourteenth amendment, and matters which may or may not be essential under the terms of a state assessing or taxing law. The two are neither correlative or coterminous. The first, due process of law, must be found in the state statute, and cannot be departed from without violating the constitution of the United States. The other depends on the law making power of the state, and as it is solely the result of such authority may vary or change as the legislative will of the state sees fit to ordain. It follows that, to determine the existence of the one, due process of law, is the final province of this court, whilst the ascertainment of the other, that is what is merely essential under the state statute, is a state question within the final jurisdiction of courts of last resort of the several states. When, then, a state court decides that a particular formality was or was not essential under the state statute, such decision presents no federal question, providing always the statute as thus construed does not violate the constitution of the United States, by depriving of property without due process of law. This paramount requirement being fulfilled, as to other matters the state interpretation of its own law is controlling and decisive. This distinction is pointed out by the decisions of this court. Pittsburg, etc., R. Co. *v.* Backus, 154 U. S. 421, 38 L. Ed. 1031; Kentucky Railroad Tax Cases, 115 U. S. 321, 29 L. Ed. 414; Davidson *v.* New Orleans, 96 U. S. 97, 24 L. Ed. 616; Castillo *v.* McConnico, 168 U. S. 674, 683, 42 L. Ed. 622, reaffirmed in Fenwick Hall Co. *v.* Old Saybrook, 169 U. S. 734, 42 L. Ed. 1215; and Warran *v.* Chandos, 169 U. S. 734, 42 L. Ed. 1216.

Castillo v. McConnico distinguished.—In Castillo *v.* McConnico, 168 U. S. 674, 42 L. Ed. 622, it was asserted that a particular assessment was void because of a mistake in the name of the person whose property had been assessed. The supreme court of Louisiana, interpreting the statutes of that state, otherwise decided.

States were denied because the litigation did not result successfully.[20] Nor has this court jurisdiction to inquire into the question whether or not the state court has exceeded its functions under the constitution of the state and in that way denied the plaintiff due process of law.[21] Mr. Justice Holmes, in a late case, said: The requirement in the fourteenth amendment of due process of law does not take up the special provisions of the state constitution and laws into the fourteenth amendment for the purposes of the case, and in that way subject a state decision that they have been complied with to revision by this court.[22]

Errors in the mere administration of a state statute, not involving jurisdiction of the subject and of the parties, could not justify this court, in its re-ex-

It was urged that such decision was in conflict with many prior rulings of that court, and therefore a federal question was presented. But it was held, that it was within the power of the state of Louisiana, without violating the constitution of the United States, to direct the assessment without giving the name of the owner, by an adequate description of the property assessed. The decision of the supreme court of the state of Louisiana raised no federal question, which could be reviewed by the supreme court of the United States. Lombard *v.* West Chicago, 181 U. S. 33, 43, 45 L. Ed. 731.

Notice of reassessment.—An answer by the defendant in an action in a state court brought to enforce a lien created by a reassessment of taxes upon its real estate, which alleges generally that the notice of the reassessment was insufficient, and specifically that by reason thereof its property was sought to be taken without due process of law, and in conflict with the terms of the fourteenth amendment to the constitution, raises a federal question of which this court has jurisdiction. Bellingham Bay, etc., R. Co. *v.* New Whatcom, 172 U. S. 314, 43 L. Ed. 460.

Property in custodia legis.—The granting of a mandatory writ of prohibition by a state court, commanding the receiver appointed by one state court to turn over the property in his hands belonging to the defendant corporation to the receiver appointed by another, does not operate to take away from the defendant its property and bestow it upon another in violation of the constitution of the United States, and of the law of the land, all of which guarantee that no property shall be taken except by due process of law. St. Louis, etc., R. Co. *v.* Merriam, 156 U. S. 478, 39 L. Ed. 502.

Libel—Reputation as property.—A contention in a state court, that reputation is property of which the owner is deprived without due process of law by a decision against his right of action for libelous matter contained in a pleading raises a federal question under U. S. Rev. Stat., § 709, providing for writ of error from the supreme court in case of a decision against any constitutional right, privilege or immunity. Abbott *v.* National Bank of Commerce, 175 U. S. 409, 44 L. Ed. 217.

20. Central Land Co. *v.* Laidley, 159 U. S. 103, 112, 40 L. Ed. 91; Walker *v.* Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Head *v.* Amoskeag Mfg. Co., 113 U. S. 9, 26, 28 L. Ed. 889; Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 171, 36 L. Ed. 925; Bergemann *v.* Backer, 157 U. S. 655, 39 L. Ed. 845; Remington Paper Co. *v.* Watson, 173 U. S. 443, 451, 43 L. Ed. 762, reaffirmed in Delahanty *v.* Pitkin, 199 U. S. 602, 50 L. Ed. 328; Archer *v.* Building & Loan Ass'n, 179 U. S. 679, 45 L. Ed. 383.

Where the action was regularly proceeded with, and was determined against plaintiff in error on grounds which did not involve federal questions, it is not within the power of the United States supreme court to review the judgment of the supreme court of the state. Remington Paper Co. *v.* Watson, 173 U. S. 443, 451, 43 L. Ed. reaffirmed in Delahanty *v.* Pitkin, 199 U. S. 602, 50 L. Ed. 328; Archer *v.* Building & Loan Ass'n, 179 U. S. 679, 45 L. Ed. 383.

Defense to tax proceeding.—It is not the duty of this court to determine whether a defense to a tax proceeding is valid, where the taxpayer is given an opportunity to present the said defense, and declined so to do. Hodge *v.* Muscatine County, 196 U. S. 276, 49 L. Ed. 477.

21. Burt *v.* Smith, 203 U. S. 129, 51 L. Ed. 121, citing French *v.* Taylor, 199 U. S. 274, 50 L. Ed. 189; Rawlins *v.* Georgia, 201 U. S. 638, 50 L. Ed. 899.

A decision by the highest state court that the burden rests on the taxpayer to show the invalidity of the tax, even if erroneous, is not one of a federal nature. Security Trust Co. *v.* Lexington, 203 U. S. 323, 51 L. Ed. 204.

What is a uniform tax.—The judgment of a state court holding that under the state constitution a tax is uniform when it is equal upon all persons belonging to the described class upon which it is imposed, will not be reviewed by us on writ of error to a state court. Armour Packing Co. *v.* Lacy, 200 U. S. 226, 50 L. Ed. 451.

22. French *v.* Taylor, 199 U. S. 274, 278, 50 L. Ed. 189; Rawlins *v.* Georgia, 201 U. S. 638, 639, 50 L. Ed. 899; Burt *v.* Smith, 203 U. S. 129, 135, 51 L. Ed. 121; Patterson *v.* Colorado, 205 U. S. 454, 459, 51 L. Ed. 879.

amination of the judgment of the state court, upon writ of error, to hold that the state had deprived, or was about to deprive, the plaintiffs of their property without due process of law.[23]

bb. *Condemnation Proceedings.*—While this court may examine proceedings had in a state court, under state authority, for the appropriation of private property to public purposes, so far as to inquire whether that court prescribed any rule of law in disregard of the owner's right to just compensation, every order or ruling of the state court, in a case like this, may not be reviewed here, notwithstanding our jurisdiction, for some purposes, is beyond question. Many matters may occur in the progress of such cases that do not necessarily involve, in any substantial sense, the federal right alleged to have been denied; and in respect of such matters, that which is done or omitted to be done by the state court may constitute only error in the administration of the law under which the proceedings were instituted.[24]

The construction of a law of a state, that it was competent for the court to try and determine in a condemnation proceeding, an adverse claim of the plaintiff therein to an interest in property sought to be condemned, is conclusive on the United States supreme court.[25] Where it is objected in the state court that a state statute violates the fourteenth amendment of the constitution of the United States, in that the owner of land condemned thereunder might be deprived of his property without due process of law, because the act does not provide for any notice to him of the proceedings, but it had previously been decided by the state courts that the act, properly construed, required notice, a writ of error will be dismissed, because we are bound to accept this conclusion of the state court as to the proper construction of the statute of the state.[26]

Whether a judgment upon an assessment for improvements where two members of a general board created by statute for the purpose of making it, had some interest in some of the property subject to the assessment, was a void or voidable judgment, is a proper question for the state court to decide. A state court has the right to place its own construction upon its own judgments, and where it holds that the judgment is not void and that it cannot be attacked collaterally, the supreme court of the United States ought to follow that determination.[27]

cc. *Regulation of Railroad Rates.*—This court should not review the judgment of a highest court of a state affirming the order of railroad commission fixing future rates, upon the ground that it deprives the railroad company of its property without due process of law or denies to it the equal protection of the law, spe-

23. Lent *v.* Tillson, 140 U. S. 316, 331, 35 L. Ed. 419.

24. Condemnation proceedings.—Backus *v.* Fort Street Union Depot Co., 169 U. S. 557, 565, 42 L. Ed. 853; Chicago, etc., R. Co. *v.* Chicago, 164 U. S. 454, 41 L. Ed. 511.

Condemnation of minority shares of stock.—Where the plaintiff in error contends that the purpose for which his stock is sought to be obtained under a state statute allowing the lessee railway company, who was the owner of three-fourths of the stock to condemn the outstanding shares owned by a person who refuses to agree to the terms of purchase, is not a public use; that the defendant in error has the power and authority to make the improvements mentioned in its application, which will be as advantageous as taking the stock; and that the proceedings and statute are in violation of the due process clause of the fourteenth amendment to the constitution of the United States and impair the contract rights of the plaintiff in error as a stockholder. This raises a federal question, and a motion to dismiss will therefore be denied. Offield *v.* New York, etc., R. Co., 203 U. S. 372, 51 L. Ed. 231.

25. Hooker *v.* Los Angeles, 188 U. S. 314, 319, 47 L. Ed. 487, reaffirmed in New York, etc., R. Co. *v.* Plymouth, 193 U. S. 668, 48 L. Ed. 839.

26. Baltimore Traction Co. *v.* Baltimore Belt R. Co., 151 U. S. 137, 38 L. Ed. 102, citing Green *v.* Neal, 6 Pet. 291, 8 L. Ed. 402; Davie *v.* Briggs, 97 U. S. 628, 24 L. Ed. 1086; Louisville, etc., R. Co. *v.* Mississippi, 133 U. S. 587, 590, 33 L. Ed. 784.

27. Newport Light Co. *v.* Newport, 151 U. S. 527, 539, 38 L. Ed. 259; Hibben *v.* Smith, 191 U. S. 310, 324, 48 L. Ed. 195.

cially where, by the law of the state, the rates established by commission are to be taken in all courts as prima facie just and reasonable.[28]

dd. *Election of State Officers.*—Where controversies over the election of state officers have reached the state courts in the manner provided by, and been there determined in accordance with, the state constitutions and laws, the cases must necessarily be rare in which the interference of this court can properly be invoked.[29] A judgment of the court of appeals of a state denying the right to the office of governor is not a decision against a title, right, privilege or immunity secured by the constitution of the United States, hence a writ of error will not lie to a state court to review such decision, because of a deprivation of property or vested rights without due process of law.[30]

Sufficiency of Hearing.—This court has no jurisdiction to review the judgment of a state court depriving the plaintiff in error of his title or right to an office held under a statute of the state, on the ground that the defendant had been deprived of his property without due process of law, or has been denied the equal protection of the laws. What kind and how much of a hearing the officer is entitled to before his suspension is a matter for the state legislature to determine, having regard to the constitution of the state. In other words, the decision of the state court, that the procedure by which an officer has been suspended or removed from office is regular and is under a constitutional and valid statute, must generally be conclusive in this court.[31]

28. Regulation of railroad rates.—Atlantic Coast Line R. Co. *v.* Florida, 203 U. S. 256, 51 L. Ed. 174; Seabord Air-Line R. Co. *v.* Florida, 203 U. S. 261, 51 L. Ed. 175.

29. Election of state officers.—Taylor *v.* Beckham, 178 U. S. 548, 571, 44 L. Ed. 1187.

"In Boyd *v.* Nebraska, 143 U. S. 135, 36 L. Ed. 103, which was a proceeding quo warranto, in which the supreme court of Nebraska had held that James E. Boyd had not been for two years preceding his election a citizen of the United States, and hence that under the constitution of the state he was not eligible to the office of governor, this court took jurisdiction because the conclusion of the state court involved the denial of a right or privilege under the constitution and laws of the United States, upon which the determination of whether Boyd was a citizen of the United States or not depended, and therefore jurisdiction to review a decision against such right or privilege necessarily existed in this tribunal. Missouri *v.* Andriano, 138 U. S. 496, 34 L. Ed. 1012. And we said (p. 161): 'Each state has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen, and the title to offices shall be tried, whether in the judicial courts or otherwise. But when the trial is in the courts, it is a "case," and if a defense is interposed under the constitution or laws of the United States, and is overruled, then, as in any other case decided by the highest court of a state, this court has jurisdiction by writ of error.'" Taylor *v.* Beckham, 178 U. S. 548, 571, 44 L. Ed. 1187.

"In Kennard *v.* Louisana, 92 U. S. 480, 23 L. Ed. 478, concerning the right of Kennard to the office of associate justice of the supreme court of Louisiana, jurisdiction was taken on the ground that the constitutionality of the statute under which the disputed title to office was tried was drawn in question. The court, speaking by Mr. Chief Justice Waite, said: 'The question before us is, not whether the courts below, having jurisdiction of the case and the parties, have followed the law, but whether the law, if followed, would have furnished Kennard the protection guaranteed by the constitution. Irregularities and mere errors in the proceedings can only be corrected in the state courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all.'" Taylor *v.* Beckham, 178 U. S. 548, 571, 44 L. Ed. 1187. See Foster *v.* Kansas, 112 U. S. 201, 28 L. Ed. 629.

30. Taylor *v.* Beckham, 178 U. S. 548, 44 L. Ed. 1187.

31. Wilson *v.* North Carolina, 169 U. S. 586, 42 L. Ed. 865, reaffirmed in Gates *v.* Commissioners, 183 U. S. 693, 46 L. Ed. 393.

"In Wilson *v.* North Carolina, 169 U. S. 586, 592, 42 L. Ed. 865, the governor of North Carolina had suspended plaintiff in error as railroad commissioner under a statute of that state, and the state supreme court had held the action of the governor a valid exercise of the power conferred upon him, and that it was due process of law within the meaning of the constitution. A writ of error from this court to review that judgment was granted, and on hearing was dismissed. Mr. Justice Peckham, in delivering the opinion said: 'The controversy relates exclusively to the title to a state office, created by a statute of the state, and to

ee. *Persons Not Parties to a Proceeding.*—A decree of a state court is not reviewable by the supreme court of the United States upon the ground that it deprives a corporation, who is not a party to the suit in which it is rendered, of his property without due process of law, as the corporation cannot be deprived of property rights by decree in a case to which it is not made a party.[32]

ff. *Denial of Right to Offer Defenses.*—This court cannot be called upon to conjecture that defenses existed which were not made and to decide that proceedings in a state court have denied due process of law because defenses were denied, when they were not presented. And especially must that be so where the court of last resort of the state, on review of all the proceedings, has held that full opportunity to make every defense was afforded.[33]

gg. *Jury and Jury Trial.*—**Selection of Juries.**—An assignment of error which avers that a Louisiana statute is in conflict with the fourteenth amendment of the constitution of the United States, because such law confers on the jury

the rights of one who was elected to the office so created. Those rights are to be measured by the statute and by the constitution of the state, excepting in so far as they may be protected by any provision of the federal constitution. Authorities are not required to support the general proposition that in the consideration of the constitution or laws of a state this court follows the construction given to those instruments by the highest court of the state. The exceptions to this rule do not embrace the case now before us. We are, therefore, concluded by the decision of the supreme court of North Carolina as to the proper construction of the statute itself, and that as construed it does not violate the constitution of the state. The only question for us to review is whether the state, through that action of its governor and judiciary, has deprived the plaintiff in error of his property without due process of law, or denied to him the equal protection of the laws. We are of opinion that the plaintiff in error was not deprived of any right guaranteed to him by the federal constitution, by reason of the proceedings before the governor under the statute above mentioned, and resulting in his suspension from office. The procedure was in accordance with the constitution and laws of the state. It was taken under a valid statute creating a state office in a constitutional manner, as the state court has held. What kind and how much of a hearing the officer should have before suspension by the governor was a matter for the state legislature to determine, having regard to the constitution of the state The procedure provided by a valid state law for the purpose of changing the incumbent of a state office will not in general involve any question for review by this court. A law of that kind does not provide for the carrying out and enforcement of the policy of the state with reference to its political and internal administration, and a decision of the state court in regard to its construction and validity will generally be conclusive here. The facts would have to be most rare and exceptional which would give rise in a case of this nature to a federal question. * * * In its internal administration the state (so far as concerns the federal government) has entire freedom of choice as to the creation of an office for purely state purposes, and of the terms upon which it shall be held by the persons filling the office. And in such matters the decision of the state court, that the procedure by which an officer has been suspended or removed from office was regular and was under a constitutional and valid statute, must generally be conclusive in this court. * * * Upon the case made by the plaintiff in error, the federal question which he attempts to raise is so unfounded in substance that we are justified in saying that it does not really exist; that there is no fair color for claiming that his rights under the federal constitution have been violated, either by depriving him of his property without due process of law or by denying him the equal protection of the laws.'" Approved in Taylor *v.* Beckham, 178 U. S. 548, 572, 44 L. Ed. 1187.

32. Persons not parties to a proceeding.—Iron Cliffs Co. *v.* Negaunee Iron Co., 197 U. S. 463, 49 L. Ed. 836.

33. Denial of right to offer defenses.—Louisville, etc., R. Co. *v.* Schmidt, 177 U. S. 230, 239, 44 L. Ed. 747, distinguishing Rees *v.* Watertown, 19 Wall. 107, 22 L. Ed. 72.

A railroad company appeared in a state court in response to a rule to show why it should not pay a judgment, pleaded its set-off, and declared that its answer constituted a full response, but no defense personal to itself of any other character, except the set-off, was pleaded or suggested in any form whatever. It was held, that the supreme court of the United States cannot presume that defenses existed which were not made and decide that the proceedings in the state court have denied due process of law because defenses were denied. Louisville, etc., R. Co. *v.* Schmidt, 177 U. S. 230, 238, 44 L. Ed. 747.

commissioners of the parish of New Orleans judicial powers in the selection of citizens for jury service, presents no federal question, if it is not pretended that the accused was subjected to any other or different treatment, in respect to that feature of the statute than that which prevails in other cases, or in the trial of white citizens.[34]

The mere refusal of a jury trial, in and of itself and separated from all other matters, raises no federal question.[35]

Mixed Juries.—The remedy, where citizens of the African race have been excluded from the list of grand and petit jurors, is for the accused to sue out a writ of error from this court to the highest court of the state having cognizance of the matter, whose judgment, if adverse to him in respect to any right, privilege or immunity, specially claimed under the constitution, or laws of the United States, can be re-examined, and reversed, affirmed or modified, by this court as the law requires.[36] But where a motion to quash an indictment is made by a negro on the ground of the denial of the equal protection of the laws and civil rights as secured to him by the constitution of the United States, by the exclusion of negroes from the grand jury, but the record fails to show that he proved or offered

34. Jury and jury trial.—Murray *v.* Louisiana, 163 U. S. 101, 41 L. Ed. 87.

35. Walker *v.* Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Wilson *v.* North Carolina, 169 U. S. 586, 595, 42 L. Ed. 865, reaffirmed in Gates *v.* Commissioners, 183 U. S. 693, 46 L. Ed. 393.

The right of trial by jury upon the question of waiver of preliminary examination is not claimed as a federal right in a state court by a plea in abatement, relating that the prosecution is in contravention of the fourteenth amendment, where this evidently referred to prior paragraphs, which dwelt on the necessity of an indictment to constitute due process of law. Bolln *v.* Nebraska, 176 U. S. 83, 44 L. Ed. 382, citing Dewey *v.* Des Moines, 173 U. S. 193, 43 L. Ed. 665.

36. In re Wood, 140 U. S. 278, 35 L. Ed. 505.

The exclusion, because of their race and color, of citizens of African descent from the grand jury that found, and from the petit jury that was summoned to try, the indictment, if made by the jury commissioners, without authority derived from the constitution and laws of the state, was a violation of the prisoner's rights, under the constitution and laws of the United States, which the trial court was bound to redress; and the remedy for any failure in that respect is ultimately in this court upon writ of error. Neal *v.* Delaware, 103 U. S. 370, 26 L. Ed. 567.

This court has power to review the action of a state court in disallowing the petition by the accused to have the case removed into the circuit court of the United States upon the allegation that the petitioner was a negro, and that persons of African descent were, by reason of their race and color, excluded by the jury commissioners from service as grand and petit jurors. Murray *v.* Louisiana, 163 U. S. 101, 41 L. Ed. 87; Neal *v.* Delaware, 103 U. S. 370, 26 L. Ed. 567; Gibson *v.* Mississippi, 162 U. S. 565, 40 L. Ed. 1075.

A person of African descent being indicted in the state court for a felony committed after the grand jury was impaneled moved to quash the indictment before he had been arraigned or pleaded to the indictment. The motion, besides stating that the defendant was of the African race, alleged that the jury commissioners selected no persons of African descent to serve on the grand jury, but excluded from the list all such persons because of their race and color. The bill of exceptions states that "after reading said motion, the defendant asked leave of the court to introduce witnesses, and offered to introduce witnesses, to prove and sustain the allegations therein made, but the court refused to hear any evidence in support of the said motion and thereupon overruled the same, without investigating into the truth or falsity of the allegations of said motion; to which action of the court the defendant then and there excepted." The defendant, after conviction and sentence, appealed, to the highest court of the state, in which a decision in the case could be had, which affirmed the judgment and denied a motion for rehearing. That court affirmed the judgment upon the assumption that no evidence was tendered by the defendant in support of the allegations in the motion to quash. It was held, that this assumption is disproved by the statements in the bill of exceptions of what took place in the trial court; the necessary conclusion is that the defendant has been denied a right, duly set up and claimed by him, under the constitution and laws of the United States; and therefore the supreme court of the United States has jurisdiction to review the judgment of the state court which is reversed and case remanded for further proceedings. Carter *v.* Texas, 177 U. S. 442, 24 L. Ed. 839.

to prove the truth of the allegations as contained in the motion, the judgment will not be disturbed.[37]

hh. *Denial of Rights to Foreign Corporations.*—A decision by the highest state court that a foreign mutual insurance company, which had not been authorized to do business in Michigan as provided by its statutes, could not maintain a suit to collect assessments due on a policy issued by one of its agents in another state on request of an insurance broker of Michigan who was unable to place the whole line in his own authorized companies, involves no federal question.[38]

ii. *Erroneous Decisions of State Courts.*—When the parties have been fully heard in the regular course of judicial proceedings, an erroneous decision of a state court does not deprive the unsuccessful party of his property without due process of law, within the fourteenth amendment of the constitution of the United States.[39] And merely because the reasoning by which the highest state court has been led to decide adversely to his rights is inconsistent with the reasoning previously announced by the same court in former cases, this does not amount to a denial of equal protection of the laws.[40] The decision of a court upon a question of law, however wrong and however contrary to previous decisions, is not an infraction of the fourteenth amendment merely because it is wrong or because earlier decisions are reversed.[41]

jj. *Showing as to Jurisdiction.*—**In General.**—Where there is nothing in the record adequately showing that the state courts were led to suppose that any claim under the fourteenth amendment to the constitution of the United States was made by the plaintiffs in error, or that any ruling involved a decision against a right set up by them under that instrument, such decision is not reviewable by this court.[42] But although the inhibition of the 14th amendment of the constitution against the deprivation of property without due process of law, is not distinctly passed upon in the opinion of the court, yet this court has jurisdiction if it is evident that the court could not have reached the decision without denying this right.[43]

Claiming Right in Motion for New Trial.—This court has jurisdiction to reexamine the final judgment of the highest state court on a writ of error under that part of the fourteenth amendment declaring that no state shall deprive any person of his property without due process of law, or deny the equal protection of the laws to any person within its jurisdiction, where the right in question is distinctly asserted by the defendant in its written motion to set aside the verdict and grant a new trial in eminent domain proceedings, in which motion for a new trial were the following grounds: "That the several rulings of the court in excluding proper evidence for the defendant, the statute under which the proceedings for condemnation were instituted, and the verdict of the jury and the judgment based upon it, were all contrary to the fourteenth amendment declaring that no state shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its limits the equal protection of the laws," such motion for a new trial being overruled, because the trial court, in overruling the

37. Brownfield *v.* South Carolina, 189 U. S. 426, 47 L. Ed. 882.

38. Denial of rights to foreign corporations.—Swing *v.* Weston Lumber Co., 205 U. S. 275, 278, 51 L. Ed. 799, citing Chicago, etc., R. Co. *v.* McGuire, 196 U. S. 128, 132, 49 L. Ed. 413; Allen *v.* Allegheny Co., 196 U. S. 458, 49 L. Ed. 551.

39. Walker *v.* Sauvinet, 92 U. S. 90, 23 L. Ed. 678; Head *v.* Amoskeag Mfg. Co., 113 U. S. 9, 26, 28 L. Ed. 889; Morley *v.* Lake Shore, etc., R. Co., 146 U. S. 162, 171, 36 L. Ed. 925; Bergeman *v.* Backer, 157 U. S. 655, 39 L. Ed. 845; Central Land Co. *v.* Laidley, 159 U. S. 103, 112, 40 L. Ed. 91.

40. Lombard *v.* West Chicago, 181 U. S. 33, 44, 45 L. Ed. 731.

41. Patterson *v.* Colorado, 205 U. S. 454, 461, 51 L. Ed. 879.

42. Showing as to jurisdiction.—Hooker *v.* Los Angeles, 188 U. S. 314, 47 L. Ed. 487, reaffirmed in New York, etc., R. Co. *v.* Plymouth, 193 U. S. 668, 48 L. Ed. 839, citing Sayward *v.* Denny, 158 U. S. 180, 39 L. Ed. 941.

43. Kaukauna Water Power Co. *v.* Green Bay, etc., Co., 142 U. S. 254, 35 L. Ed. 1004.

motion for a new trial and entering judgment, necessarily held adversely to these claims of federal right.[44]

But the general allegation that the decree was rendered against dead persons as well as in the absence of necessary parties who had no notice of the suit, and, therefore, no opportunity to be heard in vindication of their rights, does not meet the statutory requirement that the final judgment of a state court may be re-examined here if it denies some title, right, privilege or immunity "specially set up or claimed" under the constitution or authority of the United States. It cannot be said that the plaintiffs specially set up or claimed the protection of that amendment against the operation of that decree by simply averring—without referring to the constitution or even adopting its phraseology—that the decree was passed against deceased persons as well as in the absence of necessary or indispensable parties.[45]

Where Decision Rests on Principles of General or Local Law.—According to well-settled principles, where the decision of the state rests upon principles of general or local law, it cannot be reviewed here.[46]

44. Chicago, etc., R. Co. *v.* Chicago, 164 U. S. 454, 41 L. Ed. 511, distinguished in Harding *v.* Illionois, 196 U. S. 78, 87, 49 L. Ed. 394.

45. Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 654, 41 L. Ed. 1149, reaffirmed in Harkins *v.* Ashville, 180 U. S. 635, 45 L. Ed. 709; Baldwin *v.* County Commissioners, 168 U. S. 705, 42 L. Ed. 1213; Tompkins *v.* Cooper, 170 U. S. 703, 42 L. Ed. 1217; Mutual Life Ins. Co. *v.* Kirchoff, 169 U. S. 103, 110, 42 L. Ed. 677; Chappell *v.* Stewart, 169 U. S. 733, 42 L. Ed. 1207, 1215; Fenwick Hall Co. *v.* Old Saybrook, 169 U. S. 734, 42 L. Ed. 1215.

46. "In Sayward *v.* Denny, 158 U. S. 180, 39 L. Ed. 941, after stating the contention of plaintiff in error that the effect of the judgment of the state court was 'to deprive him of his property without due process of law, or to deny him the equal protection of the laws, and amounted to a decision adverse to the right, privilege, or immunity of plaintiff in error under the constitution of being protected from such deprivation or denial,' we said: 'But it nowhere affirmatively appears from the record that such a right was set up or claimed in the trial court when the demurrer to the complaint was overruled, or evidence admitted or excluded, or instructions given or refused, or in the supreme court in disposing of the rulings below. * * * We are not called on to revise these views of the principles of general law considered applicable to the case in hand. It is enough that there is nothing in the record to indicate that the state courts were led to suppose that plaintiff in error claimed protection under the constitution of the United States from the several rulings, or to suspect that each ruling as made involved a decision against a right specially set up under that instrument. And we may add that the decisions of state tribunals in respect of matters of general law cannot be reviewed on the theory that the law of the land is violated unless their conclusions are absolutely free from error.'" Hooker *v.* Los Angeles, 188 U. S. 314, 320, 47 L. Ed. 487, reaffirmed in New York, etc., R. Co. *v.* Plymouth, 193 U. S. 668, 48 L. Ed. 839.

Where the validity of a state statute is not drawn in question in a state court, but the jurisdiction of the supreme court of the United States to review the judgment of a state court is invoked upon the ground that the acts of the state officers, acting under the authority of the statute, deprived the party of due process of law, a federal question is not involved, and the supreme court of the United States has no jurisdiction. French *v.* Taylor, 199 U. S. 274, 50 L. Ed. 189, citing Castillo *v.* McConnico, 168 U. S. 674, 42 L. Ed. 622; Lehigh *v.* Green, 193 U. S. 79, 48 L. Ed. 623, reaffirmed in South Carolina *v.* Jennings, 204 U. S. 667, 668, 51 L. Ed. 671.

Validity of tax deed.—Where a plaintiff in error asserts the invalidity of a tax deed in that the names of the real owners of the property were not given and the name of a person was given who was not such; that the return of the assessor was insufficient; that the certificate of the county auditor was not attached to each book containing a tax list, etc., but the plaintiff in error says in his brief that he does not contend that the act itself is not sufficient to give due process, but insists that the manner of observance of that act is want of due process; in other words, that the act has not been complied with, but the state supreme court held, that the giving the name of the owner was not essential to the validity of the assessment, that the county officers and defendants in error fully complied with the law, this is a determination of questions of local law or of fact, not in themselves reviewable here. French *v.* Taylor, 199 U. S. 274, 50 L. Ed. 189, citing Castillo *v.* McConnico, 168 U. S. 674, 42 L. Ed. 622; Leigh *v.* Green, 193 U. S. 79, 48 L. Ed. 623.

Determination of Question.—Upon a writ of error to review the judgment of the highest court of a state upon the ground that the judgment was against a right claimed under the constitution of the United States, this court is no more bound by that court's construction of a statute of the territory, or of the state, when the question is whether the statute provided for the notice required to constitute due process of law, than when the question is whether the statute created a contract which has been impaired by a subsequent law of the state, or whether the original liability created by the statute was such that a judgment upon it has not been given due faith and credit in the courts of another state. In every such case, this court must decide for itself the true construction of the statute.[47] On the other hand if the essential requirements of full notice and an opportunity to defend were present, the supreme court of the United States, in reviewing a judgment of a state supreme court on writ of error, will accept the interpretation given by the state court as to the regularity under the state statute of the practice pursued in the particular case.[48]

(18) *Denial of Rights Claimed under Treaties.*—**In General.**—Where a right is set up and claimed under a treaty, and a decision of the highest state court is against such right, this presents a question for the jurisdiction of this court under the 25th section of the judiciary act of 1789, which is reproduced in § 709 of the Revised Statutes,[49] provided the party claims title for himself and not for

47. Huntington *v.* Attrill, 146 U. S. 657, 684, 36 L. Ed. 1123; Mobile, etc., R. Co. *v.* Tennessee, 153 U. S. 486, 492, 495, 38 L. Ed. 793; Scott *v.* McNeal, 154 U. S. 34, 45, 38 L. Ed. 896.

This court is not concluded by the construction of the highest court of a state as to whether a tax is or is not a license to sell cigarettes within the meaning of a certain statute of Iowa, yet it will accept such opinion unless it is made to appear that it is clearly wrong. Hodge *v.* Muscatine County, 196 U. S. 276, 49 L. Ed. 477.

48. Simon *v.* Craft, 182 U. S. 427, 437, 45 L. Ed. 1165.

The supreme court of the United States will accept as conclusive the ruling of the supreme court of Alabama that the jury which passes on the issues in a lunacy proceeding was a lawful jury, that the petition was in compliance with the statute, and that the asserted omissions in the recitals in the verdict and order thereon were at best but mere irregularities which did not render void the order of the state court, appointing a guardian of the alleged lunatic's estate. Simon *v.* Craft, 182 U. S. 427, 437, 45 L. Ed. 1165.

49. Denial of rights claimed under treaties.—Burthe *v.* Denis, 133 U. S. 514, 33 L. Ed. 768; Davis *v.* Police Jury, 9 How. 280, 13 L. Ed. 138; Martin *v.* Hunter, 1 Wheat. 304, 4 L. Ed. 97.

If the validity or construction of a treaty of the United States is drawn in question, and the decision is against its validity, or the title specially set up by either party, under the treaty, this court has jurisdiction to ascertain that title and determine its legal validity, and is not confined to the abstract construction of the treaty itself. Martin *v.* Hunter, 1 Wheat. 304, 305, 4 L. Ed. 97, citing Smith *v.* Maryland, 6 Cranch 286, 3 L. Ed. 225.

The decisions of a state court upon the merits of a controversy between two parties, one of whom had sold, and the other purchased, an interest in lands which, it was thought, could be acquired as Indian reservations under a treaty with the United States, cannot be reviewed by this court under the 25th section of the judiciary act. The party against whom the state court decided, instead of setting up an interest under the treaty, expressly averred that no rights had been obtained. Maney *v.* Porter, 4 How. 55, 11 L. Ed. 873.

A writ of error lies to the highest court of a state, in a case where the question is whether a confiscation under the law of the state was complete before the treaty of peace with Great Britain. Smith *v.* Maryland, 6 Cranch 286, 3 L. Ed. 225.

A right claimed under an extradition treaty in a state court and denied, raises a federal question which this court can review by writ of error to the state court. But the effect of a forcible transfer of the accused upon the right of the state court to try him, is the province of the state court to decide, and which presents no question for review by this court. Ker *v.* Illinois, 119 U. S. 436, 30 L. Ed. 421.

Where the authority of the governor of the state to issue a warrant for the extradition of a criminal is drawn in question in the highest court of the state, upon the ground that it is repugnant to the constitution of the United States, and the decision is in favor of the validity of the authority so exercised, this is one of the cases in which the writ of error is given in the 25th section of the judiciary act of 1789. Holmes *v.* Jennison, 14 Pet. 540, 562, 10 L. Ed. 579.

The third article of the treaty of Louis-

a third person.[50]

Treaties with the Indians.—A denial by a state court of a right claimed under any treaty with the Indians raises a federal question which may be reviewed by this court.[51]

iana stipulated for the admission of Louisiana into the Union, and it obviously contemplates two objects; one that stated, and the other, that until that admission, the inhabitants of the ceded territory shall be protected in the enjoyment of their liberty, property and religion. Had any of these rights been violated while the stipulation continued in force, the individual supposing himself to be injured might have brought his case into this court, under the twenty-fifth section of the judiciary act. New Orleans *v.* De Armas, 9 Pet. 224, 9 L. Ed. 109, followed in Iowa *v.* Rood, 187 U. S. 87, 93, 47 L. Ed. 86.

But this stipulation ceased to operate when Louisiana became a member of the Union, and its inhabitants were "admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States." The right to bring questions of title decided in a state court before this tribunal, is not classed among those immunities. The inhabitants of Louisiana enjoy all the advantages of American citizens, in common with their brethren in their sister states, when their titles are decided by the tribunals of the state. The act of congress admitting Louisiana into the Union, carries into execution the third article of the treaty of cession; and cannot be construed to give appellate jurisdiction to the court over all questions of title between the citizens of Louisiana. New Orleans *v.* DeArmas, 9 Pet. 224, 9 L. Ed. 109.

The treaty by which Louisiana was ceded to the United States recognized complete grants, issued anterior to the cession, and a decision of a state court against the validity of a title set up under such a grant, would be subject to revisal by this court under the 25th section of the judiciary act. But if the state court only applies the local laws of the state to the construction of the grant, it is not a decision against its validity, and this court has no jurisdiction. McDonogh *v.* Millaudon, 3 How. 693, 11 L. Ed. 787.

Treaty of Gaudalupe Hidalgo.—In Phillips *v.* Mound City Ass'n, 124 U. S. 605, 610, 31 L. Ed. 588, it was ruled that the adjudication by the highest court of a state that certain proceedings before a Mexican tribunal, prior to the treaty of Gaudalupe Hidalgo, was insufficient to affect the partition of a tract of land before that time granted by the Mexican government, which grant was confirmed under the act of March 3, 1851, presented no federal question; and Mr. Chief Justice Waite, delivering the opinion of the court, said: "Article VIII of the treaty protected all existing property rights within the limits of the ceded territory, but it neither created the rights nor defined them. Their existence was not made to depend on the constitution, laws, or treaties of the United States. There was nothing done but to provide that if they did in fact exist under Mexican law, or by reason of the action of Mexican authorities, they should be protected. Neither was any provision made as to the way of determining their existence. All that was left by implication to the ordinary judicial tribunals. Any court, whether state or national, having jurisdiction of the parties and of the subject matter of the action, was free to act in the premises." The case is in point and is decisive. Martin *v.* Hunter, 1 Wheat. 304, 4 L. Ed. 97, is not to the contrary, for there the plaintiff claimed under the treaty of 1783, and the state court decided against the title thus set up. California Powder Works *v.* Davis, 151 U. S. 389, 395, 38 L. Ed. 206.

50. Must claim title for himself.—In an action of ejectment between two citizens of Maryland, for a tract of land in Maryland, if the defendant set up an outstanding title in a British subject which he contends is protected by the treaty, and therefore the title is out of the plaintiff; and the highest state court in Maryland decides against the title thus set up; it is not a case in which a writ of error can lie to the supreme court of the United States. It is not "a case arising under a treaty." The judiciary act must be restrained by the constitution of the United States. Owings *v.* Norwood, 5 Cranch 344, 3 L. Ed. 120.

51. Treaty with Indians.—Pickering *v.* Lomax, 145 U. S. 310, 36 L. Ed. 716.

As a case arises under the constitution or laws of the United States, whenever its decision depends upon the correct construction of either, Cohens *v.* Virginia, 6 Wheat. 264, 379, 5 L. Ed. 257; Osborn *v.* Bank of the United States, 9 Wheat. 738, 824, 6 L. Ed. 204; so a case arising or growing out of a treaty is one involving rights given or protected by a treaty. Owings *v.* Norwood, 5 Cranch 344, 348, 3 L. Ed. 120. The settlement of a controversy arising or growing out of these Indian treaties or the laws of congress relating thereto, and the determination of what sum, if any, might be justly due under them, certainly does not include a claim which could only be asserted by disregarding the treaties or laws, or holding them inoperative on the ground alleged. United States *v.* Old Settlers, 148 U. S. 427, 468, 37 L. Ed. 509.

An indictment and prosecution drawing in question a treaty with the Chero-

Showing as to Jurisdiction.—But it is not intended, nor to be understood, that the question, material to the decision arrived at, must be confined exclusively and specially to the construction of the treaty in order to give the jurisdiction, as this would be too narrow a view of it. Points may arise growing out of, and connected with the general question, and so blended with it as not to be separated, and therefore, falling equally within the decision contemplated by the 25th section.[52] It must appear, however, that a construction of the treaty actually arose, not that it might have arisen.[53] It must appear from the record, and not from a report of the judge trying the case at nisi prius, which is not a part of the record, that the validity of a treaty was drawn in question.[54] The treaty need not be spread of record, but the record must show a complete title under the treaty, and that the judgment of the court is in violation of that treaty.[55] A false allegation in the record that the treaty has been misconstrued will not give the supreme court jurisdiction.[56]

kee nation of Indians is within the appellate jurisdiction of the United States supreme court. Worcester *v.* Georgia, 6 Pet. 515, 8 L. Ed. 483.

52. Smith *v.* Maryland, 6 Cranch 286, 3 L. Ed. 225; Martin *v.* Hunter, 1 Wheat. 304, 355, 4 L. Ed. 97; Williams *v.* Oliver, 12 How. 111, 124, 13 L. Ed. 921.

53. Ocean Ins. Co. *v.* Polleys, 13 Pet. 157, 10 L. Ed. 105; Coons *v.* Gallagher, 15 Pet. 18, 10 L. Ed. 645, 646; Armstrong *v.* The Treasurer, 16 Pet. 281, 10 L. Ed. 965; Mills *v.* Brown, 16 Pet. 525, 10 L. Ed. 1055; McDonogh *v.* Millaudon, 3 How. 693, 705, 11 L. Ed. 787.

Where on a writ of error to a state court it is claimed that the parties have been denied, by the decision of the court below, rights guaranteed to them by treaties between the United States and their respective countries, if no such question was made and decided in the court below, it cannot be raised in this court for the first time. Spies *v.* Illinois, 123 U. S. 131, 31 L. Ed. 80.

The record must show a complete title under the treaty, and a decision against its validity. Hickie *v.* Starke, 1 Pet. 94, 7 L. Ed. 67; Maney *v.* Porter, 4 How. 55, 11 L. Ed. 873.

In Gill *v.* Oliver, 11 How. 529, 545, 13 L. Ed. 799, on error to the court of appeals of Maryland, it was held, where an award had been obtained under a treaty with Mexico and both parties claimed under the award, that the introduction of the treaty and the award merely as part of the history of the case did not in any way involve the validity of the treaty or its construction, and that the writ of error could not be maintained. See Williams *v.* Oliver, 12 How. 111, 13 L. Ed. 921; Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 225, 32 L. Ed. 908; Borgmeyer *v.* Idler, 159 U. S. 408, 415, 40 L. Ed. 199.

Where the validity of an act of congress by which Mexican and Spanish grants have been confirmed and patented, is not drawn in question in the state court, and where the right or title asserted by the plaintiffs in error was derived under Mexican and Spanish grants, it was held that a decision of the state court on a claim asserted by the plaintiffs in error to riparian rights and subterranean waters is not against any title or right claimed under the constitution, or any treaty, or statute of, or commission held, or authority exercised, under the constitution. "If the title of plaintiffs in error were protected by the treaty, still the suit did not arise thereunder, because the controversy in the state court did not involve the construction of the treaty, but the validity of the title of Mexican and Spanish grants prior to the treaty. New Orleans *v.* De Armas, 9 Pet. 224, 9 L. Ed. 109; Iowa *v.* Rood, 187 U. S. 87, 47 L. Ed. 86; Phillips *v.* Mound City Ass'n, 124 U. S. 605, 31 L. Ed. 588." Hooker *v.* Los Angeles, 188 U. S. 314, 47 L. Ed. 487, reaffirmed in New York, etc., R. Co. *v.* Plymouth, 193 U. S. 668, 48 L. Ed. 839.

54. Inglee *v.* Coolidge, 2 Wheat. 363, 4 L. Ed. 261; Miller *v.* Nicholls, 4 Wheat. 311, 4 L. Ed. 578; Cohens *v.* Virginia, 6 Wheat. 264, 5 L. Ed. 257; McDonogh *v.* Millaudon, 3 How. 693, 705, 11 L. Ed. 787.

55. Hickie *v.* Starke, 1 Pet. 94, 7 L. Ed. 67; Wilson *v.* Black Bird Creek Marsh Co., 2 Pet. 245, 7 L. Ed. 412; Weston *v.* Charleston, 2 Pet. 449, 7 L. Ed. 481; Harris *v.* Dennie, 3 Pet. 292, 7 L. Ed. 683; McDonogh *v.* Millaudon, 3 How. 693, 705, 11 L. Ed. 787.

56. Choteau *v.* Marguerite, 12 Pet. 507, 9 L. Ed. 1174.

The supreme court has not jurisdiction of a case brought by a writ of error from the supreme court of the state of Mississippi, under the 25th section of the judiciary act, where the question was whether the appellee was a slave. The provisions of the treaty by which Louisiana was ceded to the United States, and in which was a guaranty of the property of persons residing at the time of the cession within the territory of Louisiana, may be enforced in the courts of the state of Missouri. The allegation that the treaty has been miscon-

Must Be Directly Involved.—And the validity or construction of a treaty must be drawn in question and denied directly, not incidentally.[57]

(19) *Denial of Rights under the Commerce Clause of the Constitution.*—**In General.**—The denial by a state court of some title, right, privilege or immunity, set up and claimed under the commerce clause of the constitution, gives this court jurisdiction.[58]

Status of a Railway Postal Clerk.—A decision of the highest state court that a railway postal clerk is not a passenger and has no greater rights, in the event of being injured in the course of his employment, than an employee of the railroad company would have had, presents no federal question, on the ground that it is in conflict with the power of congress to establish postoffices and post roads.[59]

Showing as to Jurisdiction.—To sustain our jurisdiction under this clause of the constitution, the federal question must be distinctly set up and claimed in the state court at the proper time and in the proper way, and must be actually or necessarily decided, or at least ignored.[60] This court has no jurisdiction of a writ

strued by the supreme court of the state in refusing to sanction the claim asserted, will not give the supreme court of the United States jurisdiction in the case. Choteau *v.* Marguerite, 12 Pet. 507, 9 L. Ed. 1174, cited in Scott *v.* Sandford, 19 How. 393, 15 L. Ed. 691.

57. Borgmeyer *v.* Idler, 159 U. S. 408, 40 L. Ed. 199, in which it was held, that the matter in controversy, being money received by one of the parties as an award under a treaty of the United States with a foreign power, providing for the submission of claims against that power to arbitration, did not in any way draw in question the validity or construction of the treaty. Followed in Sweringen *v.* St. Louis, 185 U. S. 38, 44, 46 L. Ed. 795.

58. Denial of rights under commerce clause.—Upon the authority of Missouri, etc., R. Co. *v.* Elliott, 184 U. S. 530, 46 L. Ed. 673, it may be admitted that the question of the decision of the state court being in contravention of the legislation of congress to regulate interstate commerce, was sufficiently made, and the adverse decision to the party claiming the benefit of that act, gives rise to the right of view here. Pennsylvania R. Co. *v.* Hughes, 191 U. S. 477, 487, 48 L. Ed. 268.

Where an action is brought in a state court against a railroad company to recover damages sustained by the appellee, by reason of the defendants having brought and caused to be brought into the state certain cattle alleged to have been infected with a disease known as Texas splenic or Spanish fever, and communicated by them to the plaintiff's cattle whereby the latter sickened and died, and the railway company contends that legislation by congress and the regulations prescribed by the secretary of agriculture in execution of the animal industry act, furnished a complete defense to all claims for damages asserted in the action, but the contention is overruled by the state court, this court has jurisdiction to inquire whether the state court erred in holding that the legislation of congress and the regulations of the secretary of the interior gave the railway company the right, privilege and immunity specially set up and claimed by it. Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 42 L. Ed. 878, citing Wilson *v.* Black Bird Creek Marsh Co., 2 Pet. 245, 251, 7 L. Ed. 412; Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574, 579, 28 L. Ed. 1084; Sayward *v.* Denny, 158 U. S. 180, 184, 39 L. Ed. 941; Chicago, etc., R. Co. *v.* Chicago, 164 U. S. 454, 458, 41 L. Ed. 511.

The defendant distinctly claimed that the statute of a state was inconsistent with the power of congress to regulate commerce among the several states. The state court sustained the statute upon the ground that it was intended to apply and applied to only the domestic transportation. It was held, that no federal question is presented which will confer jurisdiction upon the supreme court of the United States to review the judgment of the state court upon writ of error. Erie R. Co. *v.* Purdy, 185 U. S. 148, 46 L. Ed. 847, reaffirmed in Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328; Carnahan *v.* Connolly, 187 U. S. 636, 47 L. Ed. 343; Hughes *v.* Kepley, 191 U. S. 557, 48 L. Ed. 301; Illinois *v.* Binns, 189 U. S. 505, 47 L. Ed. 921; Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Bank of Commerce *v.* Wiltsie, 189 U. S. 505, 47 L. Ed. 921.

59. Martin *v.* Pittsburg, etc., R. Co., 203 U. S. 284, 51 L. Ed. 184.

60. Duties of connecting carriers.—This court has no jurisdiction to review the judgment of the highest court of the state upholding the contention of a common carrier admitting that it was such in certain states and portions of the country where it operated lines of roads, but denied "that it was the connecting and ultimate carrier of the carloads of corn alleged to have been delivered to the Southern Railway Company," and further denying that it made the contracts or was liable under them on which it was being

of error to a state court on the ground that the decision in the state court was in conflict with the clause of the constitution of the United States which gives congress power to regulate commerce with foreign nations and among the several states and with the Indian tribes, where no point on the commerce clause of the constitution was taken in the state court or considered by it. Accordingly, where the only question considered by the state court was whether liquor was sold by the plaintiff in error within or without the state, and the court holds that the completed sale was in the state, this does not involve any federal question.[61] But where the commerce clause of the constitution is invoked in a state court and denied, a writ of error will lie from this court to review a decision of a state court upholding the validity of the seizure of intoxicating liquors under the state laws, where the liquor was shipped C. O. D. into that state from another state.[62]

sued, or that it was bound by law to receive said alleged carloads of corn and forward and deliver them to their ultimate destination in good order and in reasonable time on the ground that this is a denial of a right under the interstate commerce act. Louisville, etc., R. Co. *v.* Smith, etc., Co., 204 U. S. 551, 51 L. Ed. 612.

Where in a suit brought in a state court by the defendant in error against the plaintiff in error, for damages alleged to have been received by the defendant in error to certain carloads of corn shipped over the Southern Railway from certain points in Tennessee to be delivered to the defendant in error in Alabama, the bill charges a breach of the contracts of shipment by one or the other of the railway companies who, the bill alleges, were connecting common carriers, and as such bound by the contracts and the law relative to common carriers to receive and forward to destination the goods shipped in good order and in a reasonable time, and plaintiff in error admitted that it was a common carrier in some states, but was not a connecting and ultimate carrier of the corn in question, denied that it was bound by the contracts, and denied that "it was bound by law" to receive the corn and forward and deliver it to its ultimate destination. It was held, that the denial by the state court of the allegations of this bill raises no federal question, because "the denial was of a legal conclusion resulting from the facts alleged, and added nothing to them. Besides, if a party relies upon a federal right, he must specially set it up, and a denial of liability under the law is not a compliance with that requirement." Louisville, etc., R. Co. *v.* Smith, etc., Co., 204 U. S. 551, 51 L. Ed. 612.

Reasonableness of railroad rates.—Where the question presented for decision in the state court was whether, consistently with the act to regulate commerce, there was power in the court to grant relief upon the finding that the rate charged for an interstate shipment was unreasonable, although such rate was the one fixed by the duly-published and filed rate sheet, and as the rate had not been found to be unreasonable by the interstate commerce commission, this court has jurisdiction, where that question was presented by the pleading, was passed upon by the trial court, was expressly and necessarily decided by the court below, and is also essentially involved in the cause. Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553.

But the question whether a railroad company has established a legal schedule of rates in compliance with the act to regulate commerce as to the posting of the established schedule, is not open to review by this court, where the state court expressly concluded that the railway company had complied with the act to regulate commerce in the matter of filing, etc., its schedule of rates, and the court and counsel confined the issue for determination to the question of the effect of the act to regulate commerce upon the rights of the parties, manifestly upon the assumption that the correctness of the conclusion of the trial court as to compliance with the act was conceded by both parties. Texas, etc., R. Co. *v.* Abilene Cotton Oil Co., 204 U. S. 426, 51 L. Ed. 553.

Validity of seizure of intoxicants.—Where the commerce clause of the constitution does not appear to have been relied on nor was it called to the attention or passed upon by the state court, a writ of error upholding the validity of a seizure of intoxicating liquors under the state laws, where the liquor was shipped C. O. D. into that state from another state, where it is claimed that the sale was complete in the former state, will be dismissed. O'Neil *v.* Vermont, 144 U. S. 323, 344, 36 L. Ed. 450; Norfolk, etc., R. Co. *v.* Sims, 191 U. S. 441, 48 L. Ed. 254; American Express Co. *v.* Iowa, 196 U. S. 133, 49 L. Ed. 417; Adams Express Co. *v.* Iowa, 196 U. S. 147, 49 L. Ed. 424.

61. O'Neil *v.* Vermont, 144 U. S. 323, 36 L. Ed. 450, Mr. Justice Field dissenting.

62. American Express Co. *v.* Iowa, 196 U. S. 133, 49 L. Ed. 417, distinguishing O'Neil *v.* Vermont, 144 U. S. 323, 324, 36 L. Ed. 450; Adams Express Co. *v.* Iowa, 196 U. S. 147, 49 L. Ed. 424.

(20) *Denial of Rights under the Fifteenth Amendment.*—The right of the supreme court of the United States to review decisions of the highest court of the state in cases where its jurisdiction is invoked because of alleged denial of the rights of the plaintiff in error, secured to him by the 15th amendment to the constitution of the United States, is regulated by § 709 of the Revised Statutes.[63]

(21) *Jurisdiction over Navigable Waters.*—**In General.**—Decisions of the highest state court affecting navigable waters, may be reviewed by this court under the judiciary act.[64] If the action is for a maritime tort committed upon

63. Denial of rights under the fifteenth amendment.—Giles *v.* Teasley, 193 U. S. 146, 48 L. Ed. 655, reaffirmed in Delahanty *v.* Pitkin, 199 U. S. 602, 50 L. Ed. 328.

Denial of elective franchise to negroes.—The judgment of the highest court of Alabama sustained a demurrer to petition in an action for damages for the refusal of a board of registrars to register the petitioner, a negro, as a voter. The ground of sustaining the demurrer is, in effect, that conceding the allegations of the petition to be true and the registrars to have been appointed and qualified under a constitution which has for its purpose to prevent negroes from voting and to exclude them from registration for that purpose, no damage has been suffered by the plaintiff, because no refusal to register by a board thus constituted in defiance of the federal constitution could have the effect to disqualify legal voters, otherwise entitled to exercise the elective franchise. It was held, that in such decision no right, immunity or privilege, the creation of federal authority, has been set up by the plaintiff in error and denied in such wise as to give the supreme court of the United States the right to review the state court decision. Giles *v.* Teasley, 193 U. S. 146, 48 L. Ed. 655, reaffirmed in Delahanty *v.* Pitkin, 199 U. S. 602, 50 L. Ed. 328.

64. Jurisdiction over navigable waters.—The question whether the courts of the United States, as courts of admiralty, have exclusive jurisdiction of suits in personam, growing out of collisions between vessels that are navigated in the Ohio river, is a federal question, and gives us jurisdiction. Schoonmaker *v.* Gilmore, 102 U. S. 118, 119, 26 L. Ed. 95.

A decision by the highest court of a state upon the question whether the mere fact that a bridge, constructed under authority derived from the act of congress of July 25, 1866, 14 Stat. 244, had not been constructed as required by the statute, rendered the owner liable for injuries happening by reason of its existence to a steamboat navigating the river, irrespective of the question whether the accident was the result of the improper construction, presents no federal question for the decision of this court. Hannibal, etc., R. Co. *v.* Missouri River Packet Co., 125 U. S. 260, 31 L. Ed. 731.

The question whether the lessee of property situated on the bank of the Mississippi River within the city of St. Louis, which had been improved with a view to its use, and was used in connection with the navigation of the river, could maintain an action against the city for extending one of its streets into the river so as to divert the natural course of the water and destroy the water privileges which were appurtenant to the property, is not one of federal law; distinguishing Railway Co. *v.* Renwick, 102 U. S. 180, 26 L. Ed. 51, as follows: "The case of Railway Co. *v.* Renwick, 102 U. S. 180, 182, 26 L. Ed. 51, was entirely different from this. There the question was whether the owner of a saw mill on the bank of the Mississippi River, who had improved his property by erecting piers and cribs in the river under the authority of a statute of Iowa, but without complying with the provisions of § 5254, Rev. Stat., could claim compensation from the railroad company for taking his property in the river for the construction of its road. The company claimed that, as congress, in the exercise of its jurisdiction over the navigable waters of the United States, had prescribed certain conditions on which the owners of saw mills on the Mississippi River might erect piers and cribs in front of their property, the statute of Iowa, under which Renwick had made his improvements, was void. This we held presented a federal question and gave us jurisdiction." St. Louis *v.* Myers, 113 U. S. 566, 28 L. Ed. 1131.

Plaintiff in error claims that the cession by the state of New Jersey to the United States of America of a certain strip of land at Sandy Hook vested in the United States exclusive legislative jurisdiction over the littoral waters extending three miles to the eastward of the coast line thereof, and that therefore a verdict should have been directed. Held, that under United States constitution, art. 1, § 8, ch. 17, this court has jurisdiction on writ of error to review the decision. The plaintiff in error explicitly limited its claim to exclusive federal jurisdiction over the adjoining waters to the three-mile limit. The record, however, discloses evidence that the collision in question occurred beyond the three-mile limit. Hamburg American Steamship Co. *v.* Grube, 196 U. S. 407, 412, 49 L. Ed. 529.

A cross complaint by a canal company in a suit in a state court, setting up and claiming a right to a water power on the ground that it was created by a dam,

navigable waters and within the admiralty jurisdiction, the appellate jurisdiction of this court over questions national and international in their nature cannot be restrained by the mere fact that the party plaintiff has elected to pursue his common-law remedy in a state court.[65]

(22) *Acts of Congress Regulating Common Carriers.*—Decisions of state courts denying any title, right, privilege or immunity under an act of congress regulating carriers of goods or passengers, may be reviewed, provided the other requisites exist.[66]

(23) *Decisions Relating to Boundaries between Land Granted by United States.*—This court has not jurisdiction, under the twenty-fifth section of the judiciary act, to review the judgment of a state court, where the question involved merely related to the proper boundary between two tracts of land, although the owners of both had valid grants from the United States.[67]

canal, and other improvements owned and operated by the United States, and that the canal company's right and title to the water power so created arose under and by virtue of certain alleged and recited acts of congress, and especially by virtue of an alleged contract between the United States and the canal company, whereby the use of the surplus water, not needed for purposes of navigation, was granted and reserved to the canal company, "specially set up and claimed" federal rights, within Revised Statutes, § 709; and a final judgment of the state courts denying such rights is reviewable by the supreme court. Green Bay, etc., Canal Co. *v.* Patten Paper Co., 172 U. S. 58, 43 L. Ed. 364.

65. Belden *v.* Chase, 150 U. S. 674, 691, 37 L. Ed. 1218.

66. Acts of congress regulating common carriers.—Where in a suit upon a policy of insurance to recover for the loss of the plaintiff in errors steamboat by fire, the defense was that the fire was caused by his gross negligence in the use of turpentine, on board as freight, to increase steam while racing with another boat, it was held that the plaintiff in error claimed no "title, right, privilege or immunity" under the constitution, laws or treaties of the United States, and no such title, right, privilege or immunity has been denied him, although an act of congress prohibited the transportation of turpentine, as freight, on steamboats carrying passengers, "except in cases of special license for that purpose." No complaint was made of the carriage of the turpentine, but of its use while being carried. Marsh *v.* Citizens' Ins. Co., 131 U. S., appx. ccxiii, 25 L. Ed. 9.

67. Decisions relating to boundaries between land granted by United States.—Moreland *v.* Page, 20 How. 522, 15 L. Ed. 1009.

This court has repeatedly held, that the twenty-fifth section of the judiciary act of 1789 does not warrant the review of an adjudication upon a mere question of boundary. The fact that the land to which the boundary relates is held by a title derived from an act of congress does not change the result. If the title be admitted as recognized by the act, its location upon the land is a subject wholly within the cognizance of the state tribunals, and it is not within the power of this court to revise their action. In such cases our authority is limited to errors relating to the title. If any such are committed, it is our duty to correct them. If there are none, we have no more authority to interpose than in any other case of alleged maladministration of justice by a state court. A party cannot, by setting up an unfounded claim of title, compel us, after deciding the claim against him, to take to ourselves a jurisdiction which, but for such claim, we could not have exercised. Such a result would make the jurisdiction depend, not upon the nature and merits of the case, but upon what the party may choose to allege. In this way, in every case where the title is derived from the United States, and a question of boundary is involved, this court might be constrained to do what it has uniformly held to be beyond the sphere of its power. Lanfear *v.* Hunley, 4 Wall. 204, 209, 18 L. Ed. 325.

State courts have a right to decide upon the true running of lines of tracts of land, and this court has no authority to review those decisions under the 25th section of the judiciary act. Where the decision was that the true lines of the litigants did not conflict with each other, but the losing party alleged that her adversary's title was void under the correct interpretation of an act of congress, this circumstance did not bring the case within the jurisdiction of this court. Nor is the jurisdiction aided because the state court issued a perpetual injunction upon the losing party. This was a mere incident to the decree, and arose from the mode of practice in Louisiana, where titles are often quieted in that way. Almonester *v.* Kenton, 9 How. 1, 13 L. Ed. 21.

This court has no jurisdiction to review the judgment of a state court, ascertaining the boundaries between two neighbors having complete grants. "If the accident to the controversy that both par-

(24) *Claim of Title to Land under United States*—aa. *In General.*—Where the plaintiff in error claims title to land under an act of congress, or under the authority of the United States, and the decision is against the right or title so set up and claimed, it may be reviewed by this court.[68] But this court has frequently

ties claim title under the United States should be considered as sufficient to bring it within our jurisdiction, then every controversy involving the title to such lands, whether it involve the inheritance, partition, devise, or sale of it, may, with equal propriety, be subject to the examination of this court in all time to come. This question is now new; it was decided in the case of McDonough *v.* Millaudon, 3 How. 693, 11 L. Ed. 787, where this court refused to entertain jurisdiction to review the judgment of a state court, ascertaining the boundaries between complete grants under the French government, as it did not call in question either the construction or the validity of the treaty, or the title to the land held under it. See, also, Kennedy *v.* Hunt, 7 How. 586, 593, 12 L. Ed. 829." Moreland *v.* Page, 20 How. 522, 15 L. Ed. 1009.

The twenty-fifth section of the judiciary act does not warrant the review of an adjudication upon a mere question of boundary; the fact that the land to which the boundary relates is held by a title derived from an act of congress does not change the result. If the title be admitted as recognized by the act, its location upon the land is a subject wholly within the cognizance of the state tribunals, and it is not within the power of this court to reverse their action. In such cases its authority is limited to errors relating to the title. Lanfear *v.* Hunley, 4 Wall. 204, 205, 18 L. Ed. 325.

68. Claim of title to land under United States.—Pollard *v.* Kibbe, 14 Pet. 353, 10 L. Ed. 490; Rector *v.* Ashley, 6 Wall. 142, 18 L. Ed. 733; Northern Pac. R. Co. *v.* Colburn, 164 U. S. 383, 41 L. Ed. 479; Johnson *v.* Towsley, 13 Wall. 72, 80, 20 L. Ed. 485.

Where the question involved in the state court was as to the title or right of Cornell University to lands claimed by the college under the act of congress of 1862, 12 Stat. c. 130, 503, providing for aid to public institutions in the state a great fund in lands, etc., and this title or right is denied by the state court, this raises a federal question. Cornell University *v.* Fiske, 136 U. S. 152, 34 L. Ed. 427.

Where the complainant had no title to the land he sets up and claims under the act of congress, of course he cannot come here under the 25th section of the judiciary act. Wynn *v.* Morris, 20 How. 3, 15 L. Ed. 800.

Where a pre-emptioner sold his inchoate title, which passed ultimately into the hands of a trustee, and the trustee loaned money out of the trust fund to the pre-emptioner, in order to enable him to pay the government; and the title thus obtained from the United States was conveyed by the pre-emptioner to the trustee, without any reference to the trust; and the trustee was ordered by a state court to hold the property subject to the trust—he cannot remove the case to this court, by virtue of the twenty-fifth section of the judiciary act. There is no title, right, privilege, or exemption, under an act of congress, set up by the party and decided against him by the state court. By his own showing, he has acquired no title from the United States. Udell *v.* Davidson, 7 How. 769, 12 L. Ed. 907.

Patent for land.—The decree of a state court denying the plaintiff in error a right asserted under a patent for land from the United States, is within § 709 of the Revised Statutes. Baldwin *v.* Stark, 107 U. S. 463, 27 L. Ed. 526, citing Johnson *v.* Towsley, 13 Wall. 72, 20 L. Ed. 485; Marquez *v.* Frisbie, 101 U. S. 473, 25 L. Ed. 800; Morrison *v.* Stalnaker, 104 U. S. 213, 26 L. Ed. 741.

A claim of title under a patent from the United States, if denied by a state court, may be reviewed by this court under the 25th section of the judiciary act. Tyler *v.* Magwire, 17 Wall. 253, 254, 21 L. Ed. 576.

Grant of lands to Montana for school purposes.—Where the United States granted to the state of Montana public lands for a normal school to be held, appropriated and disposed of for such purpose, or in such manner as the legislature should provide, and the legislature, by a law enacted in due form, did provide that bonds should be issued, secured by the proceeds of the sale, etc., and it is specially set up and claimed in the state court that the legislature had authority, under a statute of the United States, namely, § 17 of the enabling act, to deal with the lands as it did by the bond act, and that if the bond act was in violation of the constitution of the state, the law enacted in pursuance of an authority granted by the United States was valid and effective notwithstanding, this is a claim of a right under an authority exercised under the United States, and therefore raises a federal question. Haire *v.* Rice, 204 U. S. 291, 51 L. Ed. 490, citing Magwire *v.* Tyler, 1 Black 195, 17 L. Ed. 137.

Denial by state court of validity of patent for land.—A decision in the highest court of a state against the validity of a patent granted by the United States for land, and whose validity is drawn in question in such court, is a decision against the validity of an authority exer-

been vainly asked to hold that controversies in respect to lands, one of the parties

cised under the United States, and the subject of re-examination here, although the other side have also set up as their case a similar authority whose validity is by the same decision affirmed. Reichert *v.* Felps, 6 Wall. 160, 18 L. Ed. 849.

Both the plaintiff and defendants claimed title under the provisions of the act of congress, passed March 3d, 1803, entitled, "An act regulating the grant of land, and providing for the disposal of the lands of the United States, south of the State of Tennessee;" and the decision of the Supreme Court of the State of Mississippi, was, upon the construction given to that act by the commissioners acting under its authority. This is a case which draws into question the construction of an act of Congress, and the Supreme Court of the United States has jurisdiction on a writ of error, by which the decision of the court of the State of Mississippi is brought up for revision, under the 25th section of the judiciary act of 1789. Ross *v.* Doe, 1 Pet. 655, 7 L. Ed. 302, citing Matthews *v.* Zane, 4 Cranch 382, 2 L. Ed. 654.

Claim by municipality.—Where suit is brought in a state court by a town claiming part of its common under the act of congress passed in 1812, and the defense is that there was a survey in pursuance of the federal statute which estops the plaintiff to set up his claim, this court has jurisdiction to re-examine the case, and reverse or affirm the judgment. "The 25th section of the judiciary act provides, that where there is drawn in question the construction of any statute of the United States, and the decision is against the title set up and claimed under the statute, the case may be re-examined in this court, and the decision reversed or affirmed. Here, title was set up and claimed by Carondelet to a part of its common, according to a true construction of the act of 1812. The claim depends solely on this act of congress, taken in connection with Soulard's survey; and the decision being adverse to the claim, jurisdiction exists." Carondelet *v.* Saint Louis, 1 Black 179, 188, 17 L. Ed. 102.

The judgment of a state court that a donation land claim under the act of congress of September 27, 1850, c. 76, below high water mark, was invalid, upon the ground that the grant from the United States upon which it was founded passed no title or right, as against the subsequent deeds from the state, in lands below high water mark, is a direct adjudication against the validity of a right or privilege claimed under a law of the United States, and presents a federal question within the appellate jurisdiction of this court. Shively *v.* Bowlby, 152 U. S. 1, 38 L. Ed. 331, citing Railroad Co. *v.* Schurmeier, 7 Wall. 272, 19 L. Ed. 74; Packer *v.* Bird, 137 U. S. 661, 34 L. Ed. 819; Knight *v.* United States Land Ass'n, 142 U. S. 161, 35 L. Ed. 974.

Title under private act of congress.—Action of ejectment in the state court of Alabama for a lot of ground in the city of Mobile. The plaintiff claimed the title to the lot under an act of congress, and the decision of the state court was against the right and title so set up and claimed. A writ of error was prosecuted to the supreme court of Alabama. It was held, that this case was embraced by the 25th section of the judiciary act of 1789, which gives this court jurisdiction to revise the judgment of the state court in such cases. The act of congress under which title was claimed, being a private act, and for the benefit of the city of Mobile and certain individuals, it is fair to presume it was passed with reference to the particular claims of individuals, and the situation of the land embraced in the law at the time it was passed. Pollard *v.* Kibbe, 14 Pet. 353, 10 L. Ed. 490.

Where the title to land, under confirmation by United States commissioners, was directly drawn in question and the decision below rejected the title, this court has authority to re-examine the decision of the state court. Berthold *v.* McDonald, 22 How. 334, 16 L. Ed. 318.

The adjudication of the register and receiver, which authorized the entry of land, is subject to revision in the courts, on showing that the entry was obtained by fraud and false testimony as to settlement and cultivation. "Another preliminary question is presented on this record, namely: Whether the adjudication of the register and receiver, which authorized Cloyes' heirs to enter the land, is subject to revision in the courts of justice, on proof, showing that the entry was obtained by fraud and the imposition of false testimony on those officers, as to settlement and cultivation. We deem this question too well settled in the affirmative for discussion. It was so treated in the case of Cunningham *v.* Ashley, 14 How. 377, 14 L. Ed. 462; again in Barnard *v.* Ashley, 18 How. 43, 15 L. Ed. 285; and conclusively in the case of Garland *v.* Wynn, 20 How. 6, 8, 15 L. Ed. 801." Lytle *v.* Arkansas, 22 How. 193, 16 L. Ed. 306.

"Congress, in acting upon complete grants, recognized them as they stood; and the act of May 11th, 1820, confirming such as were recommended for confirmation by the register and receiver, had no reference to any particular surveys. A decision of a state court, therefore, which may be in opposition to one of these surveys, is not against the validity of a title existing under an act of congress, and this

to which had derived his title directly under an act of congress, for that reason

court has no jurisdiction in such a case." McDonogh *v.* Millaudon, 3 How. 693, 11 L. Ed. 787.

Claim under authority exercised by secretary of treasury.—Where, upon the trial of a case in a state court, a party claims the land in dispute, under an authority which he alleges has been exercised by the secretary of the treasury, in behalf of the United States, and the decision was against the validity of the authority, the party is entitled to have his case brought to this court under the twenty-fifth section of the judiciary act. Neilson *v.* Lagow, 7 How. 772, 12 L. Ed. 908.

Claim of title under grants from state.—In 1841, congress granted to the state of Louisiana 500,000 acres of land, for the purposes of internal improvement, and in 1849 granted also the whole of the swamp and overflowed lands which may be found unfit for cultivating. In both cases, patents were to be issued to individuals under state authority. In a case of conflict between two claimants, under patents granted by the state of Louisiana, this court has no jurisdiction, under the 25th section of the judiciary act, to review the judgment of the supreme court of Louisiana, given in favor of one of the claimants. Shaffer *v.* Scudday, 19 How. 16, 15 L. Ed. 592.

Riparian rights.—Where the parties to the contest both claim under title derived under the United States, the plaintiff in error under patents granted to the state of Oregon under the swamp land grant; the defendant in error under the homestead laws, and the plaintiff in error contended in the Oregon courts and in the supreme court of the United States that a proper construction of the survey and patents gives riparian rights covering the land in dispute, and that it is not competent to overcome such rights by evidence affecting the legal import of the plats and patents, it was held, that a federal question is thus presented. French-Glenn Live Stock Co. *v.* Springer, 185 U. S. 47, 46 L. Ed. 800, affirmed and followed in French-Glenn Live Stock Co. *v.* Colwell, 185 U. S. 54, 46 L. Ed. 804.

Where a title under a settlement certificate issued under an act of congress is set up by a party in the highest court of a state, and the decision of such court is against the title so set up, a writ of error lies from this court under the twenty-fifth section of the judiciary act. Silver *v.* Ladd, 6 Wall. 440, 18 L. Ed. 828.

Laws of congress perfecting title to public lands.—Where laws of congress and acts of officers executing them in perfecting titles to public lands have been drawn in question and construed by the decision of a state court, and the decision is against the title set up under them, jurisdiction is vested in this court by the 25th section of the judiciary act, to examine the judgment of the state court. "And in doing so, we refer to the opinoin of that court, which is made part of the record by the laws of Louisiana, and is explanatory to the judgment, of which it is there deemed an essential part. We refer to the opinion, in order to show that questions did arise and were decided, as required, to give this court jurisdiction. Almonester *v.* Kenton, 9 How. 1, 9, 13 L. Ed. 21. This is necessarily so in cases brought here by writ of error to the courts of Louisiana, because no bill of exceptions is necessary there, when appeals are prosecuted. The court of last resort acts on the law and facts as presented by the whole record." Cousin *v.* Labatut, 19 How. 202, 15 L. Ed. 601.

Examination of plaintiff's title.—Where a party claiming title to lands under an act of congress, brought a bill for a conveyance, and stated several equitable circumstances in aid of his title, and the state court where the suit was brought having dismissed the bill, and the cause being brought to this court by appeal, under the 25th section of the judiciary act of 1789, c. 20, upon the ground of an alleged misconstruction of the act of congress by the state court; held, that this court could not take into consideration any distinct equity arising out of the contracts or transactions of the parties, and creating a new and independent title, but was confined to an examination of the plaintiff's title as depending upon the construction of the act of congress. Matthews *v.* Zane, 7 Wheat. 164, 5 L. Ed. 425.

Validity of authentication of purchases.—Where the supreme court of a state has decided against the validity of a patent, on the ground that the act of congress and regulations of the general land office directing the manner in which the purchase of public lands shall be authenticated by the registers and receivers of the land offices has not been complied with, this court has jurisdiction under the 25th section of the judiciary act to review that judgment. Bell *v.* Hearne, 19 How. 252, 15 L. Ed. 614, citing Armstrong *v.* The Treasurer, 16 Pet. 281, 10 L. Ed. 965; Grand Gulf Railroad, etc., R. Co. *v.* Marshall, 12 How. 165, 13 L. Ed. 939.

Identity of person entitled to title.—A question of federal jurisdiction under the twenty-fifth section of the judiciary act is not necessarily raised by every suit for real estate in which the parties claiming under the federal government are at issue as to which of them is entitled to the benefit of that title. And when the issue turns solely upon the personal identity of the individual to whom the recorder of

alone presented a federal question.[69] The mere fact that an act of congress or a patent of the United States appears in a chain of title of a state, does not constitute such a right, title or immunity as gives the federal court jurisdiction, un-

land titles confirmed, or meant to confirm, a lot of ground—as ex. gr., whether when he confirmed the land in the name of Louis Lacroix he meant Louis Lacroix, or whether he really meant Joseph Lacroix—a matter to be determined by the rules of common law—this court has no jurisdiction, even though the parties claimed under the federal government. Carpenter *v.* Williams, 9 Wall. 785, 19 L. Ed. 827.

Grounds of decision immaterial.—Under the 25th section of the judiciary act, it is not material whether the invalidity of a title was decreed in the state court upon a question of fact or of law. The fact that the title was rejected in that court, authorizes this court to re-examine the decree. "The decision in the supreme court of Arkansas drew in question an authority exercised under the United States, to wit; that of admitting Cloyes to make his entry; and the decision was against its validity, and overthrew his title, and is, therefore, subject to be re-examined, and reversed or affirmed in this court, on all the pleadings and proofs which immediately respect the question of the proper exercise of authority by the officers administering the sale of the public lands on the part of the United States. In the case of Martin *v.* Hunter, 1 Wheat. 304, 352, 4 L. Ed. 97, the foregoing construction of the 25th section of the judiciary act of 1789 was recognized, and has been followed since, in the cases of Chouteau *v.* Eckhart, 2 How. 344, 372, 11 L. Ed. 293; Cunningham *v.* Ashley, 14 How. 377, 14 L. Ed. 462; Garland *v.* Wynn, 20 How. 6, 8, 15 L. Ed. 801, and other cases." Lytle *v.* Arkansas, 22 How. 193, 16 L. Ed. 306.

But where ejectment is brought in the state court to recover possession of the town site claimed under a patent from the United States for a mining claim, a decision of the state court that the statute of limitations did not begin to run against the mining claim until the patent had been issued, presents no federal question. Carothers *v.* Mayer, 164 U. S. 325, 41 L. Ed. 453.

Where ejectment is brought in the state court to recover possession of a town site, claimed under a patent from the United States for a mining claim, a decision of the state court that the matter alleged as an estoppel having taken place before the time the plaintiffs made their application for a patent, and notice of such application having been given, that all adverse claimants be given an opportunity of contesting the applicant's right to a patent, and that the patent having been issued, it was too late to base a defense upon the facts existing prior thereto, presents no federal question. Carothers *v.* Mayer, 164 U. S. 325, 41 L. Ed. 453.

69. Blackburn *v.* Portland Gold Min. Co., 175 U. S. 571, 579, 44 L. Ed. 276, reaffirmed in Empire State-Idaho Min., etc., Co. *v.* Bunker Hill Min. Co., 200 U. S. 613, 50 L. Ed. 620; Warder *v.* Loomis, 197 U. S. 619, 49 L. Ed. 909; Chapman, etc., Land Co. *v.* Bigelow, 206 U. S. 41, 51 L. Ed. 953.

In a suit for the recovery of lands, where both parties claimed under a common grantor whose title from the United States was admitted, this court had no jurisdiction for the review of the decisions of a state court upon questions relating only to the title acquired by the several parties, under their respective grants, from the common grantor, and which were not in themselves of a federal character. Hastings *v.* Jackson, 112 U. S. 233, 237, 28 L. Ed. 712, following Romie *v.* Casanova, 91 U. S. 379, 23 L. Ed. 374; McStay *v.* Friedman, 92 U. S. 723, 23 L. Ed. 767.

Thus in Romie *v.* Casanova, 91 U. S. 379, 23 L. Ed. 374, which was an action brought to recover the possession of certain lands in the city of San Jose, the question to be determined was, which of the two parties had actually obtained a grant of the particular premises in question. The title of the city had originated before the cession of California to the United States. But this court said: "The title of the city was not questioned. Even if it depended upon the treaty of Guadalupe Hidalgo and the several acts of congress to ascertain and settle private land claims in California, the case would not be different. Both parties admit that title, and their litigation extends only to the determination of the rights which they have severally acquired under it." Accordingly the writ of error to the supreme court of California was dismissed for want of jurisdiction.

Where, in ejectment for a part of the lands confirmed to the city of San Francisco by an act of congress, the validity and operative effect of which were not questioned, the judgment of the supreme court of the state of California was adverse to the defendant, who endeavored to make out such possession as would, under the operation of the city ordinance and the act of the legislature, transfer, as he claimed, the title of the city to him, held, that this court has no jurisdiction. "No federal question was involved in the decision of the supreme court. The city title was not drawn in question. The real controversy was as to the transfer

less such title involves the construction of the act or the determination of the rights of the party under it.[70]

bb. *Construction of Patents.*—No federal question arises upon the pure question of the construction of the language used in a patent from the United States, there being no construction put upon any statute, nor upon any authority exercised under the United States. But where the grant is bounded by the waters of a navigable river and the right to make the grant to the extent claimed by the grantee is denied by a grantee under a state, the denial of the validity of the authority exercised would present a federal question.[71]

of that title to the plaintiffs in error; and this did not depend upon the 'constitution, or any treaty or statute of, or commission held or authority exercised under, the United States.' The case is, therefore, in all essential particulars, like that of Romie *v.* Casanova, 91 U. S. 379, 23 L. Ed. 374, and the writ must be." McStay *v.* Friedman, 92 U. S. 723, 23 L. Ed. 767.

This court has no jurisdiction to review the judgment of the supreme court of California where no right of the state to have the land listed to California under § 8 of the act of September 24, 1841, was in question, but the litigation is confined to a contest between the parties as to which has the better right to buy from the state. Mace *v.* Merrill, 119 U. S. 581, 30 L. Ed. 503, following Romie *v.* Casanova, 91 U. S. 379, 23 L. Ed. 374; McStay *v.* Friedman, 92 U. S. 723, 23 L. Ed. 767; Hastings *v.* Jackson, 112 U. S. 233, 28 L. Ed. 712.

70. De Lamar's Nevada Min. Co. *v.* Nesbitt, 177 U. S. 523, 44 L. Ed. 872; Iowa *v.* Rood, 187 U. S. 87, 92, 47 L. Ed. 86.

This court has no jurisdiction to review by writ of error the decision of a state court, holding that in an action to quiet title to wild and unoccupied lands, the plaintiff must succeed, if at all, on the strength of his own title, and not on the weakness of his adversary's, although the plaintiffs claim title under an act of congress entitled an act to enable the state of Arkansas and other states to reclaim the swamp lands within their limit. Chapman, etc., Land Co. *v.* Bigelow, 206 U. S. 41, 51 L. Ed. 953.

71. Construction of patents.—The question was whether the plaintiff is entitled to the alluvion caused by the recession of the Mississippi river to a point east of where it flowed, at the time plaintiff's predecessor took title to the property by virtue of a patent from the United States. The state court construing the language used in the patent, decided that the grant did not extend to the river bank, but bounded the land conveyed under it, by a line separated from the waters of the river by a sand beach. On writ of error to the state court it was held that no federal question was involved or decision made as to validity of the authority exercised, but that it was mere interpretation of the authority really exercised. It was really a question of fact as to how far east the measurement of the courses and distances carried the boundary. There was no contention as to the authority of the government to convey the land to the bank of the river where the water was actually flowing if it chose to do so. Sweringen *v.* St. Louis, 185 U. S. 38, 46 L. Ed. 795, distinguishing Packer *v.* Bird, 137 U. S. 661, 34 L. Ed. 819; Shively *v.* Bowlby, 152 U. S. 1, 38 L. Ed. 331.

"In Packer *v.* Bird, 137 U. S. 661, 34 L. Ed. 819, it was a question how far a grant carried the title to land bounded by the margin of the Sacramento River, or, as stated by Mr. Justice Field, who delivered the opinion of the court in that case, 'The question presented is, whether the patent of the United States, describing the eastern boundary of the land as commencing at a point on the river, which was on the right and west bank, and running southerly on its margin, embraces the island within it, or whether, notwithstanding the terms of apparent limitation of the eastern boundary to the margin of the river, the patent carries the title of the plaintiff holding under it to the middle of the stream. The contention of the plaintiff is that the land granted and patented, being bounded on the river, extends to the middle of the stream, and thus includes the island. It does not appear in the record that the waters of the river at the point where the island is situated are affected by the tides; but it is assumed that such is not the case. The contention of the plaintiff proceeds upon that assumption.' The opinion then proceeds with an examination of the question of what was the common law upon the subject, and whether that law had been adopted in the state of California where the land was. It was stated that it was 'undoubtedly the rule of the common law that the title of owners of land bordering on rivers above the ebb and flow of the tide extends to the middle of the stream, but that where the waters of the river are affected by the tides, the title of such owners is limited to ordinary high-water mark. The title to land below that mark in such cases is vested, in England in the Crown, and in this country in the state within whose boundaries the waters lie, private ownership of the soils under them being deemed inconsistent with the interest of the public at large in their use for purposes of commerce.' It was said

cc. *Titles Claimed under Patents Based upon Spanish or Mexican Grants.*—Where the title was not derived from the United States, but from a Spanish or French grant, this court has no jurisdiction.[72]

there was much conflict of opinion in the western states as to what the true doctrine was, whether it was the common law, which decided the question by the ebb and flow of the tides, or the law of actual navigability of the river, and in the case then before the court it accepted the view of the supreme court of California in its opinion as expressing the law of that state, 'that the Sacramento River being navigable in fact, the title of the plaintiff extends no farther than the edge of the stream.' It was in a case involving such facts that the remark was made, in the course of the opinion, that the courts of the United States would construe the grants of the general government without reference to the rules of construction adopted by the states for their grants, but that whatever incidents or rights attached to the ownership of property conveyed by the government would be determined by the states, subject to the condition that their rules do not impair the efficacy of the grants or the use and enjoyment of the property by the grantee. It was a necessary case for the court to adopt one or the other of these two conflicting rules for the construction of the grants of the general government, and in making its decision as to the proper construction in such cases the court held that the question of construction became one of a federal nature." Sweringen *v.* St. Louis, 185 U. S. 38, 43, 46 L. Ed. 795.

In Shively *v.* Bowlby, 152 U. S. 1, 38 L. Ed. 331, the controversy was as to the extent of the grant of the United States government of land bounded by the Columbia River in the state of Oregon. The question was as to how far such a grant extended (the actual limitations of the boundaries, by the language used, not being disputed), whether in legal effect it granted lands under the water of the river, and the question was held to be a federal one. Sweringen *v.* St. Louis, 185 U. S. 38, 43, 46 L. Ed. 795.

72. Titles claimed under patents based upon Spanish or Mexican grants.—California Powder Works *v.* Davis, 151 U. S. 389, 38 L. Ed. 206; Phillips *v.* Mound City Ass'n, 124 U. S. 605, 31 L. Ed. 588.

On a writ of error to a state court under the 25th section of the judiciary act, on the alleged ground that a right or title derived from the United States has been denied by the state court, if it appears that such title was not derived from the United States but from a French patent or grant, the writ of error will be dismissed. The court said that "the principles of law applicable to these possessions as existing in Alabama, and as to land held under ancient French and Spanish permits and grants, we do not propose to consider; nor do we propose to revise the correctness of the rulings of the state courts concerning them, because they are matters clearly within their sole jurisdiction." Opinion of Mr. Justice Woodberry. Doe *v.* Eslava, 9 How. 421, 13 L. Ed. 200.

Forbes & Company obtained a grant of land in 1807 from Morales, Intendant-General under the Spanish government, which land was adjacent to Mobile, in West Florida. This grant purported to be, in part, the confirmation of a concession granted in 1796 and surveyed in 1802. The survey terminated at high-water mark upon the river. The grant of 1807 includes the land between the then bank of the river and the high-water mark of 1802. This grant of 1807 was excepted from the operation of the act of congress passed on the 26th of March, 1804, which annulled all Spanish grants made after the 1st of October, 1800, and was recognized as a valid grant by the act of March 3d, 1819. An act of March 2d, 1829, confirmed an incomplete Spanish concession which was alleged to draw after it, as a consequence, certain riparian rights conflicting with those claimed under the grant of 1807. A decision of a state court, giving the land covered by these riparian rights to the claimants under the grant of 1807, was only a constitution of a perfected Spanish title, and cannot be reviewed by this court under the twenty-fifth section of the judiciary act. It did not draw in question an act of congress or any authority exercised under the constitution or laws of the United States. "In this case, as in that of McDonogh *v.* Miliaudon, 3 How. 693, 11 L. Ed. 787, the state courts were called on to construe a perfected Spanish title and to settle its limits by applying the local law, and having done so, this court has no authority to revise the judgment." Kennedy *v.* Hunt, 7 How. 586, 12 L. Ed. 829.

In Hoadley *v.* San Francisco, 4 Otto 4, 24 L. Ed. 34, the action was commenced by the appellant, a citizen of California, in the district court for the twelfth judicial district of that state, to quiet his title to certain of the pueblo lands of the city of San Francisco granted to that city by the act of congress, passed July 1, 1864, 13 Stat. 333, § 5, which provides: "That all the right and title of the United States to the lands within the corporate limits of the city of San Francisco * * * are hereby relinquished and granted to the said city and its successors, for the uses and purposes specified in the ordinances of said city, ratified by an act of the legislature of the said state, approved on the

But where the defendant's title depends upon a Spanish grant claimed to have been perfected under the treaty of 1819 between the United States and the King of Spain, 8 Stat. 252, and a patent of the United States dated December 28, 1836, in alleged confirmation of such claim, a federal question is involved and

11th of March, 1858." It was held, that the question of title involved in this case did not arise under the constitution or the laws of the United States, or a treaty made under its authority. The circuit court therefore did not err in remanding it to the state court from which it had been removed.

The decision by a state court as to whether title claimed under a Mexican grant made prior to the treaty of Guadalupe Hidalgo, was forged or obtained by fraud, does not involve a denial of a right or title set up under the treaty or statute. "The treaty extended no protection to a fraudulent claim, nor did proceedings under the statute to which each was respectively not a party or privy determined any such question as between these private parties, neither of whom claimed under the United States by title subsequent, but both of whom claimed under patents based upon Mexican grants. Lynch *v.* Bernal, 9 Wall. 315, 323, 19 L. Ed. 714." California Powder Works *v.* Davis, 151 U. S. 389, 38 L. Ed. 206.

In an action for recovery of real estate, defenses based on a Spanish land grant involve no question of a federal nature, where neither the validity nor construction of any treaty of the United States, nor the validity of the grant, are challenged, and a decision of the state court is not reviewable by the supreme court of the United States on the ground that a federal question is involved. O'Conor *v.* Texas, 202 U. S. 501, 50 L. Ed. 1120, reaffirmed in Garza *v.* Texas, 205 U. S. 536, 51 L. Ed. 920.

An adjudication by the highest court of a state that certain proceedings before a Mexican tribunal prior to the treaty of Guadalupe Hidalgo were insufficient to effect a partition of a tract of land before that time granted by the Mexican government to three persons who were partners, which grant was confirmed by commissioners appointed under the provisions of the act of March 3, 1851, 9 Stat. 631, "to ascertain and settle the private land claims in the state of California," presents no federal question which is subject to review here. "The only question is, whether such a partition was made, and upon that the decision of the state court is final, and not subject to review. It 'drew in question no act of congress, nor any authority exercised under the constitution or laws of the United States, and therefore the decision of the state court could not be opposed either to the laws or to any authority exercised under the laws of the United States.' This was said in Kennedy *v.* Hunt, 7 How. 586, 593, 12 L. Ed. 829, in reference to the construction which had been given to a Spanish title by a state court, and is equally applicable here." Phillips *v.* Mound City Ass'n, 124 U. S. 605, 612, 31 L. Ed. 588, approved in California Powder Works *v.* Davis, 151 U. S. 389, 395, 38 L. Ed. 206.

This court has jurisdiction, under the twenty-fifth section of the judiciary act in a Missouri land cause, where the title is not to be determined by the Spanish laws alone, but where the construction of an act of congress is involved to sustain the title. Chouteau *v.* Eckhart, 2 How. 344, 11 L. Ed. 293, citing Pollard *v.* Kibbe, 14 Pet. 353, 10 L. Ed. 490; Mobile *v.* Eslava, 16 Pet. 234, 10 L. Ed. 948.

Where the validity of an act of congress by which Mexican and Spanish grants have been confirmed and patented, is not drawn in question in the state court, and where the right or title asserted by the plaintiffs in error was derived under Mexican and Spanish grants, it was held, that a decision of the state court on a claim asserted by the plaintiffs in error to riparian rights and subterranean waters is not against any title or right claimed under the constitution, or any treaty, or statute of, or commission held, or authority exercised, under the constitution. "If the title of plaintiffs in error were protected by the treaty, still the suit did not arise thereunder, because the controversy in the state court did not involve the construction of the treaty, but the validity of the title of Mexico and Spanish grants prior to the treaty. New Orleans *v.* De Armas, 9 Pet. 224, 9 L. Ed. 109; Iowa *v.* Rood, 187 U. S. 87, 47 L. Ed. 86; Phillips *v.* Mound City Ass'n, 124 U. S. 605, 31 L. Ed. 588; Hooker *v.* Los Angeles, 188 U. S. 314, 47 L. Ed. 487, reaffirmed in New York, etc., R. Co. *v.* Plymouth, 193 U. S. 668, 48 L. Ed. 839.

Where the contention is that the state courts decided against the claim of plaintiffs in error to the rights of a riparian owner, and to the ownership of alleged percolating waters, as derived from patents of the United States as well as from Mexican grants, or under the treaty of Guadaloupe Hidalgo, it was held, that the question as to the title or right of plaintiffs in error in the land, and whatever appertained thereto, is one of state law and of general public law, on which the decision of the state court is final. Hooker *v.* Los Angeles, 188 U. S. 314, 47 L. Ed. 487, citing San Francisco *v.* Scott, 111 U. S. 768, 28 L. Ed. 593; California Powder Works *v.* Davis, 151 U. S. 389, 38 L. Ed. 206.

the supreme court may review the judgment of the state court.[75]

(25) *Claim of Right under Automatic Coupler Act.*—A federal question is not presented for review by this court under the act of March 2, 1893, requiring railroads engaged in interstate commerce to equip their cars with automatic couplers, where no right under such act is specially set up or claimed, and denied by the state court.[76]

(26) *Denial of Title of United States to Land.*—The denial by the state court of the title of the United States to land purchased under an act of congress authorizing such purchase, may be reviewed by this court.[77]

(27) *Denial of Rights under Swamp Land Act.*—Where the decision of the highest state court is adverse to a claim of title under the swamp land act, a writ of error will lie from this court.[78]

(28) *Illegal or Unenforceable Contracts.*—In order to bring himself within the act of congress, the complainant must show that he claimed some right, some interest, which the law recognizes and protects, and which was denied to him in the state court. This act of congress gives him no right to protection from the consequences of a contract made in violation of law. Such a contract, it is true, would not be enforced against him in a court of justice; not on account of his own rights or merits, however, but from the want of merits and good conscience in the party asking the aid of the court. In short, to support this writ of error, he must claim a right which, if well founded, he would be able to assert in a court of justice, upon its own merits, and by its own strength.[79]

75. Mobile Transportation Co. *v.* Mobile, 187 U. S. 479, 482, 47 L. Ed. 266, reaffirmed in Mobile Transportation Co. *v.* Mobile, 199 U. S. 604, 50 L. Ed. 330.

76. Claim of right under automatic coupler act.—Southern R. Co. *v.* Carson, 194 U. S. 136, 48 L. Ed. 907.

77. Denial of title of United States to land.—Where land was conveyed to trustees, for the purpose of paying a debt due to the United States, and the highest court of a state decided against a title set up under that deed, upon the ground that the deed was in violation of the act of congress, this court has jurisdiction, under the twenty-fifth section of the judiciary act, to review that decision. Neilson *v.* Lagow, 12 How. 98, 13 L. Ed. 909.

This court has jurisdiction in an appeal from the supreme court of the state of Ohio, in a case where was drawn in question at the trial the construction of the act by which Virginia ceded the territory she claimed northwest of the river Ohio to the United States, and of the resolution of congress accepting the deed of cession, and the acts of congress prolonging the time for completing titles to lands within the Virginia military reservation; the decision of the supreme court of Ohio having been against the title set up under the acts of congress. Wallace *v.* Parker, 6 Pet. 680, 8 L. Ed. 543.

78. Denial of rights under swamp land act.—Iowa *v.* Reed, 187 U. S. 87, 47 L. Ed. 86, approved in Chapman, etc., Land Co. *v.* Bigelow, 206 U. S. 41, 45, 51 L. Ed. 953.

79. Illegal or unenforceable contracts.—Walworth *v.* Kneeland, 15 How. 348, 14 L. Ed. 724; Udell *v.* Davidson, 7 How. 769, 12 L. Ed. 907; National Bank *v.* Petrie, 189 U. S. 423, 424, 47 L. Ed. 879; Coude *v.* York, 168 U. S. 649, 42 L. Ed. 611.

"In Walworth *v.* Kneeland, 15 How. 348, 14 L. Ed. 724, it was held, as correctly stated in the headnotes: 'Where a case was decided in a state court against a party, who was ordered to convey certain land, and he brought the case up to this court upon the ground that the contract for the conveyance of the land was contrary to the laws of the United States, this is not enough to give jurisdiction to this court under the twenty-fifth section of the judiciary act. The state court decided against him upon the ground that the opposite party was innocent of all design to contravene the laws of the United States. But even if the state court had enforced a contract, which was fraudulent and void, the losing party has no right which he can enforce in this court, which cannot therefore take jurisdiction over the case.'" Cited in Allen *v.* Arguimbau, 198 U. S. 149, 155, 49 L. Ed. 990; Conde *v.* York, 168 U. S. 642, 649, 42 L. Ed. 611.

Mr. Chief Justice Taney said, in Walworth *v.* Kneeland, 15 How. 348, 14 L. Ed. 724: "But if it had been otherwise, and the state court had committed so gross an error as to say that a contract, forbidden by an act of congress, or against its policy, was not fraudulent and void, and that it might be enforced in a court of justice, it would not follow that this writ of error could be maintained. In order to bring himself within the twenty-fifth section of the act of 1789, he must show that he claimed some right, some interest, which the law recognizes and pro-

(29) *Validity of Confederate Transactions.*—The difference in the extent of the jurisdiction of this court on writ of error to the highest court of a state, and on appeal from a circuit court of the United States—as affected by the ground of the decision of the court below—is illustrated by the cases of contracts payable in confederate currency, or made in consideration of loans of confederate currency, during the war of the rebellion, and by the cases of promissory notes given before that war for the price of persons sold as slaves. Those cases clearly establish that, on a writ of error to a state court, this court had jurisdiction to review and reverse the judgment, if that judgment was based wholly upon the state constitution; but that if it was based on the previous law of the state, this court had no jurisdiction to review it, although the view taken by the state court was adverse to the view taken by this court in earlier and later cases coming up from a circuit court of the United States.[80]

tects, and which was denied to him in the state court. But this act of congress certainly gives him no right to protection from the consequences of a contract made in violation of law. Such a contract, it is true, would not be enforced against him in a court of justice; not on account of his own rights or merits, but from the want of merits and good conscience in the party asking the aid of the court. But to support this writ of error, he must claim a right which, if well founded, he would be able to assert in a court of justice, upon its own merits, and by its own strength." Allen *v.* Argumbau, 198 U. S. 149, 156, 49 L. Ed. 990.

Deeds.—Where a case was decided in a state court against a party, who was ordered to convey certain land, and he brought the case up to this court upon the ground that the contract for the conveyance of the land was contrary to the laws of the United States, this is not enough to give jurisdiction to this court under the 25th section of the judiciary act. The state court decided against him upon the ground that the opposite party was innocent of all design to contravene the laws of the United States. But even if the state court had enforced a contract, which was fraudulent and void, the losing party has no right which he can enforce in this court, which cannot therefore take jurisdiction over the case. Walworth *v.* Kneeland, 15 How. 348, 14 L. Ed. 724, cited in Conde *v.* York, 168 U. S. 649, 42 L. Ed. 611.

Bills and notes.—No title, right, privilege or immunity under a statute of the United States, within the intent and meaning of § 709 of the Revised Statutes, was specially set up or claimed by the defendant and decided against him, where the state court has overruled a plea setting up as a defense to the action that certain notes sued on were illegal and void as the transaction in which they were given involved a violation of §§ 3390, 3393, and 3397 of the Revised Statutes some such sections are regulations to secure the collection of the taxes imposed by chapter 7, tit. 35, and defendant could derive no personal right under those sections to enforce the repudiation of his notes, even although, on grounds of public policy, they were illegal and void. Allen *v.* Arguimbau, 198 U. S. 149, 155, 49 L. Ed. 990, following Walworth *v.* Kneeland, 15 How. 348, 14 L. Ed. 724.

80. Validity of confederate transactions.—New Orleans Waterworks Co. *v.* Louisiana Sugar Co., 125 U. S. 18, 33, 31 L. Ed. 607.

Validity of contracts for loan of Confederate money.—The decision of a state court which simply held that promissory notes, given for the loan of "Confederate currency," together with a mortgage to secure the notes, were nullities on the ground that the consideration was illegal, according to the law of the state, at the time the contract was entered into, is not a decision repugnant to the constitution. Bethell *v.* Demaret, 10 Wall. 537, 19 L. Ed. 1007.

Where the judgment of a state court was annulled by the decree of a court of the same state, on the ground that the notes on which the judgment was rendered were given for a loan of Confederate money, and that the transactions which resulted in the acquisition of the notes were had between enemies during the late civil war, in violation of the proclamation of the president forbidding commercial intercourse with the enemy, this court cannot review the ruling in these particulars. It conflicts with no part of the constitution, laws, or treaties of the United States, and presents no federal question. Stevenson *v.* Williams, 19 Wall. 572, 22 L. Ed. 162.

Payment in Confederate money.—Where the only averments in the bill that can by any possibility raise a federal question are those which relate to the payments in the notes and bonds of the Confederate states, it does not necessarily involve the decision of any federal question and the writ must be dismissed. In Delmas *v.* United States, 14 Wall. 661, 20 L. Ed. 757, we said distinctly that a federal question was not necessarily involved in a case because the consideration of a contract to

(30) *Decisions of State Courts under Ordinance of Secession.*—A title, right, privilege or immunity claimed under the Virginia ordinance of secession, gave this court jurisdiction.[81]

(31) *Denial of Rights under Fifth Amendment.*—Where the only provision of the constitution of the United States referred to in the assignment of errors in the state court is the fifth amendment, the averment of its violation creates no real federal question, because that amendment is a restriction on federal power, and not on the power of the states.[82] Therefore, a contention in the highest court of a state that, by the judgment of the trial court, private property is taken for public use without just compensation in violation of the 5th amendment to the constitution of the United States, creates no real federal question, since that amendment applies only to the federal government.[83]

(32) *Denial of Right to Trial by Jury under Seventh Amendment.*—Where the record shows that the state court of last resort determined that a certain state law was not in conflict with the provisions of the federal constitution which secures to every party, where the value in controversy exceeds $20, the right of trial by jury, this is not sufficient to give this court jurisdiction under § 709 of the Revised Statutes, because this amendment to the constitution does not apply to trials in state courts.[84]

(33) *Questions Arising under the Stamp Acts.*—Where a title, right, privilege

be enforced was Confederate money. Dugger *v.* Bocock, 104 U. S. 596, 601, 26 L. Ed. 846.

"Here there are no averments in the bill which directly present the validity under the laws of the United States of a payment in Confederate securities, and it may fairly be inferred that the appellants relied upon an entirely different ground for the relief they asked. Such being the case, no federal question was necessarily involved in the decision that has been made." Dugger *v.* Bocock, 104 U. S. 596, 603, 26 L. Ed. 846.

81. Decisions of state courts under ordinance of secession.—Allen *v.* McVeigh, 107 U. S. 433, 27 L. Ed. 572.

Ordinance of secession.—A writ of error will lie from this court to review the decision of a state court under an ordinance of the convention of the state of Virginia, passed April 13, 1861, whereby if the debtor, against whom there was an execution in the hands of an officer, offered bond with security for the payment of the debt, interest, and costs, when the operation of the ordinance ceases, his property should be restored to him, but if he offered no bond, the property was to be restored to him without lien, unless it would bring its appraised value as of the date of Nov. 6, 1860. Daniels *v.* Tearney, 102 U. S. 415, 26 L. Ed. 187.

82. Denial of rights under the fifth amendment.—Winous Point Shooting Club *v.* Caspersen, 193 U. S. 189, 48 L. Ed. 675, citing and affirming Chapin *v.* Fye, 179 U. S. 127, 45 L. Ed. 119.

Plaintiff after judgment in a state court, excepted to the denial of his motion for a new trial on the ground, among others, that the statute of the state in question was in violation of the 5th and 7th amendments to the constitution, and repeated that contention in the assignment of errors in the supreme court, adding also that the statute was inconsistent with the ordinance of 1787. It was held that a constitutional question, which will confer jurisdiction upon the supreme court of the United States on writ of error to a state court, is not raised as the ordinance of 1787 was superseded by the adoption of the constitution of the United States, and of the state, and the 5th and 7th amendments were intended to operate solely on the federal government. Chapin *v.* Fye, 179 U. S. 127, 45 L. Ed. 119, reaffirmed in Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Brewster *v.* Cahill, 194 U. S. 629, 48 L. Ed. 1158; Gates *v.* Commissioners, 183 U. S. 693, 46 L. Ed. 393.

83. Winous Point Shooting Club *v.* Caspersen, 193 U. S. 189, 48 L. Ed. 675, citing and affirming Chapin *v.* Fye, 179 U. S. 127, 45 L. Ed. 119.

84. Denial of right to trial by jury under seventh amendment.—Edwards *v.* Elliott, 21 Wall. 532, 22 L. Ed. 487, citing Barron *v.* Baltimore, 7 Pet. 243, 247, 8 L. Ed. 672; Twitchell *v.* Pennsylvania, 7 Wall. 321, 326, 19 L. Ed. 223; Livingston *v.* Moore, 7 Pet. 469, 551, 8 L. Ed. 751; Fox *v.* Ohio, 5 How. 410, 12 L. Ed. 213; Smith *v.* Maryland, 18 How. 71, 76, 15 L. Ed. 269; Cooley on Constitutional Limitations, 2d ed. 19.

By article 7 of the amendments it is provided, that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved." This, as has been many times decided, relates only to trials in the courts of the United States. Edwards *v.* Elliott, 21 Wall. 532, 557, 22 L. Ed. 487. The states, so far as this amendment is concerned, are left to regulate

or immunity is set up and claimed under the federal stamp act, and denied by the state court, we have jurisdiction.[85] The denial by the state court of an objection that an instrument was not stamped as required by the act of congress, raises a federal question,[86] but it is otherwise where this point is only incidentally in question.[87]

(34) *Questions Arising under the Quarantine Laws.*—A decision of the highest state court in an action for conspiracy against the collector of the port, and a firm of warehousemen, in having certain cargoes of rags belonging to the plaintiffs condemned as unclean and infectious property, cannot be reviewed by this court on a writ of error where the defendants set up no claim of privilege or immunity under Revised Statutes, § 4792, relating to the inspection and health laws.[88]

(35) *Power of the States to Emit Bills of Credit.*—This court has jurisdiction where the question is whether a state statute is not in violation of the tenth section of the first article of the United States constitution which declares that no state shall emit bills of credit, where the question is directly and plainly before the state court, and its decision is in favor of the validity of the state statute.[89]

trials in their own courts in their own way. A trial by jury in suits at common law pending in the state courts is not, therefore, a privilege or immunity of national citizenship, which the states are forbidden by the fourteenth amendment to abridge. Walker *v.* Sauvinet, 92 U. S. 90, 92, 23 L. Ed. 678.

The provision in the seventh amendment of the constitution of the United States, which declares that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law, applies to the facts tried by a jury in a cause in a state court. "It seems to us also that cases of Federal cognizance, coming up from state courts, are not only within the words, but are also within the reason and policy of the amendment. They are cases involving questions arising under the constitution, the laws of the United States, and treaties, or under some other federal authority; and, therefore, are as completely within the exercise of the judicial power of the United States, as much so as if the cases had been originally brought in some inferior federal court. No other cases tried in the state courts can be brought under the appellate jurisdiction of this court or any inferior federal court on which appellate jurisdiction may have been conferred." The Justices *v.* Murray, 9 Wall. 274, 19 L. Ed. 658.

85. Questions arising under the stamp acts.—The issue between the parties involved an assertion on one side that the statute of June 13, 1884, c. 448, "to meet war expenditures, etc.," imposed on the express company the absolute duty of furnishing the receipt, of affixing the stamp thereto and canceling the same. On the other hand, the defense of the express company was that under the act of congress it had the right, privilege or immunity (which it specially set up and claimed) of demanding payment of the one cent tax or of increasing its rates to the extent that the tax imposed a burden upon it, provided only the rates charged were just and reasonable. The supreme court of the state decided that the express company could not in any event or by any means transfer the burden of the tax in question. It was held, that the decision involved a federal question. The case as made by the pleadings, and which was decided below, involved a right, privilege or immunity under the act of congress, which was specially set up and claimed by the express company, to contract with the shippers for the payment of the tax provided by the act of congress or to increase its rate, within the limit of reasonableness, to the extent of such tax, which right, privilege or immunity was denied and held to be without merit by the court below. There is therefore jurisdiction. Rev. Stat., § 709. American Express Co. *v.* Michigan, 177 U. S. 404, 44 L. Ed. 823.

86. On a bill to enforce a vendor's lien, where the vendee set up that the deed which the complainant had given him was insufficiently stamped (which fact, if true, would, under an act of congress, prevent its being used in evidence), the supreme court of a state, disregarding the objection, enforced the lien. The vendee brought the case here as within the 25th section of the judiciary act. Held, that however frivolous the objection of the vendee, it raised a question under the section. Hall *v.* Jordan, 15 Wall. 393, 21 L. Ed. 72.

87. A final judgment or decree by the highest court of law or equity of a state that revenue stamps attached to a deed offered in evidence and objected to as not having stamps proportioned to the value of the land conveyed are insufficient, is not a subject for review by this court under the 25th section of the judiciary act of 1789. Lewis *v.* Campau, 3 Wall. 106, 17 L. Ed. 211.

88. Questions arising under the quarantine laws.—Bartlett *v.* Lockwood, 160 U. S. 357, 40 L. Ed. 455.

89. Power of the states to emit bills of credit.—Craig *v.* Missouri, 4 Pet. 410, 7 L. Ed. 903; Darrington *v.* Bank of Ala-

(36) *Power of the States to Coin Money.*—A denial of a right, title, privilege or immunity under cl. 5, § 8, art. 1, of the constitution, raises a federal question.[91]

(37) *Compacts between States.*—Where it appears on the record that the question involved arises out of that section of the constitution which forbids compacts between the states, this court may take jurisdiction.[92] But the writ of error will be dismissed unless the record shows that the constitutional provision was involved in the case. A transaction which simply fixes boundaries between the states is insufficient.[93]

(38) *Sovereignty of the States.*—The sovereignty of a state over the beds of its

bama, 13 How. 12, 14 L. Ed. 30; Rae *v.* Homestead, etc., Co., 176 U. S. 121, 44 L. Ed. 398; Byrne *v.* Missouri, 8 Pet. 40, 8 L. Ed. 859.

Where a case is brought up from the supreme court of the state of Alabama by writ of error issued under the 25th section of the judiciary act, and it appears that the question intended to be raised here is whether the acts of the state of Alabama creating a bank and branches are not in violation of the 10th section of the first article of the United States constitution which declares that no state shall emit bills of credit, in order to bring that question before this court it must have been raised in the supreme court of the state, and have been decided there. Matheson *v.* Bank of Alabama, 7 How. 260, 12 L. Ed. 692.

Where in an action on a contract payable "in gold coin of the United States of America of the present standard weight and fineness," the state court did not decree the payment in gold coin of the United States, but simply held plaintiffs in error to respond in lawful money, and entered its decree accordingly, and the supreme court decided that plaintiffs in error could not complain of that decree because not prejudiced thereby, this is not a decision against any benefit secured by § 8 of article 1 of the constitution empowering congress to coin money and regulate the value thereof, and clause 1, §10 of article 1 provided that no state shall coin money, emit bills of credit, or make anything but gold and silver coin a tender for the payment of debts. Rae *v.* Homestead etc., Co., 176 U. S. 121, 44 L. Ed. 398.

91. Power of the states to coin money.—Rae *v.* Homestead, etc., Co., 176 U. S. 121, 44 L. Ed. 398.

92. Compacts between states.—Where the question involving the jurisdiction over the Ohio river was raised in the courts of Indiana, the supreme court acquires jurisdiction, since the compact of Virginia and the act of congress of February 4, 1791, were involved. Wedding *v.* Meyler, 192 U. S. 573, 581, 48 L. Ed. 570, citing Pennsylvania *v.* Wheeling, etc., Bridge Co., 13 How. 518, 14 L. Ed. 249.

93. Where a writ of error is sued out in this court to a state court under that section of the constitution forbidding compacts between the states, the assignment of error being that "the plaintiff derived his title from Virginia, the act or acts of the state of Kentucky on which the court has found its opinion, is repugnant to the compact with Virginia, therefore, void as to the case before the court, being against the constitution of the United States," the record must show that the compact with Virginia was involved in the case; on the ground that the jurisdiction of this court must in some manner appear on the record. Fisher *v.* Cockerell, 5 Pet. 248, 8 L. Ed. 114, reviewing Harris *v.* Dennie, 3 Pet. 292, 7 L. Ed. 683; Craig *v.* Missouri, 4 Pet. 410, 7 L. Ed. 903; Owings *v.* Norwood, 5 Cranch 344, 3 L. Ed. 120; Miller *v.* Nicholls, 4 Wheat. 311, 4 L. Ed. 578.

Two states made an agreement as to where the boundary line between them was, and congress by statute gave its assent to the agreement. After this one of the states sued a corporation of the other for taking possession of land and water which the state sueing alleged were in its territory. The corporation asserted, in defense, that under the agreement the land and water were within the jurisdiction of the other state; and the highest tribunal of the state in which the suit was brought decided that it was so. Held, that this was but an adjudication upon the meaning of the agreement, and not one upon the construction of the statute; and accordingly that error would not lie under the 25th section of the judiciary act. People *v.* Central Railroad, 12 Wall. 455, 20 L. Ed. 458.

A contention that the act of congress of June 28, 1834, 4 Stat. 708, ch. 126, giving consent to the agreement or compact between the states of New Jersey and New York in respect of their territorial limits and jurisdiction, dated September 16, 1833, vested exclusive jurisdiction in the federal government over the sea adjoining the two states, does not raise a federal question reviewable by this court on the writ of error where there is absolutely nothing in the agreement and confirmatory statutes abdicating rights in favor of the United States, and the transaction simply amounted to fixing the boundaries between the two states. Hamburg American Steamship Co. *v.* Grube, 196 U. S. 407, 413, 49 L. Ed. 529.

inland lakes does not rest upon any statute or provision of the constitution of the United States, but upon general principles of the common law which long antedated the constitution, and the decision of the state court denying the title of the state is not reviewable by the supreme court of the United States.[94]

(39) *Questions Arising under Federal Mining Statutes.*—**In General.**—Where the decision of a state court involves the validity of a mineral claim under the statutes of the United States relating to mineral lands, the supreme court acquires jurisdiction, a federal question being involved.[95] But the mere fact that a suit is brought under § 2326 of the Revised Statutes to try adverse rights to a mining claim, does not necessarily involve a federal question so as to authorize a writ of error from the supreme court of the United States to the state court, especially where in both state courts the question was treated as one of local law.[96] The mere fact that parties claim adversely to each other under the mining laws or under patents of the United States does not entitle them to a writ of error from this court, unless there be a question made as to the meaning and construction of a federal statute, or of an authority exercised under the United States.[97] Controversies in respect to titles derived under the mining laws of the United States may be legitimately determined in the state courts, and to enable this court to review the judgment in such a case it must appear not only that the application of a federal statute was involved, but that the controversy was determined by a construction put upon the statute adverse to the contention of one of the parties.[98]

94. Sovereignty of the states.—Iowa *v.* Rood, 187 U. S. 87, 47 L. Ed. 86.

Where title set up by the state of Iowa rests solely upon the proposition that it became vested, upon its admission into the union under the act of congress of December 28, 1846, 9 Stat. 117, with sovereignty over the beds of all lakes within its borders, and by the act of the general government in meandering such lakes, and excluding from its survey of public land all such as lay beneath their waters, this clearly does not involve the validity of any treaty or statute of the United States, or the constitutionality of any state statute or authority. Iowa *v.* Rood, 187 U. S. 87, 90, 47 L. Ed. 86.

95. Questions arising under federal mining statutes.—Lavagnino *v.* Uhlig, 198 U. S. 443, 451, 49 L. Ed. 1119.

96. McMillen *v.* Ferrum Min. Co., 197 U. S. 343, 49 L. Ed. 784, citing Bushnell *v.* Crooke Min. Co., 148 U. S. 682, 37 L. Ed. 610; Telluride, etc., Co. *v.* Rio Grande, etc., R. Co., 175 U. S. 639, 44 L. Ed. 305; Blackburn *v.* Portland Gold Min. Co., 175 U. S. 571, 44 L. Ed. 276; Shoshone Min. Co. *v.* Rutter, 177 U. S. 505, 44 L. Ed. 864.

97. Avery *v.* Popper, 179 U. S. 305, 310, 45 L. Ed. 203; Blackburn *v.* Portland Gold Min. Co., 175 U. S. 571, 44 L. Ed. 276; De Lamar's Nevada Gold Min. Co. *v.* Nesbitt, 177 U. S. 523, 44 L. Ed. 872; Mountain View, etc., Co. *v.* McFadden, 180 U. S. 533, 534, 45 L. Ed. 656; Cramer *v.* Wilson, 195 U. S. 408, 416, 49 L. Ed. 256.

98. Gillis *v.* Stinchfield, 159 U. S. 658, 40 L. Ed. 295; Colorado, etc., Min. Co. *v.* Turck, 150 U. S. 138, 37 L. Ed. 1030; Blackburn *v.* Portland Gold Min. Co., 175 U. S. 571, 585, 44 L. Ed. 276.

Gillis *v.* Stinchfield, 159 U. S. 658, 40 L. Ed. 295, was a suit brought in a state court of California and concerned the ownership of a mining claim. The case was brought to this court, and it was claimed that, as the question in dispute could only be determined by an application of §§ 2322 and 2336 of the Revised Statutes of the United States, such a state of facts appearing by the record, there was disclosed a federal question, which, of itself, gave this court jurisdiction to review the judgment of the supreme court of the state. But a motion to dismiss the writ of error was allowed. It is true that this court put its judgment on the ground that the judgment of the state supreme court was based upon an estoppel, deemed by that court to operate against the plaintiff in error upon general principles of law, irrespective of any federal question. Blackburn *v.* Portland Gold Min. Co., 175 U. S. 571, 585, 44 L. Ed. 276, reaffirmed in Empire, etc., Min. Co. *v.* Bunker Hill, etc., Min. Co., 200 U. S. 613, 50 L. Ed. 620; Warder *v.* Loomis, 197 U. S. 619, 49 L. Ed. 909.

In Gillis *v.* Stinchfield, 159 U. S. 658, 40 L. Ed. 295, the dispute arose concerning the ownership of a mining claim. In the course of the opinion in the Blackburn *v.* Portland Gold Min. Co., 175 U. S. 571, 44 L. Ed. 276, referring to the Gillis *v.* Stinchfield, 159 U. S. 658, 40 L. Ed. 295; it was said: "It is true that this court put its judgment on the ground that the judgment of the state supreme court was based upon an estoppel, deemed by that court to operate against the plaintiff in error upon general principles of law, irrespective of any federal question. Still the case is authority for the proposition that controversies in respect to titles derived under the mining laws of the

Under § 2326, Rev. Stat., for the trial of adverse claims to a mining patent, the right to review the judgment of a state court is to be limited to a proper case having been made, clearly implying that some federal question should be involved, and a mere controversy as to the right of possession will not make such a proper case, for otherwise every case arising under § 2326 would be a proper case.[99]

Under Rev. Stat., § 2339, the question of priority of possession of water rights for use for mining purposes and the conformity thereof to local customs, laws and decisions, does not involve a federal question in order to give this court jurisdiction to review the decision relating thereto under § 709 of the Revised Statutes; they are merely local questions.[1]

A controversy between rival claimants under §§ 2325 and 2326 of the Revised Statutes may be properly determined by a state court, and the judgment of a state supreme court, in such a case, cannot be reviewed by this court simply because the parties were claiming rights under the federal statute.[2]

Title to Ore.—A federal question reviewable by this court is presented by the decision of a state court, in favor of plaintiff's contention, that he had acquired title to certain ore, where the question presented was whether or not the mine was patented under the act of July 26th, 1866, or the act of May 10th, 1872, and presents the question as to the lack of parallelism of the end lines of the location.[3]

Showing as to Jurisdiction.—The rule that if it sufficiently appears from the record that the validity of a state statute was drawn in question as repugnant to the constitution of the United States and the question was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not in terms specially set up and claimed in the record is not conclusive against a review of the question here, does not dispense with the necessity for a special reference to § 2339 of the Revised Statutes.[4] To sustain a writ of error from the supreme court

United States may be legitimately determined in the state courts, and that to enable the court to review the judgment in such a case it must appear not only that the application of a federal statute was involved but that the controversy was determined by a construction put upon the statute adverse to the contention of one of the parties." The Blackburn case was followed by Shoshone Min. Co. *v.* Rutter, 177 U. S. 505, 44 L. Ed. 864, which reaffirmed the doctrine, approved in Sweringen *v.* St. Louis, 185 U. S. 38, 45, 46 L. Ed. 795.

99. Blackburn *v.* Portland, Gold Min. Co., 175 U. S. 571, 44 L. Ed. 276, citing Chambers *v.* Harrington, 111 U. S. 350, 28 L. Ed. 452.

1. Telluride, etc., Co. *v.* Rio Grande, etc., R. Co., 175 U. S. 639, 641, 44 L. Ed. 305, reaffirmed in Dakota, etc., R. Co. *v.* Crouch, 203 U. S. 582, 51 L. Ed. 327, citing Bushnell *v.* Crooke Min. Co., 148 U. S. 682, 37 L. Ed. 610.

2. Blackburn *v.* Portland Gold Min. Co., 175 U. S. 571, 584, 40 L. Ed. 296, reaffirmed in Empire, etc., Min., etc., Co. *v.* Bunker Hill Min. Co., 200 U. S. 613, 50 L. Ed. 620; Warder *v.* Loomis, 197 U. S. 619, 49 L. Ed. 909; Dakota, etc., R. Co. *v.* Crouch, 203 U. S. 582, 51 L. Ed. 327, following Bushnell *v.* Crooke Min. Co., 148 U. S. 682, 37 L. Ed. 610; Telluride, etc., Co. *v.* Rio Grande, etc., Co., 175 U. S. 639, 44 L. Ed. 305.

Where the question involved turned largely upon the provision of state statutes, and the decisions of the supreme court construing the same, which limited the width of mining claims to 150 in width on each side of the centre of the lode or vein at the surface, etc., the question thus presented and decided involves no construction of any federal statute, unless it becomes necessary to determine the rights of the parties under the federal mining statutes. Bushnell *v.* Crooke Min. Co., 148 U. S. 682, 37 L. Ed. 610.

3. Kennedy Min., etc., Co. *v.* Argonaut Min. Co., 189 U. S. 1, 47 L. Ed. 685, Mr. Justice White and Mr. Justice McKenna dissenting.

4. Telluride, etc., Co. *v.* Rio Grande, etc., R. Co., 175 U. S. 639, 647, 44 L. Ed. 305, distinguishing Columbia Water Power Co. *v.* Columbia Street Railway Co., 172 U. S. 475, 43 L. Ed. 521.

Pleadings, which while they make no special reference to the statutes of the United States, nevertheless show that plaintiffs in error asserted title through valid mining claims duly located, and denied the title of the defendants in error on the ground that the locations under which they claimed had become forfeited and abandoned, do not comply with the requirements of § 709 of the Revised Statutes that the title or right must be specially set up or claimed. Speed *v.* McCarthy, 181 U. S. 269, 273, 45 L. Ed. 855, citing and approving Oxley Stave Co. *v.*

of the United States, something more must appear than that the parties claim title under an act of congress.[5] And where the decision of the state court rests upon principles of general or local law, broad enough to sustain it,[6] or the judgment is

Butler County, 166 U. S. 648, 41 L. Ed. 1149.

An assertion of plaintiffs in error in an amended answer, that defendant in error intended to set up certain rights under certain mining claims, and that these claims were abandoned and forfeited before certain other claims were located, falls short of that definite claim of a right or title under a statute of the United States, which § 709 requires. On such a record the supreme court of the United States would not be justified in holding that the state court, denied a right or title specially set up as secured by an act of congress. Speed *v.* McCarthy, 181 U. S. 269, 276, 45 L. Ed. 855.

5. De Lamar's Nevada Min. Co. *v.* Nesbitt, 177 U. S. 523, 44 L. Ed. 872, reaffirmed in Blackburn *v.* The Portland Gold Min. Co., 175 U. S. 571, 44 L. Ed. 276.

The plaintiff's right to recover was based upon the acts of congress providing that the requirements of § 2324, Rev. Stat., be suspended for the years 1893, 1894 "so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for the nonperformance of the annual assessment." The decision of the state court was in favor of the right claimed under the statute. It was held, that the defendant is not entitled to a writ of error from the supreme court of the United States to review the judgment of the state court. "The defendant set up no right, title, privilege or immunity under a statute of the United States, the decision of which was adverse to it in that particular. The mere fact that the mining company claimed title under a location made * * * under the general mining laws of the United States, Rev. Stat., § 2325, was not in itself sufficient to raise a federal question, since no dispute arose as to the legality of such location, except so far as it covered ground previously located, or as to the construction of this section. We have repeatedly held that to sustain a writ of error from this court something more must appear than that the parties claim title under an act of congress. The subject is fully discussed and the prior authorities cited in the recent case of Blackburn *v.* Portland Mining Company, 175 U. S. 571, 44 L. Ed. 276, which was also a contest between rival claimants of a mine under §§ 2325 and 2326. It was held that the provision in § 2326 for the trial of adverse claims to a mining patent "by a court of competent jurisdiction," did not in itself vest jurisdiction in the federal courts, although, of course, jurisdiction would be sustained, if the requirements of amount and diverse citizenship existed; and that the judgment of the supreme court of the state in such case could not be reviewed in this court simply because the parties were claiming rights under a federal statute. A like ruling was made in the still later case of Florida, etc., R. Co. *v.* Bell, 176 U. S. 321, 44 L. Ed. 486. See, also, California Powder Works *v.* Davis, 151 U. S. 389." De Lamar's Nevada Min. Co. *v.* Nesbitt, 177 U. S. 523, 44 L. Ed. 872.

6. The mere fact that an action is brought under §§ 2325 and 2326 of the federal statutes, in support of an adverse claim does not of itself entitle the defeated party to a writ of error. Although brought under the authority of a federal statute, the questions involved may be only of general or local law. Blackburn *v.* Portland Gold Min. Co., 175 U. S. 571, 44 L. Ed. 276; Shoshone Min. Co. *v.* Rutter, 177 U. S. 505, 44 L. Ed. 864; Beals *v.* Cone, 188 U. S. 184, 186, 47 L. Ed. 435, reaffirmed in Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328.

A decision of a state court that the rights involved under United States patents to mining claims has been barred by the laches of the plaintiff in asserting his claims, whereby the status quo could not be restored, presents no federal question reviewable by the court on writ of error. Pittsburg, etc., Co. *v.* Cleveland, etc., Min. Co., 178 U. S. 270, 44 L. Ed. 1065, reaffirmed in Wright *v.* Seminary Tacoma, 187 U. S. 639, 47 L. Ed. 345.

A decision of a state court, that the rights involved under United States patents to mining claims has been settled by a specific contract between the parties, by this court on writ of error. Pittsburg, etc., Co. *v.* Cleveland, etc., Min. Co., 178 U. S. 270, 44 L. Ed. 1065, reaffirmed in Wright *v.* Seminary Tacoma, 187 U. S. 639, 47 L. Ed. 345.

The supreme court of a state, deciding a case upon general principles of law, held that a cotenant cannot relocate a mining claim when the annual assessment work has not been done, and thereby obtain title as against his cotenants. It was held, that this decision did not rest involves no federal question reviewable upon the disposition of a federal question, which can be reviewed by the supreme court of the United States on writ of error to the state court. Speed *v.* McCarthy, 181 U. S. 269, 45 L. Ed. 855, reaffirmed in Wright *v.* Seminary Tacoma, 187 U. S. 639, 47 L. Ed. 345; Wyoming, etc., Co. *v.* Crouch, 203 U. S. 582, 51 L. Ed. 327.

Whether a party is estopped to deny the validity of a mining claim or not, is not a

in favor of and not adverse to the right claimed by the plaintiff in error under this statute,[7] the writ of error will be dismissed.

(40) *Questions Relating to Public Officers and Members of the Cabinet.*—Where in suits against United States officers, such as marshals, the defendant claims protection of "an authority exercised under the United States," and the decision is against the protection thus claimed, this court has jurisdiction.[8]

federal question which may be reviewed by the supreme court of the United States on writ of error to the highest court of a state. Speed *v.* McCarthy, 181 U. S. 269, 45 L. Ed. 855, reaffirmed in Wright *v.* Seminary Tacoma, 187 U. S. 639, 47 L. Ed. 345; Wyoming, etc., Co. *v.* Crouch, 203 U. S. 582, 51 L. Ed. 327, citing and approving Gillis *v.* Stinchfield, 159 U. S. 658, 40 L. Ed. 295; Pittsburg, etc., Co. *v.* Cleveland, etc., Min. Co., 178 U. S. 270, 44 L. Ed. 1065.

A decision of a state court that the rights involved under United States patents to mining claims has been forfeited by an estoppel, involves no federal question reviewable by this court on writ of error. Pittsburg, etc., Co. *v.* Cleveland, etc., Min. Co., 178 U. S. 270, 44 L. Ed. 1065, reaffirmed in Wright *v.* Seminary Tacoma, 187 U. S. 639, 47 L. Ed. 345. See Beals *v.* Cone, 188 U. S. 186, 47 L. Ed. 435.

7. De Lamar's Nevada Min. Co. *v.* Nesbitt, 177 U. S. 523, 44 L. Ed. 872.

8. **Questions relating to public officers and members of the cabinet.**—In trespass in a state court against the marshal of the United States for levying on goods which ought not to have been levied on, the marshal's title as marshal is not necessarily drawn in question. He may be sued not as marshal, but as trespasser. Hence, a judgment in a state court against a marshal for making a levy alleged to be wrong, is not necessarily a proper subject for review in this court, under the 25th section of the judiciary act, allowing such review in certain cases where "an authority exercised under the United States is drawn in question, and the decision is against its validity." Day *v.* Gallup, 2 Wall. 97, 17 L. Ed. 855.

A suit prosecuted in the state courts to the highest court of such state, against a marshall of the United States for trespass, who defends himself on the ground that the acts complained of were performed by him under a writ of attachment from the proper federal court, presents a case for a writ of error under the 25th section of the judiciary act, when the final decision of the state courts is against the validity of the authority thus set up by the marshal. Buck *v.* Colbath, 3 Wall. 334, 18 L. Ed. 257, reaffirmed in Etheridge *v.* Sperry, 139 U. S. 266, 35 L. Ed. 171.

The action of the government surveyors in segregating and setting apart a lake in the state by meander lines from the public lands and the approval of such survey by the commissioners of the general land office, is not an adjudication by the government that the lake was set apart as the property of the state and not a part of the public land, and the supreme court had no jurisdiction to review a judgment of the state court denying the title of the state. Iowa *v.* Rood, 187 U. S. 87, 47 L. Ed. 86, cited in Chapman, etc., Land Co. *v.* Bigelow, 206 U. S. 41, 51 L. Ed. 953.

Where an action of trespass to try title is brought against officers of the United States, exercising an authority under the United States, in holding possession of the property in controversy, and the defense is set up that they were acting under authority of the United States, in such a case the validity of an authority exercised under the United States is drawn in question, and where the final judgment or decree in the highest court of a state in which a decision could be had is against its validity, jurisdiction exists in this court to review that decision on writ of error. Stanley *v.* Schwalby, 147 U. S. 508, 519, 37 L. Ed. 259.

Where a suit was brought in a state court upon a marshal's bond, under the act of April 10, 1806, ch. 21, by a person injured by a breach of the condition of the bond, and the defendants set up as a defense to the action that the suit ought to have been brought in the name of the United States, and the court decided that it was well brought by the party injured in his own name; held, that the exemption here set up being merely as to the form of the action, and no question arising as to the legal liability of the defendants under the act of congress, this court had no authority to re-examine the judgment, so far as respected the construction of that part of the act which provides that suits on marshals' bonds "shall be commenced and prosecuted within six years after the said right of action shall have accrued, and not afterwards." Montgomery *v.* Hernandez, 12 Wheat. 129, 6 L. Ed. 575.

Secretary of Interior.—Where the construction of the acts of congress, defining the powers of the secretary of the interior, is drawn in question in a state court, and the decision is against the title set up by maintaining the validity of the secretary's decision, this court has jurisdiction to revise the case on writ of error. Magwire *v.* Tyler, 1 Black 195, 17 L. Ed. 137.

Secretary of treasury.—No federal

(41) *Validity of State Election Laws.*—The decision of a highest court of a state upholding the validity of state statutes claimed to be in contravention to the act of congress providing for the appointment of electors of president and vice-president, is reviewable by this court under § 709 of the Revised Statutes.[9]

(42) *Questions Relating to Federal Securities.*—Where it is insisted in a state court that certain federal securities are exempt from taxation under the constitution and laws of the United States, but the exemption is denied by the highest state court, it is clear that a right, privilege or immunity is claimed under the constitution or a statute of the United States, and therefore the jurisdiction of this court to review that decision is undoubted.[10]

(43) *Claim of Right under Legal Tender Act.*—Any denial of a title, right, privilege or immunity claimed under the legal tender act, raises a federal question which may be reviewed by this court.[11]

question is involved in the decision of a state court in a suit brought by the executors of a former collector of the customs against an attorney collecting money for deceased from the United States treasury, but failing to pay it over, in which it was decided that the defendant was estopped from showing that the moneys in question were paid out of the United States treasury under a mistake of fact; that the secretary had vacated the award; or that no valid agency existed by force of the statutes of the United States to collect and pay over these moneys. Sherman *v.* Grinnell, 144 U. S. 198, 36 L. Ed. 403.

Secretary of agriculture.—Where a right or immunity is claimed under an order of the secretary of agriculture, and denied by the state court, a writ of error will lie. Illinois Central R. Co. *v.* McKendree, 203 U. S. 514, 524, 51 L. Ed. 298.

9. Validity of state election laws.—McPherson *v.* Blackner, 146 U. S. 1, 36 L. Ed. 869.

10. Questions relating to federal securities.—Where an act of the state legislature authorized the issue of bonds, by way of refunding to banks such portions of a tax as had been assessed on federal securities made by the constitution and statutes of the United States exempt from taxation, and the officers who were empowered to issue the obligations refused to sign them, because, as they alleged, a portion of the securities for the tax on which the bank claimed reimbursement, was, in law, not exempt, and the highest court of the state sanctioned this refusal; held, that this was a decision by a state court against a right, privilege, or immunity claimed under the constitution or a statute of the United States, and so that this court had jurisdiction under the 25th section of the judiciary act, and the amendatory act of February 5th, 1867. The Banks *v.* The Mayor, 7 Wall. 16, 19 L. Ed. 57.

11. Claim of right under legal tender act.—Trebilcock *v.* Wilson, 12 Wall. 687, 20 L. Ed. 460; Maryland *v.* Baltimore, etc., R. Co., 22 Wall. 105, 22 L. Ed. 713; Woodruff *v.* Mississippi, 162 U. S. 291, 40 L. Ed. 973.

Where a plaintiff in error set up in the court below that he was entitled to have a note held by him and made by the defendant in error, paid in gold or silver coin under the constitution, upon a proper construction of various clauses of that instrument, and the decision of the court below was against the right thus set up, this court has appellate jurisdiction under the 25th section of the judiciary act of 1789, or the 2d section of the amendatory judiciary act of 1867, to review the decision. Trebilcock *v.* Wilson, 12 Wall. 687, 20 L. Ed. 460, overruling Roosevelt *v.* Meyer, 1 Wall. 512, 17 L. Ed. 500.

In an action brought in a state court against a railroad company for ejecting the plaintiff from a car, the defense was that a silver coin, offered by him in payment of his fare, was so abraded as to be no longer legal tender. The supreme court of the state, after referring to the congressional legislation on the subject, held that, "so long as a genuine silver coin is worn only by natural abrasion, is not appreciably diminished in weight, and retains the appearance of a coin duly issued from the mint, it is a legal tender for its original value." The railroad company, although denying the plaintiff's claim, set up no right under any statute of the United States in reference to the effect of the reduction in weight of silver coin by natural abrasion. Judgment being given for plaintiff, the railroad company sued out a writ of error for its review. Held, that this court was without jurisdiction. Jersey City, etc., R. Co. *v.* Morgan, 160 U. S. 288, 40 L. Ed. 430.

In Jersey City, etc., R. Co. *v.* Morgan, 150 U. S. 288, 40 L. Ed. 430, in an action brought in a state court against a railroad company for ejecting the plaintiff from a car, the defense was that a silver coin offered by him in payment of his fare was so abraded as to be no longer legal tender, and that defense was overruled. And a writ of error having been sued out by the railroad company from this court to review the judgment thereupon rendered against it, we held that the writ could not be maintained. It was here said: "The claim which defendant now states it re-

(44) *Claim of Right under Internal Revenue Act.*—The decision of a state court against a right claimed under the internal revenue act, gives jurisdiction to this court.[12]

(45) *State Legislation Regulating Sale of Intoxicating Liquors.*—The usual and ordinary legislation of the states regulating or prohibiting the sale of intoxicating liquors raises no question under the constitution of the United States prior to the fourteenth amendment of that instrument.[13] The question as to what licenses shall or shall not be required of those who engage in the liquor traffic, is a matter properly submitted to the states for determination. The question is one of a particularly local character, affecting solely the internal police of the state, in respect to which we have no reviewing power, and in which is involved no matter of a federal character, or of general commercial law.[14]

(46) *Questions Arising under the Public Land Acts.*—**In General.**—Where a title or right under the acts of congress relating to the public lands is asserted in a state court and denied, this court has jurisdiction.[15] A state may prescribe the pro-

lies on is that the coin in question was not legal tender under the laws of the United States. This, however, is only a denial of the claim by plaintiff that the coin was such, and as, upon the facts determined by the verdict, the state courts so adjudged, the decision was in favor of and not against the right thus claimed under the laws of the United States, if such a right could be treated as involved on this record, and this court has no jurisdiction to review it. Missouri *v.* Andriano, 138 U. S. 496, 34 L. Ed. 1012, and cases cited. And, although denying plaintiff's claim, defendant did not pretend to set up any right it had under any statute of the United States, in reference to the effect of reduction in weight of silver coin by natural abrasion." Conde *v.* York, 168 U. S. 642, 650, 42 L. Ed. 611, reaffirmed in Farmers' National Bank *v.* Robinson, 176 U. S. 681, 682, 44 L. Ed. 637.

In Maryland *v.* Baltimore, etc., R. Co., 22 Wall. 105, 22 L. Ed. 713, in which the state had made certain advances for the railroad company in gold and sought judgment accordingly and the state court held, that it was only entitled to recovery in currency, no objection was raised to the jurisdiction of this court to review the judgment. Woodruff *v.* Mississippi, 162 U. S. 291, 299, 40 L. Ed. 973.

Under the 25th section of the judiciary act where the record shows no other reason why the court of appeals of Kentucky sustained a demurrer to the plea than that it was made in legal tender notes of the United States, it sufficiently appeared that the question of the validity of these notes as a tender was made and decided in the negative. This court, therefore, has jurisdiction to review the judgment; and though the note sued on was made before the passage of the legal tender statutes by Congress, held that the tender was a valid tender, and that the judgment of the court below must be reversed. Dooley *v.* Smith, 13 Wall. 604, 20 L. Ed. 547.

A decision of the highest state court as to the medium in which an issue of state bonds are payable, and, if in gold coin, the effect thereof, involves the right to enforce a contract according to the meaning of its terms as determined by the constitution and laws of the United States, interpreted by the tribunal of last resort, and therefore raises questions of a federal nature which may be reviewed by this court on a writ of error. Woodruff *v.* Mississippi, 162 U. S. 291, 40 L. Ed. 973.

12. Claim of right under internal revenue act.—McGuire *v.* The Commonwealth, 3 Wall. 382, 17 L. Ed. 165.

Where a party is indicted in a state court for doing an act contrary to the statute of the state as selling intoxicating liquors, and sets up a license from the United States under one of its statutes, and the decision of the state court is against the right claimed under such last-mentioned statute, this court has jurisdiction under the 25th section of the judiciary act of 1789. McGuire *v.* The Commonwealth, 3 Wall. 382, 17 L. Ed. 165.

13. State legislation regulating sale of intoxicating liquors.—Bartemeyer *v.* Iowa, 18 Wall. 129, 21 L. Ed. 929.

14. Miller *v.* Ammon, 145 U. S. 421, 423, 36 L. Ed. 759.

15. Questions arising under the public land acts.—The second section of the act of the 29th of May, 1830, providing, that "if two or more persons be settled upon the same quarter section, the same may be divided between the two first actual settlers, if by a north and south, or east and west line the settlement or improvement of each can be included in a half quarter section," refers only to tracts of land containing one hundred and sixty acres, and does not operate upon one containing only one hundred and thirty-three acres. Therefore, where tenants in common of a tract of one hundred and thirty-three acres applied to a state court for a partition under the above act, the judgment of that court cannot be reviewed by this court, when brought up by a writ of error under the twenty-fifth section of the

cedure in the federal courts as the rule of practice in its own tribunals; it may authorize the disposal of its own lands in accordance with the provisions for the sale of the public lands of the United States; and in such cases an examination may be necessary of the acts of congress, the rules of the federal courts, and the practices of the land department, and yet the questions for decision would not be of a federal character. The inquiry along federal lines is only incidental to a determination of the local question of what the state has required and prescribed. The matter decided is one of state rule and practice. The facts by which that state rule and practice are determined may be of a federal origin.[16]

Federal Question Must Be Real, Not Fictitious.—Now, in ordinary cases, it would not be doubted that a party entering upon vacant land, the title to which had been conveyed from the general government by patent to an individual, could not create a federal question such as to give this court jurisdiction over the judgment of the highest court of the state, by simply averring that such possession was taken with a view of entering the land under the homestead laws of the United States, and that he went through the form of making application to the local land office for permission to make such entry; for if he could, almost any case in ejectment could be taken from the supreme court of a state to this. In order that such claim of the party in possession may raise a genuine federal question, there must be some reason to believe that the apparent legal title transferred by the patent from the United States was wrongfully conveyed, and that the real title in fact remains in the government; and whether there be such shadow upon the legal title of the defendant in error, that the denial of plaintiff in error's right to enter the land as a homestead presents a genuine rather than a fictitious federal question, is a doubtful matter.[17]

(47) *Constitutional Provision Defining the Judicial Power.*—The supreme court of the United States has jurisdiction under § 709 of the Revised Statutes—when a plaintiff in error alleges that a court which has decided a case against him was constituted in violation of the federal constitution, and the supreme court of the state where the court sat has decided that it was not so constituted.[18]

(48) *Claim of Title or Right under the Patent Laws.*—**In General.**—Where the record shows that some question was raised under the patent law and denied by the state court, this court has jurisdiction.[19]

To constitute a cause as one arising under the patent right laws of the United States in any proper sense of the term, the plaintiff must set up some right, title, or interest under the patent laws, or at least make it appear that some right or privilege will be defeated by one construction, or sustained by the opposite construction of these laws.[20] The correctness of the decision of the highest

judiciary act, because the right asserted does nor arise under an act of congress. The writ of error must be dismissed. Downes *v.* Scott, 4 How. 500, 11 L. Ed. 1075.

Homestead laws.—Where to a bill for specific performance of a contract, the defendants answer that the contract is void under the homestead laws of the United States, but notwithstanding this defense so expressly stated, a decree for specific performance is entered; as no decree could pass against the defendants without denying the protection asserted by them under the homestead laws it follows that the case is one in which a right is specifically set up and claimed under the statutes of the United States, and the decision and judgment of the state court are against that right. Hence, the jurisdiction of this court cannot be doubted. Anderson *v.* Carkins, 135 U. S. 483, 34 L. Ed. 272, citing Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429.

16. Miller *v.* Swann, 150 U. S. 132, 137, 37 L. Ed. 1028.

17. Hamblin *v.* Western Land Co., 147 U. S. 531, 533, 37 L. Ed. 267.

18. Constitutional provision defining the judicial power.—Mechanics' and Trader's Bank *v.* Union Bank, 22 Wall. 276, 22 L. Ed. 871.

19. Claim of title or right under the patent laws. Brown *v.* Atwell, 92 U. S. 327, 23 L. Ed. 511.

20. Starin *v.* New York, 115 U. S. 248, 29 L. Ed. 388; Germania Ins. Co. *v.* Wisconsin, 119 U. S. 473, 30 L. Ed. 461; Pratt *v.* Paris Gaslight, etc., Co., 168 U. S. 255, 259, 42 L. Ed. 458.

court of the state, upon the merits, based upon the existence of an agreement whereby an inventor, having taken out letters patent for his invention, agreed to transfer an interest therein to the plaintiff, and not necessarily passing upon any question under the patents laws, cannot be reviewed by this court on a writ of error.[21]

"Cases" Arising under Patent Laws.—Section 711 does not deprive the

21. Marsh *v.* Nichols, 140 U. S. 344, 35 L. Ed. 413.

An action upon an agreement in writing, by which, in consideration of a license from the patentee to make and sell the invention, the licensee acknowledges the validity of the patent, stipulates that the patentee may obtain reissues thereof, and promises to pay certain royalties so long as the patent shall not have been adjudged invalid, is not a case arising under the patent laws of the United States, and is within the jurisdiction of the state courts; and the correctness of a decision of the highest court of a state upon the merits of the case, based upon the effect of the agreement, without passing upon the validity of a reissue or any other question under those laws, cannot be reviewed by this court on writ of error. Dale Tile Mfg. Co. *v.* Hyatt, 125 U. S. 46, 31 L. Ed. 683, citing Wilson *v.* Sandford, 10 How. 99, 13 L. Ed. 344; Brown *v.* Shannon, 20 How. 55, 15 L. Ed. 826; Hartell *v.* Tilghman, 99 U. S. 547, 25 L. Ed. 357.

Thus in Brown *v.* Shannon, 20 How. 55, 15 L. Ed. 826, it was decided that a bill in equity in the circuit court of the United States by the owner of letters patent to enforce a contract for the use of the patent, and in Wilson *v.* Sandford, 10 How. 99, 13 L. Ed. 344, to set aside such a contract because the defendant had not complied with its terms, was not within the acts of Congress by which an appeal to this court was allowable in cases arising under the patent laws, without regard to the value of the matter in controversy. Marsh *v.* Nichols, 140 U. S. 344, 355, 35 L. Ed. 413.

So in Albright *v.* Teas, 106 U. S. 613, 27 L. Ed. 295, where a suit was brought in a state court, the parties thereto being citizens of the same state, for moneys alleged to be due to the plaintiff under a contract, whereby certain letters patent granted to him were transferred to the defendant, it was held that the suit, not involving the validity or the construction of the patents, was not one arising under a law of the United States, and could not be removed to the circuit court. Marsh *v.* Nichols, 140 U. S. 344, 355, 35 L. Ed. 413.

In Wood Mowing, etc., Co. *v.* Skinner, 139 U. S. 293, 35 L. Ed. 193, in an action for breach of contract in refusing to account and pay for a certain patented invention, the supreme court of New York adjudged upon the trial that plaintiff in error had agreed to use defendant in error's device upon all its machines, and also that it had in fact used them or their mechanical equivalent; but the court in general term, in affirming the judgment, found it unnecessary to determine whether the plaintiff in error had actually made use of the device or its equivalent, and held it to be liable upon the ground that it had agreed to use it upon all the machines, and was therefore bound to pay its value as fixed by the referee. The judgment was affirmed by the court of appeals without an opinion, and the writ of error from this court was dismissed, because it was apparent that the case might properly have been determined on a ground broad enough to sustain the judgment without resort to a federal question. Marsh *v.* Nichols, 140 U. S. 344, 356, 35 L. Ed. 413.

In accordance with the general rule that where a suit is brought on a contract of which a patent is the subject matter, either to enforce such contract, or to annul it, the case arises on the contract, or out of the contract, and not under the patent laws, this court has no jurisdiction to review on a writ of error the decision of the highest state court in a controversy in respect to the rescission of a contract for the exchange of an invention for a stock of merchandise, on the ground of fraud and misrepresentation, and holding there was in fact no fraud, that the plaintiff got what he bargained for, and was not deceived or misled in the premises, because the decree rests on grounds broad enough to sustain it without any reference to any federal question. Wade *v.* Lawder, 165 U. S. 624, 41 L. Ed. 851.

Where an ordinary action of assumpsit is brought upon the common counts for the price of a patented machine, to recover damages for an infringment or to enjoin its use by the defendant, and not to test its validity, the fact that the state court admits testimony to show that the patent was invalid, and the machine an infringment upon a prior patent, presents no federal question under § 711 of the Revised Statutes which declares that "the jurisdiction vested in the courts of the United States, in the cases and proceedings hereinafter mentioned, shall be exclusive of the courts of the several states * * * Fifth. Of all cases arising under the patent-right or copyright laws of the United States." Pratt *v.* Paris Gaslight etc., Co., 168 U. S. 255, 42 L. Ed. 458.

state courts of the power to determine questions arising under the patent laws, but only of assuming jurisdiction of "cases" arising under those laws. There is a clear distinction between a case and a question arising under the patent laws. The former arises when the plaintiff in his opening pleading—be it a bill, complaint or declaration—sets up a right under the patent laws as ground for a recovery. Of such the state courts have no jurisdiction. The latter may appear in the plea or answer or in the testimony. The determination of such question is not beyond the competency of the state tribunals.[22]

Showing as to Jurisdiction.—And according to the rule that in order to justify a writ of error from this court to review the judgment of a state court, the record must show that the judgment rests upon the disposition of a federal question, a writ of error will be dismissed where the state court did not decide any question arising under the patent laws, nor did the judgment require, to sustain it, any such decision. And where neither the validity of the patent, nor its construction, nor the patentability of the device, is brought under consideration, even collaterally.[23]

(49) *Questions Relating to the Indian Tribes.*—Where a right is claimed in the state court under the act of congress of March, 1802, entitled "An act to regulate trade and intercourse with the Indian tribes," and denied, this court has jurisdiction.[24] Likewise, a decision of a state court that an Indian had no authority to convey his land without permission from the president previously obtained, under the treaty of Prairie du Chien, 7 Stat. 320, making grants of lands to certain Indians, upon condition that they should never be leased or conveyed by the grantees or their heirs, to any persons whatever, without the permission of the president of the United States, raises a federal question.[25]

(50) *Federal Statutes Relating to Rivers and Harbors.*—The decision of a state court denying the petitioners a writ of prohibition to restrain the harbor commissioners of a state from extending or locating harbor lines erected by and belonging to the petitioner, the averment in the relator's petition being that "he is now and has been for thirty years last past the owner of the following described property, to wit, the property commonly known as Yesler's wharf and dock, and

22. Pratt *v.* Paris Gaslight, etc., Co., 168 U. S. 255, 259, 42 L. Ed. 458.

23. Marsh *v.* Nichols, 140 U. S. 344, 35 L. Ed. 413; Wilson *v.* Sandford, 10 How. 99, 13 L. Ed. 344. Brown *v.* Atwell, 92 U. S. 327, 330, 23 L. Ed. 511.

24. Questions relating to the Indian tribes.—The plaintiff in error was indicted in the supreme court of the county of Gwinnett in the state of Georgia, "for residing on the 15th July, 1831, in that part of the Cherokee Nation attached by the laws of the state of Georgia in that county, without a license or permit from the Governor of the state, or from any one authorized to grant it, and without having taken the oath to support and defend the constitution and laws of the state of Georgia, and uprightly to demean himself as a citizen thereof, contrary to the laws of the said state." To this indictment he pleaded that he was, on the 15th July, 1531, in the Cherokee Nation, out of the jurisdiction of the court of Gwinnett county; that he was a citizen of Vermont, and entered the Cherokee Nation as a missionary under the authority of the President of the United States, and has not been required by him to leave it, and that with the permission and approval of the Cherokee Nation he was engaged in preaching the gospel; that the state of Georgia ought not to maintain the prosecution, as several treaties had been entered into by the United States with the Cherokee Nation, by which that nation was acknowledged to be a sovereign nation, and by which the territory occupied by them was guaranteed to them by the United States, and that the laws of Georgia, under which the plaintiff in error was indicted, are repugnant to the treaties, and unconstitutional and void, and also that they are repugnant to the act of congress of March, 1802, entitled "An act to regulate trade and intercourse with the Indian tribes." The superior court of Gwinnett overruled the plea, and the plaintiff in error was tried and convicted and sentenced "to hard labor in the penitentiary for four years." Held, that this was a case in which the supreme court of the United States had jurisdiction by writ of error, under the twenty-fifth section of the "Act to establish the judicial court of the United States" passed in 1789. Worcester *v.* Georgia, 6 Pet. 515, 8 L. Ed. 483.

25. Pickering *v.* Lomax, 145 U. S. 310, 36 L. Ed. 716.

the upland abutting on the shore upon which said wharf and dock were constructed," is not against any title or right of the relator arising under a statute of the United States.[26]

(51) *Ordinance for Government of Northwest Territory.*—The general provisions of the ordinance of 1787 as to the rights of property cannot give jurisdiction to this court. They do not come within the 25th section of the judiciary act.[27]

(52) *Federal Statutes Relating to Administration of Estates.*—The decision of the highest state court as to whether or not a right given by an act of congress to the "legal representatives" of a deceased person is for the benefit of creditors as against the next of kin, presents a federal question, and may be reviewed upon a writ of error sued out by the executor of the estate.[28]

(53) *Domestic and Social Status of Persons, Such as Slaves.*—Where the suit in a state court was one affecting the personal status of the defendant in error, a citizen of that state, in other words, where the question was whether defendnat was a citizen of the state, and the court decided he was not; it was held, that such a decision of the state court does not present a question of which this court has jurisdiction.[29] Under the 25th section of the judiciary act, this court has no jurisdiction over the following question, viz: "Whether slaves who had been permitted by their master to pass occasionally from Kentucky into Ohio acquired thereby a right to freedom after their return to Kentucky." The laws of Kentucky alone could decide upon the domestic and social condition of the persons domiciled within its territory, except so far as the powers of the states in this respect are restrained or duties and obligations imposed upon them by the constitution of the United States. There is nothing in the constitution of the United States that can in any decree control the law of Kentucky upon this subject. The

26. Federal statutes relating to rivers and harbors.—Yesler *v.* Washington, etc., Commissioners, 146 U. S. 646, 36 L. Ed. 1119.

27. Ordinances for government of northwest territory.—Strader *v.* Graham, 10 How. 82, 13 L. Ed. 337; Chapin *v.* Fye, 179 U. S. 127, 45 L. Ed. 119.

The mother of Aspasia, a colored woman, was born a slave at Kaskaskia, in Illinois, previous to 1787, and before that country was conquered for Virginia, Aspasia was born in Illinois subsequent to the passage of the ordinance for the government of that territory. Aspasia was afterwards sent as a slave to the state of Missouri. In Missouri Aspasia claimed to be free under the ordinance "for the government of the territory of the United States northwest of the River Ohio," passed 13th July, 1787. The supreme court of Missouri decided that Aspasia was free, and Menard, who claimed her as his slave, brought this writ of error under the 25th section of the Act of 1789, claiming to reverse the judgment of that court. Held, that the case is not within the provisions of the 25th section of the Act of 1789. The provisions of the compact which relate to "property," and to "rights," are general. They refer to no specific property or class of rights; it is impossible, therefore, judicially, to limit their application. If it were admitted that Aspasia is the property of the plaintiff in error, and the court were to take jurisdiction of the cause under the provisions of the ordinance, must they not on the same ground interpose their jurisdiction in all other controversies respecting property which was acquired in the northwestern territory? Whatever right may be claimed to have originated under the ordinance of 1787, it would seem that a right to the involuntary service of an individual could not have had its source in that instrument. It declares that "there shall not be slavery nor involuntary servitude in the territory." If this did not destroy a vested right in slaves, it at least did not create or strengthen that right. If the decision of the supreme court of Missouri had been against Aspasia, it might have been contended that the reversing power of this court, under the 25th section of the judiciary act, could be exercised. In such a case the decision would have been against the express provision of the ordinance in favor of liberty, and on that ground, if that instrument could be considered under the circumstances as an act of congress, within the 25th section, the jurisdiction of this court would be unquestionable. But the decision was not against, but in favor of the express provision of the ordinance. Menard *v.* Aspasia, 5 Pet. 505, 8 L. Ed. 207.

28. Federal statutes relating to administration of estates.—Briggs *v.* Walker, 171 U. S. 466, 42 L. Ed. 243.

29. Domestic and social status of persons, such as slaves.—Hunt *v.* Hunt, 131 U. S., appx. clxv, 24 L. Ed. 1109.

ordinance of 1787 cannot confer jurisdiction upon this court. It was itself superseded by the adoption of the constitution of the United States, which placed all the states of the Union upon a perfect equality, which they would not be if the ordinance continued to be in force after its adoption. Such of the provisions of the ordinance as are yet in force owed their validity to acts of congress passed under the present constitution, during the territorial government of the northwest territory, and since to the constitutions and laws of the states formed in it.[30]

(54) *Slave Contracts and Transactions.*—This court has no jurisdiction to review the judgment of a state court, deciding as to the validity of a contract, the consideration for which was a sale or purchase of slaves.[31]

(55) *Impairment of Obligation of Contract*—aa. *In General.*—Section 709 of the Revised Statutes gives a review on writ of error of the judgments of a state court whenever they sustain the validity of a state statute claimed to impair the obligation of a contract.[32]

30. Strader *v.* Graham, 10 How. 82, 13 L. Ed. 337; Chapin *v.* Fye, 179 U. S. 127, 45 L. Ed. 119; Menard *v.* Aspasia, 5 Pet. 505, 8 L. Ed. 207.

31. Slave contracts and transactions.—Where suit was brought in a state court against an administrator upon a writing obligatory, and the administrator pleaded: First, that the consideration of the obligation was the purchase of slaves, and that they were all emancipated by the constitution of the state; Second, that the slaves were emancipated by an amendment to the constitution of the United States, and that the consideration of the obligation thereby wholly failed; Third, that the contract was originally null and void, the writ of error to the state court will be dismissed. Jackoway *v.* Denton, 154 U. S. appx. 583, 20 L. Ed. 645.

The supreme court of Arkansas ordered judgment for a plaintiff suing on a note given for the price of slaves. Subsequently to this the state of Louisiana ordained as part of its constitution, "that all contracts for the sale or purchase of slaves were null and void, and that no court of the state should take cognizance of any suit founded upon such contracts, and that no amount should ever be collected or recovered on any judgment or decree which had been, or should thereafter be, rendered on account of any such contract or obligation." On application by the defendant in the suit to supersede and perpetually stay all proceedings on the judgment against him, the supreme court overruled the application. The case being brought here under an assumption that it was within the 25th section, held that it was not so; and the case was dismissed for want of jurisdiction accordingly. Sevier *v.* Haskell, 14 Wall. 12, 20 L. Ed. 827.

32. Impairment of obligation of contract.—Railroads *v.* Richmond, 15 Wall. 3, 21 L. Ed. 118; Holt *v.* Indiana Mfg. Co., 176 U. S. 68, 72, 44 L. Ed. 374; Pierce *v.* Somerset R. Co., 171 U. S. 641, 648, 43 L. Ed. 316; Eustis *v.* Bolles, 150 U. S. 361, 366, 37 L. Ed. 1111; Covington *v.* Kentucky, 173 U. S. 231, 232, 43 L. Ed. 679; Houston, etc., R. Co. *v.* Texas, 177 U. S. 66, 74, 44 L. Ed. 673; Armstrong *v.* The Treasurer, 16 Pet. 281, 10 L. Ed. 965; Crowell *v.* Randell, 10 Pet. 368, 392, 9 L. Ed. 458; McKinney *v.* Carroll, 12 Pet. 66, 9 L. Ed. 1002; Curran *v.* Arkansas, 15 How. 304, 319, 14 L. Ed. 705, 713; Walsh *v.* Columbus, etc., R. Co., 176 U. S. 469, 44 L. Ed. 548; The Binghamton Bridge, 3 Wall. 51, 18 L. Ed. 137; Wright *v.* Nagle, 101 U. S. 791, 25 L. Ed. 921.

Whether a contract is such as to be impaired by a statute subsequently passed by a state, is one of the questions of which this court has jurisdiction under § 709 of the Revised Statutes. University *v.* People, 99 U. S. 309, 25 L. Ed. 387, citing Jefferson Branch Bank *v.* Skelly, 1 Black 436, 17 L. Ed. 173; Bridge Proprietors *v.* Hoboken, etc., Co., 1 Wall. 116, 144, 17 L. Ed. 571; Delmas *v.* Merchant's Ins. Co., 14 Wall. 661, 668, 20 L. Ed. 757.

In New Orleans *v.* Benjamin, 153 U. S. 411, 424, 38 L. Ed. 764, it is said: "Ordinarily the question of the repugnancy of a state statute to the impairment clause of the constitution is to be passed upon by the state courts in the first instance, the presumption being in all cases that they will do what the constitution and laws of the United States require, Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 108 U. S. 18, 27 L. E. 636; and if there be ground for complaint of their decision, the remedy is by writ of error under § 709 of the Revised Statutes." Defiance Water Co. *v.* Defiance, 191 U. S. 184, 191, 48 L. Ed. 140.

Where a statute of a state creates a contract and a subsequent statute is alleged to impair the obligation of that contract, and the highest court of law or equity in the state construes the first statute in such a manner as that the second statute does not impair it, whereby the second statute remains valid under the constitution of the United States, the validity of the second statute is, "drawn in question," and the decision is "in favor" of its validity, within the meaning of the 25th section of the judiciary act of 1789. This court may accordingly under the said

bb. *Prior or Subsequent Legislation.*—The contract clause of the constitution

section, re-examine and reverse the judgment or decree of the state court given as before said. Bridge Proprietors *v.* Hoboken, etc., Co., 1 Wall. 116, 17 L. Ed. 571, distinguishing Commercial Bank *v.* Buckingham, 5 How. 317, 12 L. Ed. 169, Grier, J., dissenting.

Discharge under insolvency laws.—Where the defendants in the trial court, in an action against them to recover on a promissory note, depended on a discharge obtained by them under regular proceedings under the insolvency laws of the state, and this defense the plaintiffs met by alleging that the statutes, under which the defendants had procured their discharge had been enacted after the promissory note sued on had been executed and delivered, and that, to give effect to a discharge obtained under such subsequent laws, would impair the obligation of a contract, within the meaning of the constitution of the United States, it is plain that if the highest state court should adjudge that question adversely to the plaintiffs, a federal question is presented, and it is the duty of this court to consider the soundness of such judgment. Eustis *v.* Bolles, 150 U. S. 361, 37 L. Ed. 1111, followed in Winter *v.* Montgomery, 156 U. S. 385, 39 L. Ed. 460.

Reduction of railroad rates.—A judgment of the highest court of a state affirming an order awarding a peremptory writ of mandamus commanding a railroad company to reduce its rates to conform with a state law, upon the ground that on its incorporation under that law it became subject to its provisions, is based upon a federal question and subject to review by the supreme court of the United States, where it is plain from the averments of the answer that the company relied upon the provisions of a prior law, authorizing the incorporation of the purchaser of railroads after sale in foreclosure proceedings, as constituting a contract protected by the constitution of the United States. Grand Rapids, etc., R. Co. *v.* Osborn, 193 U. S. 17, 48 L. Ed. 598.

Lottery franchise.—Where in a proceeding by quo warranto to exclude the plaintiffs in error from the further use of the franchises of a lottery, on the ground that the event had happened which fixed the period for the termination of the grant under which they were acting, but no claim was made under any of the statutes of the state passed for the suppression of lotteries, and no effect whatever was given to any law of the state impairing the obligations of the grant, a motion to dismiss will be granted, on the ground that no federal question was raised or decided. France *v.* Missouri, 154 U. S., appx. 667, 26 L. Ed. 86. See Douglas *v.* Kentucky, 168 U. S. 488, 42 L. Ed. 553.

Condemnation of stock.—Where the plaintiff in error contends that the purpose for which his stock is sought to be obtained under a state statute allowing the lessee railway company, who is the owner of three-fourths of the stock, to condemn the outstanding shares owned by a person who refuses to agree to the terms of purchase, is not a public use; that the defendant in error has the power and authority to make the improvements mentioned in its application, which will be as advantageous as taking the stock; and that the proceedings and statute are in violation of the due process clause of the fourteenth amendment to the constitution of the United States and impair the contract rights of the plaintiff in error as a stockholder, this raises a federal question, and a motion to dismiss will therefore be denied. Offield *v.* New York, etc., R. Co., 203 U. S. 372, 51 L. Ed. 231.

Violation of contract granting ferry right.—The jurisdiction of this court, under the twenty-fifth section of the judiciary act, extends to a review of the judgment of a state court, where the point involved was the alleged violation of a contract granting a ferry right by a state to an individual, but it does not extend to a case where the alleged violation of a contract is, that a state has taken more land than was necessary for the easement which is wanted, and thus violated the contract under which the owner held his land by a patent. It rests with the state legislature and state courts exclusively to protect their citizens from injustice and oppression of this description. "Were this court to assume jurisdiction, and re-examine and revise state court decisions, on a doubtful construction, that an interest in land held by patent was a contract, and the owner entitled to constitutional protection by our decision in case of abuse and trespass by an oppressive exercise of state authority, it would follow, that all state laws, special and general, under whose sanction roads, ferries and bridges are established, would be subject to our supervision. A new source of jurisdiction would be opened, of endless variety and extent, as, on this assumption, all such cases could be brought here for final adjudication and settlement; of necessity, we would be called on to adjudge of fairness and abuse to ascertain whether jurisdiction existed, and thus to decide the law and facts; in short, to do that which state courts are constantly doing, in an exercise of jurisdiction over peculiarly local matters; by which means a vast mass of municipal powers, heretofore supposed to belong exclusively to state cognizance, would be taken from the states, and exercised by the general government, through the instru-

of the United States has reference only to a statute of a state enacted after the

mentality of this court. That such a doctrine cannot be maintained here has in effect been decided in previous cases; and specially in that of Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 650, 9 L. Ed. 773, where other cases are cited and reviewed." Mills *v.* St. Clair County, 8 How. 569, 12 L. Ed. 1201, 1202.

Municipal securities.—In a suit brought, in one of her courts, by the state of Louisiana, seeking to restrain payment on the bonds issued to the New Orleans, Mobile, and Chattanooga Railroad Company, under an act of the legislature approved April 20, 1871, and praying for relief, upon the ground that the act was in violation of the constitutional amendment of 1870, which declares "that, prior to the first day of January, 1890, the debt of the state shall not be so increased as to exceed twenty-five millions of dollars," which limit, it was claimed, had been attained before the passage of the act, a holder of some of the bonds, who was permitted to intervene, set up that they were issued in discharge and release of valid and then subsisting obligations of the state, which, prior to the adoption of the amendment, had been created under her legislation. Held, that this court has jurisdiction to determine whether the amendment, as construed by the court below and applied to the facts of the case, impairs the obligation of a contract. Williams *v.* Louisiana, 103 U. S. 637, 26 L. Ed. 595, reaffirmed in Durkee *v.* Board of Liquidation, 103 U. S. 646, 26 L. Ed. 598.

Issuance of unauthorized bank paper.—In 1816 the legislature of Ohio passed an "act to prohibit the issuing and circulation of unauthorized bank paper," and in 1839 an act amendatory thereof; and the question was, whether or not a canal company, incorporated in 1837, was subject to these acts. In deciding that it was, the supreme court of Ohio only gave a construction to an act of Ohio, which neither of itself, nor by its application, involved in any way a repugnancy to the constitution of the United States, by impairing the obligation of a contract. Lawler *v.* Walker, 14 How. 149, 14 L. Ed. 364.

Act allowing state to be sued.—Under the constitution of the state of Arkansas, the legislature passed a law allowing the state to be sued. According to this law, a suit was brought upon some of the state bonds; and whilst the suit was going on, the legislature passed another law, requiring the bonds to be filed in court, or the suit to be dismissed. The suitor refusing to file his bonds, the suit was dismissed; and the case was carried to the supreme court of the state, where the judgment was affirmed. The case, being brought to this court under the twenty-fifth section of the judiciary act, must be dismissed for want of jurisdiction. The permission to bring the suit was not a contract whose obligations were impaired by the passage of the subsequent law. Beers *v.* Arkansas, 20 How. 527, 15 L. Ed. 991.

Provisions in railroad charters.—The charter of the Baltimore and Ohio Railroad Company for constructing and working a branch railroad between Baltimore and Washington contained a stipulation that the company at the end of every six months should pay to the state one-fifth of the whole amount received for the transportation of passengers. This charter was accepted and complied with for many years. Held, that as the alleged unconstitutionality of the stipulation was set up as a defense, the state court was bound to pass upon it; and having decided against the exemption thus claimed, this court is authorized to review the decision. Railroad Co. *v.* Maryland, 21 Wall. 457, 22 L. Ed. 678.

A decision by the supreme court of the state of Illinois that the power given by the charter of the Illinois Central Railroad Company of February 10, 1851, "to 'enter upon and take possession of and use all and singular any lands, streams and materials of every kind, for the location of depots and stopping stages for the * * * complete operation of said road,' and the grant to said corporation of 'all such lands, waters, materials and privileges belonging to the state,' did not include lands covered by the waters of Lake Michigan," and was not impaired by legislation subsequent to the charter of the railroad company, prohibiting the driving or placing of any piles, stone, timber or other obstruction in the harbor of the city, without the permission of the commissioner of public works, presents a federal question. The claim is certainly not a frivolous one. Illinois Central R. Co. *v.* Chicago, 176 U. S. 646, 653, 44 L. Ed. 622, citing Bacon *v.* Texas, 163 U. S. 207, 41 L. Ed. 132; Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 23, 43 L. Ed. 341.

Grant of land to state by congress.—A decision by the supreme court of the state of Ohio that the act of congress of May 24, 1828, granting to the state of Ohio 500,000 acres of land for the construction of canals, and providing that such canals, "when completed or used, shall be, and forever remain, public highways, for the use of the government of the United States," and the acceptance thereof by the general assembly, did not constitute a contract by the state for the perpetual maintenance of such canals as public highways, at least until they were given up by consent of the United States, and that the subsequent act of the gen-

making of the contract, whose obligation is alleged to have been impaired.[33] No jurisdiction exists in this court under the 25th section of the judiciary act, to review a decision of the highest court of the state, maintaining the validity of a law, which it has been set up "impairs the obligation of a contract," when the law set up as having this effect was in existence when the alleged contract was made, and the highest state court has only decided that there was no contract in the case.[34] In other words, where the federal question upon which the juris-

eral assembly of May 18, 1894, providing for the abandonment of such canals, without such consent being given, was not obnoxious to that provision of the federal constitution declaring that no state shall pass a law impairing the obligation of contracts, raises a federal question. Walsh *v.* Columbus, etc., R. Co., 176 U. S. 469, 44 L. Ed. 548, reaffirmed in Walsh *v.* Columbus, etc., R. Co., 176 U. S. 469, 481, 44 L. Ed. 548; Gates *v.* Commissioners, 183 U. S. 693, 46 L. Ed. 393.

Curative acts.—A statute which merely cures defects, is not objectionable as impairing the obligation of a contract. In 1839, a treaty was made between the United States and Mexico, providing for the "adjustment of claims of citizens of the United States on the Mexican Republic." Under this treaty a sum of money was awarded to be paid to the members of the Baltimore Mexican Company, who had subscribed money to fit out an expedition against Mexico, under General Mina, in 1816. The proceeds of one of the shares of this company were claimed by two parties; one as being the second permanent trustee of the insolvent owner of the share, and the other as being the assignee of the first permanent trustee. This court has no jurisdiction in consequence of the additional fact that the legislature of Maryland passed a law curing certain defects in the assignment to Oliver, the validity of which law was drawn into question, as impairing the obligation of a contract; because, if there had been no such law, the decision of the state court would have been the same. Williams *v.* Oliver, 12 How. 111, 13 L. Ed. 915.

Prohibitory liquor law of state.—Where it appears from the record that the point, that the prohibitory liquor law of Massachusetts of 1869 impaired the obligation of the contract contained in the charter of the company, was made on the trial of the case, and decided adversely to the company, and was afterwards carried, by a bill of exceptions, to the supreme court of Massachusetts, where the rulings of the lower court were affirmed, this court has jurisdiction. Beer Co. *v.* Massachusetts, 97 U. S. 25, 24 L. Ed. 989.

Confiscation of debts by confederacy.—This court has jurisdiction under the 25th section of the judiciary act of 1789 to re-examine and reverse upon a writ of error the final judgment or decree in the highest court of a state, holding that the confiscation of debts due to citizens of the United States, under an act of the confederate government, enforced as a law of the state, is a valid proceeding. Williams *v.* Bruffy, 102 U. S. 248, 26 L. Ed. 135, citing Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. 71, 14 L. Ed. 55.

A writ of error will lie from this court to the supreme court of a state, where it is plain that a debt due to the plaintiff was sequestered under a law of a confederation by one state with another. Williams *v.* Bruffy, 96 U. S. 176, 24 L. Ed. 716.

Mortgage debt.—The decision of a state court, relating to the validity of statutes passed subsequently to the execution of a mortgage holding that the statute did not impair the obligation of the contract contained in the mortgage, presents a federal question reviewable by this court. Pierce *v.* Somerset R. Co., 171 U. S. 641, 648, 43 L. Ed. 316.

Railroad aid bonds.—In Smith *v.* Jennings, 206 U. S. 276, 51 L. Ed. 1061, the plaintiff in error was the holder of certain railroad aid bonds issued by the state in aid of a certain railroad company. A state statute was passed authorizing and requiring the state treasurer to write off the books in his office these bonds. The holder sued out an injunction in the state court to restrain the treasurer of the state from obeying the requirements of the act, on the ground that it impaired the obligation of the contract made by the bond. This court in dismissing the writ of error said: "Nor did the law complained of impair the obligation of the state to pay the bonds therein mentioned, or the remedy to recover upon them. The obligation and the remedy remained precisely the same after the enactment of the law as before. Neither one was in the slightest degree diminished or affected. The law merely directed a change of entries in the books of the state treasurer, and could by no possibility, in any respect whatever, deny, obstruct, impair or affect the rights of the plaintiff in error."

33. Prior or subsequent legislation.—Lehigh Water Co. *v.* Easton, 121 U. S. 388, 391, 30 L. Ed. 1059; Pinney *v.* Nelson, 183 U. S. 144, 147, 46 L. Ed. 125; New Orleans Waterworks Co. *v.* Louisiana, 185 U. S. 336, 351, 46 L. Ed. 936; Oshkosh Waterworks Co. *v.* Oshkosh, 187 U. S. 437, 446, 47 L. Ed. 249.

34. Railroad Co. *v.* McClure, 10 Wall. 511, 19 L. Ed. 997.

Remedy for forfeiture of corporate charter.—On writ of error from the su-

diction of this court is based grows out of an alleged impairment of the obligation of a contract, it is now definitely settled that the contract can only be impaired within the meaning of this clause in the constitution, and so as to give this court jurisdiction on writ of error to a state court, by some subsequent statute of the state which has been upheld or effect given it by the state court.[35]

cc. *Distinction between Violation and Impairment.*—And while it is true that the decision of a state court in favor of the validity of any statute of the state impairing the obligation of a contract may be reviewed here, still there is a broad distinction between the violation of a contract by the state and its impairment.[36]

preme court of the United States to a state court to review a proceeding in the entry of a quo warranto brought by the attorney general of the state to obtain a forfeiture of the charter of the defendant a waterworks company, the plaintiff in error, the corporation claimed the existence in the record of a federal question which the brief of defendant in error set forth as follows: "If mandamus for the forfeiture be sanctioned by, and sought pursuant to a state statute, subsequent in date to the charter of the waterworks company, does not such a statute impair the obligation of the charter contract, divest vested rights, and deny to said company the equal protection of the laws?" It was held that "there is no state statute subsequent in date to the charter of the water company under or by virtue of which this proceeding was commenced, or which in any way affects the contract of plaintiff in error. The joint resolution of the legislature of Louisiana referred the whole matter to the attorney general for him to bring suit to forfeit the charter or to take such action as he might think proper. It was a simple authority, if any were needed, to present the question to the court, and neither the contract nor any other rights of the parties were in anywise altered by such resolution. The proceeding herein is based solely upon an alleged violation of the terms of the charter by the corporation; that question has been judicially determined after a full investigation by the state courts, and in a proceeding to which the company was a party and after a full hearing has been accorded it in such proceeding. This was due process of law, and no federal question arises from the decision of the court." New Orleans Waterworks Co. *v.* Louisiana, 185 U. S. 336, 46 L. Ed. 936, reaffirmed in Brewster *v.* Cahill, 194 U. S. 629, 48 L. Ed. 1158; Gates *v.* Parmly, 191 U. S. 557, 48 L. Ed. 301; Weltmer *v.* Bishop, 191 U. S. 560, 561, 48 L. Ed. 302; Coventry *v.* Davis, 193 U. S. 668, 48 L. Ed. 840; Hamburg, etc., Steamship Co. *v.* Lennan, 194 U. S. 628, 48 L. Ed. 1157; Iron Bridge Co. *v.* Brennan, 194 U. S. 630, 48 L. Ed. 1158.

35. Lehigh Water Co. *v.* Easton, 121 U. S. 388, 30 L. Ed. 1059; New Orleans Waterworks Co. *v.* Louisiana Sugar Co., 125 U. S. 18, 31 L. Ed. 607; Central Land Co. *v.* Laidley, 159 U. S. 103, 109, 40 L. Ed. 91; Bacon *v.* Texas, 163 U. S. 207, 216, 41 L. Ed. 132; Weber *v.* Rogan, 188 U. S. 10, 12, 47 L. Ed. 363.

Municipal securities.—Where a constitutional amendment is adopted while a municipal bond is still in the possession of the state, by which it is declared that certain of the state bonds are void, but subsequently an officer of the state puts such bond in circulation and absconds, a refusal of the state to make payment to an innocent purchaser for value, in a suit brought by him to recover the purchase money, raises no federal question. If the plaintiff in error had been a holder for the value of the bond when the constitutional amendment was adopted, it would evidently be beyond the power of the state, by act of the legislature, or by an amendment to its constitution, to nullify such bonds in his hands. But if, when the constitutional amendment was adopted, the bond was still in the possession of the state, there was then no contract with the plaintiff in error upon which such amendment could operate, and hence no contract subject to impairment. In other words, there is no objection to the state declaring bonds still in its possession to be null and void. Bier *v.* McGehee, 148 U. S. 137, 37 L. Ed. 397, citing New Orleans *v.* New Orleans Waterworks, 142 U. S. 86, 35 L. Ed. 946.

36. Brown *v.* Colorado, 106 U. S. 95, 27 L. Ed. 132.

Distinction between violation and impairment.—A state made a contract with a person whom it employed to work for it, to pay him so much money for his work; the money to be paid from time to time as the work went on. The work was done. Payment was made part in money, and part in state warrants much depreciated when paid out, and which the contractor was obliged, in order to keep his engagement to the state, to sell at a heavy loss; though in the hands of the purchasers they were ultimately redeemed. The people of the state subsequently ordained by its constitution that the debt of the state should not be increased so as to exceed $25,000,000. And after this, there being no money unappropriated in the treasury, and the debt of the state then being $25,000,000, the legislature passed an act to pay the contractor $50,331 to reimburse him the losses which he had sustained by the state's

dd. *Whether a Subsequent Statute Has Repealed a Contract.*—Where a contract is claimed to arise from a state law and it is held below that a subsequent statute has repealed the alleged contract and effect is thereby given to the subsequent law, the mere question whether the alleged contract has been repealed by the subsequent law is a state and not a federal question. In such a case this court concerns itself not with the question whether the state law, from which the contract is asserted to have arisen, has been repealed, but proceeds to determine whether the repeal was void because it produced an impairment of the obligations of the contract within the purview of the constitution of the United States. In other words, where the state court has given effect to a subsequent law, this court decides whether such effect, so given by the state court, violates the constitution of the United States.[37]

ee. *By-Laws and Ordinances.*—It is not necessary that the law of a state, in order to come within this constitutional prohibition, should be either in the form of a statute enacted by the legislature in the ordinary course of legislation, or in the form of a constitution established by the people of the state, as their fundamental law. A by-law or ordinance of a municipal corporation may be such an exercise of legislative power delegated by the legislature to the corporation as a political subdivision of the state, having all the force of law within the limits of the municipality, that it may properly be considered as a law within the meaning of this article of the constitution of the United States.[38]

ff. *Impairment by Judicial Department.*—Regarding the impairment of any alleged contract, it must be borne in mind that the constitutional provision refers to state legislation, or to an enactment of a legislative character, though by a municipal

want of good faith in paying him in money all that it owed him under its contract. On an application for a mandamus, the supreme court of the state adjudged that this act created a new debt, and so increased the debt of the state above $25,000,000, and was void. Held in this court, that no writ of error lay under the 25th section of the judiciary act. "No question as to the repugnance of the constitution of Louisiana to the constitution of the United States was made in the supreme court of the state, or decided by that court; nor is it easy to see how such a question could be made." Salomon *v.* Graham, 15 Wall. 208, 21 L. Ed. 37.

Municipal aid.—Statutes of a state authorized a district in a county, defined by exact boundaries, to determine by the vote of its inhabitants to subscribe for stock in a railroad company, and required bonds to be executed in its name by the county judge to the railroad company for the amount of stock so subscribed for. By later statutes, it was enacted that this district should be entitled to vote on the amount of its stock, and in so doing be represented by certain magistrates of the county; and that it should have a certain corporate name, and by that name might sue and be sued. The highest court of the state held that by the earlier statutes the district was made a corporation, and entitled to vote and to receive dividends on its stock in the railroad company, and that the later statutes made no change in the contract created by the earlier statutes. Held, that this court had no jurisdiction on writ of error. "It thus appears that the state court, upon full consideration, decided that the acts of 1870 and 1873 conferred no new rights, but only defined more clearly the manner in which the rights conferred by the earlier statutes should be exercised; and that it based its judgments entirely upon the construction and effect of the earlier statutes, and upon grounds which would have been equally controlling if the later acts had not been passed. The necessary conclusion is that this court has no jurisdiction to review those judgments. West Tenn. Bank *v.* Citizens' Bank, 13 Wall. 432, 20 L. Ed. 514; S. C., 14 Wall. 9, 20 L. Ed. 514; Palmer *v.* Marston, 14 Wall. 10, 20 L. Ed. 826; Kennebec R. *v.* Portland R. Co., 14 Wall. 23, 26, 20 L. Ed. 850; Stevenson *v.* Williams, 19 Wall. 572, 22 L. Ed. 162; New Orleans Waterworks *v.* Louisiana Sugar Co., 125 U. S. 18, 31 L. Ed. 607; Kreiger *v.* Shelby R. Co., 125 U. S. 39, 46, 31 L. Ed. 675.

37. Whether a subsequent statute has repealed a contract.—Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 46 L. Ed. 86; Northern Central R. Co. *v.* Maryland, 187 U. S. 258, 266, 47 L. Ed. 167.

38. By-laws and ordinances.—Bacon *v.* Texas, 163 U. S. 207, 216, 41 L. Ed. 132; St. Paul Gaslight Co. *v.* St. Paul, 181 U. S. 142, 45 L. Ed. 788; New Orleans Waterworks Co. *v.* Louisiana Sugar Co., 125 U. S. 18, 31 L. Ed. 607; Hamilton Gaslight, etc., Co. *v.* Hamilton, 146 U. S. 258, 36 L. Ed. 963; Walla Walla *v.* Walla Walla Water Co., 172 U. S. 1, 42 L. Ed. 341.

corporation, made subsequent to the contract, and which impairs its obligation.[39] In other words, in order to come within the provision of the constitution of the United States, which declares that no state shall pass any law impairing the obligation of contracts, not only must the obligation of a contract have been impaired, but it must have been impaired by some act of the legislative power of the state, and not by a decision of its judicial department only.[40] This court does

39. Impairment by judicial department. —New Orleans Waterworks Co. *v.* Louisiana Sugar Co., 125 U. S. 18, 30, 31 L. Ed. 607; St. Paul Gaslight Co. *v.* St. Paul, 181 U. S. 142, 148, 45 L. Ed. 788; New Orleans Waterworks Co. *v.* Louisiana, 185 U. S. 336, 350, 46 L. Ed. 936, reaffirmed in Brewster *v.* Cahill, 194 U. S. 629, 48 L. Ed. 1158; Gates *v.* Parmly, 191 U. S. 557, 48 L. Ed. 301; Weltmer *v.* Bishop, 191 U. S. 560, 561, 48 L. Ed. 302; Coventry *v.* Davis, 193 U. S. 669, 48 L. Ed. 840; Hamburg Steamship, etc., Co. *v.* Lennan, 194 U. S. 628, 48 L. Ed. 1157; Iron Bridge Co. *v.* Brennan, 194 U. S. 630, 48 L. Ed. 1158; Hanford *v.* Davies, 163 U. S. 273, 41 L. Ed. 157; Savannah, etc., R. Co. *v.* Savannah, 198 U. S. 392, 396, 49 L. Ed. 1097.

40. Central Land Co. *v.* Laidley, 159 U. S. 103, 109, 40 L. Ed. 91.

The state court may erroneously determine questions arising under a contract which constitutes the basis of the suit before it; it may hold a contract void which, in our opinion, is valid; it may adjudge a contract valid which, in our opinion, is void; or its interpretation of the contract may, in our opinion be radically wrong; but, in neither of such cases, would the judgment be reviewable by this court under the clause of the constitution protecting the obligation of contracts against impairment by state legislation, and under the existing statutes defining and regulating its jurisdiction, unless that judgment in terms or by its necessary operation, gives effect to some provision of the state constitution, or some legislative enactment of the state, which is claimed by the unsuccessful party to impair the obligation of the particular contract in question. Railroad *v.* Rock, 4 Wall. 177, 181, 18 L. Ed. 381; Railroad Co. *v.* McClure, 10 Wall. 511, 515, 19 L. Ed. 997; Knox *v.* Exchange Bank, 12 Wall. 379, 383, 20 L. Ed. 414; Delmas *v.* Merchants' Ins. Co., 14 Wall. 661, 665, 20 L. Ed. 757; University *v.* People, 99 U. S. 309, 319, 25 L. Ed. 387; Chicago Life Ins. Co. *v.* Needles, 113 U. S. 574, 582, 28 L. Ed. 1084; Lehigh Water Co. *v.* Easton, 121 U. S. 388, 392, 30 L. Ed. 1059.

It was said by Mr. Justice Miller, in delivering a later judgment of this court: "We are not authorized by the judiciary act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held." Knox *v.* Exchange Bank, 12 Wall. 379, 383, 20 L. Ed. 414, approved in Central Land Co. *v.* Laidley, 159 U. S. 103, 110, 40 L. Ed. 91; Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 41, 46, 45 L. Ed. 415.

In Turner *v.* Wilkes County Commissioners, 173 U. S. 461, 43 L. Ed. 768, it was said that "this being a writ of error to a state court, we cannot take jurisdiction under the allegation that a contract has been impaired by a decision of that court, when it appears that the state court has done nothing more than construe its own constitution and statutes existing at the time when the bonds were issued, there being no subsequent legislation touching the subject." In this case, too, the plaintiff in error sought to take advantage of a change of judicial construction by the supreme court of the state, which had held that the bonds were void, because the acts under which they were issued were not valid laws, not having been passed in the manner directed by the constitution. Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 41, 46, 47, 45 L. Ed. 415.

In Central Land Co. *v.* Laidley, 159 U. S. 13, 40 L. Ed. 91, an action of ejectment was brought by Laidley against the land company in a court of West Virginia. The case turned upon the defectiveness of a wife's acknowledgment to a deed of land. The court of appeals of Virginia, prior to the organization of the state of West Virginia, had in several cases held that acknowledgments in this form were sufficient; but the court of appeals of West Virginia in this case held it to be insufficient, and the change of the settled construction of the statute was charged as an impairment of the contract. This court held that under the contract clause of the constitution, not only must the obligation of the contract be impaired, but it must have been impaired by some act of the legislative power of the state and not by decisions of the judicial department only. "The appellate jurisdiction of this court," said Mr. Justice Gray, "upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the constitution of the United States has been decided by

not and cannot entertain jurisdiction to review the judgment of a state court, solely because that judgment impairs or fails to give effect to a contract. The judgment must give effect to some subsequent state statute, or state constitution, or, it may be added, some ordinance of a municipal corporation passed by the authority of the state legislature, which impairs the obligation of a contract, before the constitutional provision regarding the impairment of such contract comes into play.[41] This court cannot review the decision of a state court, upon

the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court. The statute of West Virginia is admitted to have been valid, * * * and it necessarily follows that the question submitted to and decided by the state court was one of construction only, and not of validity." Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 41, 46, 45 L. Ed. 415.

The supreme court of the United States on writ of error to a state court has no jurisdiction to review and determine an assertion that in enforcing a condition which is impliedly a part of the charter of a corporation, the state, through the regular administration of the law by its courts of justice, has by such courts erroneously construed its own laws. New Orleans Waterworks Co. *v.* Louisiana, 185 U. S. 336, 46 L. Ed. 936, reaffirmed in Brewster *v.* Cahill, 194 U. S. 629, 48 L. Ed. 1158; Gates *v.* Parmly, 191 U. S. 557, 48 L. Ed. 301; Weltmer *v.* Bishop, 191 U. S. 560, 561, 48 L. Ed. 302; Coventry *v.* Davis, 193 U. S. 669, 48 L. Ed. 840; Hamburg Steamship, etc., Co. *v.* Lennan, 194 U. S. 628, 48 L. Ed. 1157; Iron Bridge Co. *v.* Brennan, 194 U. S. 630, 48 L. Ed. 1158.

Forfeiture of charter.—On writ of error from the supreme court of the United States to a state court to review a proceeding in the entry of a quo warranto brought by the attorney general of the state to obtain a forfeiture of the charter of the defendant a waterworks company, the plaintiff, in error, the corporation claimed the existence in the record of federal questions which the brief of plaintiff in error set forth as follows: "(1) Can the state forfeit such a charter and take back the franchises at the same time that she leaves the corporation in possession of the physical property depleted in value by the loss of the franchise, and at the same time that she keeps the money paid for the property plus the franchise? (2) The general laws of the state providing a restitutio in integrum in all cases where a synallagmatic, commutative contract is dissolved, and the charter containing no special provision taking the state's contract from under general provisions of law, is not a state statute authorizing the attorney general to institute proceedings to forfeit the contract and take back the franchise, at the same time that the state keeps the consideration paid for the same, a statute impairing the obligations of a contract? (3) Is not a judicial decision refusing to apply to this contract the general provisions of the law of contracts prevailing in the state, a taking by the state through her judiciary of the property of the defendant corporation without due process of law? (4) Is not the legislative resolution, the action of the attorney general, and the action of the supreme court of the state, the taking by the state of property without due process of law through the instrumentality of her legislative, her executive and her judicial departments, both jointly and severally? (5) Is not the refusal to apply to this case the general provisions of the law of contract prevailing in the state of Louisiana a denial to the plaintiff in error of the equal protection of the laws of the state of Louisiana?" It was held these questions are composed upon the proposition that the judicial determination of these particular questions by the state tribunal was erroneous, and on account of such error the rights of the plaintiff in error, under the federal constitution, have been violated. But mere error in deciding questions of this nature furnishes no ground of jurisdiction for this court to review the judgments of a state court. The assumption that the state court has refused to apply to the contract herein set up the general provisions of the law of contracts prevailing in the state, and that, therefore, the state has taken through her judiciary the property of the plaintiff in error without due process of law, is wholly without foundation. If it were otherwise, then any alleged error in the decision by a state court, in applying state law to the case in hand, resulting in a judgment against a party, could be reviewed in this court on a claim that on account of such error due process of law had not been given him. This cannot be maintained. New Orleans Waterworks Co. *v.* Louisiana, 185 U. S. 336, 46 L. Ed. 936, reaffirmed in Brewster *v.* Cahill, 194 U. S. 628, 48 L. Ed. 1158; Gates *v.* Parmly, 191 U. S. 557, 48 L. Ed. 301; Weltmer *v.* Bishop, 191 U. S. 560, 561, 48 L. Ed. 302; Coventry *v.* Davis, 193 U. S. 668, 48 L. Ed. 840; Hamburg, etc., Steamship Co. *v.* Lennan, 194 U. S. 629, 48 L. Ed. 1157; Iron Bridge Co. *v.* Brennan, 194 U. S. 630, 48 L. Ed. 1158.

41. New Orleans Waterworks Co. *v.* Louisiana, 185 U. S. 336, 352, 46 L. Ed. 936, reaffirmed in Brewster *v.* Cahill, 194

the general ground, that that court has declared a contract void, which this court may think to be valid.[42] This court has repeatedly held, that we cannot revise the judgment of the highest court of a state unless, by its terms, or necessary operation, it gives effect to some provision of a state constitution or law which, as thus construed, impairs the obligation of a precedent contract.[43]

U. S. 629, 84 L. Ed. 1158; Gates *v.* Parmly, 191 U. S. 557, 48 L. Ed. 301; Weltmer *v.* Bishop, 191 U. S. 560, 561, 48 L. Ed. 302; Coventry *v.* Davis, 193 U. S. 669, 48 L. Ed. 840; Hamburgh, etc., Steamship Co. *v.* Lennan, 194 U. S. 629, 48 L. Ed. 1157; Iron Bridge Co. *v.* Brennan, 194 U. S. 630, 48 L. Ed. 1158; Knox *v.* Exchange Bank, 12 Wall. 379, 20 L. Ed. 414, reaffirmed in Northern R. Co. *v.* New York, 12 Wall. 384, 20 L. Ed. 412.

Where a writ of error to a state court is sued out on the ground that the judgment of the state court gives effect to some statute, or state constitution, which impairs the obligation of a contract, or is alleged to do so by the plaintiff in error, it is not sufficient in such case that the party in his pleading or the counsel in argument assailed such statute on that ground. And it must appear that the state court rested its judgment on the validity of the statute, either expressly or by necessary intendments. Hence, if the judgment of the court would have been the same without the aid of the special statutory provisions assailed by the plaintiff in error, there is no case for review in this court. Knox *v.* Exchange Bank, 12 Wall. 379, 20 L. Ed. 414, reaffirmed in Northern Railroad *v.* People, 12 Wall. 384.

This court has no jurisdiction to review a judgment of the highest court of a state, on the ground that the obligation of a contract has been impaired, unless some legislative act of the state has been upheld by the judgment sought to be reviewed. The general rule, as applied to this class of cases, has been clearly stated in two opinions of this court, delivered by Mr. Justice Miller. "It must be the constitution or some law of the state, which impairs the obligation of the contract, or which is otherwise in conflict with the constitution of the United States; and the decision of the state court must sustain the law or constitution of the state, in the matter in which the conflict is supposed to exist; or the case for this court does not arise." Railroad *v.* Rock, 4 Wall. 177, 181, 18 L. Ed. 381; New Orleans, etc., Co. *v.* Louisiana Sugar, Refin. Co., 125 U. S. 18, 39, 31 L. Ed. 607.

"We are not authorized by the judiciary act to review the judgments of the state courts, because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, where the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held." Knox *v.* Exchange Bank, 12 Wall. 379, 383, 20 L. Ed. 414; New Orleans, etc., Co. *v.* Louisiana Sugar Refin. Co., 125 U. S. 18, 39, 31 L. Ed. 607.

This court does not obtain jurisdistion to review a judgment of a state court because that judgment impairs or fails to give effect to a contract. The state court must give effect to some subsequent statute or state constitution which impairs the obligation of the contract, and the judgment of that court must rest on the statute either expressly or by necessary implication. Railroad *v.* Rock, 4 Wall. 177, 180, 18 L. Ed. 381; Railroad Company *v.* McClure, 10 Wall. 511, 19 L. Ed. 997; Knox *v.* Exchange Bank, 12 Wall. 379, 20 L. Ed. 414. These cases are referred to and applied in Lehigh Water Co. *v.* Easton, 121 U. S. 388, 392, 30 L. Ed. 1059; New Orleans Waterworks Co. *v.* Louisiana, 185 U. S. 336, 344, 46 L. Ed. 936, reaffirmed in Brewster *v.* Cahill, 194 U. S. 629, 48 L. Ed. 1158; Gates *v.* Parmly, 191 U. S. 557, 558, 48 L. Ed. 301; Weltmer *v.* Bishop, 191 U. S. 560, 561, 48 L. Ed. 302; Coventry *v.* Davis, 193 U. S. 669, 48 L. Ed. 840; Hamburg, etc., Steamship Co. *v.* Lennan, 194 U. S. 629, 48 L. Ed. 1157; Iron Bridge Co. *v.* Brennan, 194 U. S. 630, 48 L. Ed. 1158.

42. "In Railroad *v.* Rock, 4 Wall. 177, 181, 18 L. Ed. 381, this court pronounced it a 'fundamental error that this court can, as an appellate tribunal, reverse the judgment of a state court, because that court may hold a contract to be void, which this court might hold to be valid.'" Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 78, 46 L. Ed. 86.

Rights under corporate franchise.—The decision by the highest state court that a transfer by a corporation of its franchises to an individual, his heirs, executors, administrators, and assigns, of all the property of whatsoever nature or description, only passes a life estate, which does not pass to his heirs, presents no matter of a federal nature. Because the decision does not deny that the corporation had by its charter a valid and exclusive franchise, but merely that such conveyance did not vest in the grantee the franchise as a matter of private property, passing by inheritance to his heirs. Snell *v.* Chicago, 152 U. S. 191, 38 L. Ed. 408.

43. Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 75, 46 L. Ed. 86.

"In Knox *v.* Exchange Bank, 12 Wall. 379, 383, 20 L. Ed. 414, it was said by Mr.

Alteration of Views by State Court.—We have no jurisdiction, because a state court changes its views in regard to the proper construction of its state statute, although the effect of such judgment may be to impair the value of what the state court had before that held to be a valid contract.[44]

gg. *Acts of State Officers.*—Nor does the constitutional inhibition apply to the acts of state officers under statutes in force at the time of the making of the contract.[45]

hh. *Misconstruction of State Statute by State Court.*—The appellate jurisdiction of this court, upon writ of error to a state court, on the ground that the obligation of a contract has been impaired, can be invoked only when an act of the legislature alleged to be repugnant to the constitution of the United States has been decided by the state court to be valid, and not when an act admitted to be valid has been misconstrued by the court.[46] Upon a writ of error to a state court, this court cannot take jurisdiction under the allegation that a contract has been impaired by a decision of that court, when it appears that the

Justice Miller: 'But we are not authorized by the judiciary act to review the judgments of the state courts because their judgments refuse to give effect to valid contracts, or because those judgments, in their effect, impair the obligation of contracts. If we did, every case decided in a state court could be brought here, when the party setting up a contract alleged that the court had taken a different view of its obligation to that which he held.' To the same effect are Lehigh Water Co. *v.* Easton, 121 U. S. 388, 392, 30 L. Ed. 1059; New Orleans, etc., Co. *v.* Louisiana Sugar Refin. Co., 125 U. S. 18, 30, 31 L. Ed. 607." Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 76, 46 L. Ed. 86.

44. Bacon *v.* Texas, 163 U. S. 207, 221, 41 L. Ed. 132, distinguishing Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. Ed. 1090; Baker *v.* Brickell, 166 U. S. 717, 41 L. Ed. 1186; Goodsell *v.* Delta, etc., Land Co., 166 U. S. 718, 41 L. Ed. 1186; Wheelen *v.* Brickell, 166 U. S. 718, 41 L. Ed. 1186.

This court has no jurisdiction to review a judgment of a state court on writ of error because such jurisdiction is based upon an alleged impairment of a contract by reason of the alteration by a state court of a construction theretofore given by it to such contract or to a particular statute or series of statutes in existence when the contract was entered into. Bacan *v.* Texas, 163 U. S. 207, 41 L. Ed. 132.

There is no decision in the case of Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. Ed. 1090, which gives the least support to the proposition that jurisdiction exists in this court to review on writ of error to a state court, its holding as to what the contract was, simply because it had changed its construction thereof, nor that the obligation of a contract may be impaired within the contract clause of the federal constitution, unless there has been some subsequent act of the legislative branch of the government to which effect has been given by the judgment of the state court. The case may, therefore, be regarded as in entire harmony with the later cases on the subject. The opinion proceeds upon the assumption that effect had been given to this subsequent legislation, and it proves that such legislation impaired the contract as construed here. Reviewed in Bacon *v.* Texas, 163 U. S. 207, 223, 41 L. Ed. 132, reaffirmed in Baker *v.* Brickell, 166 U. S. 717, 41 L. Ed. 1186; Goodsell *v.* Delta, etc., Land Co., 166 U. S. 718, 41 L. Ed. 1186; Wheelan *v.* Brickell, 166 U. S. 718, 41 L. Ed. 1186.

A change of opinion by a state court with respect to riparian rights upon tide waters, does not raise a case under the contract clause of the constitution, and the supreme court has no jurisdiction to review the judgment of the state court on that ground. Mobile Transportation Co. *v.* Mobile, 187 U. S. 479, 487, 47 L. Ed. 266, reaffirmed in Transportation Co. *v.* Mobile, 199 U. S. 604, 50 L. Ed. 330.

45. Acts of state officers.—Hanford *v.* Davies, 163 U. S. 273, 41 L. Ed. 157; Weber *v.* Rogan, 188 U. S. 10, 47 L. Ed. 363; New Orleans Waterworks Co. *v.* Louisiana Sugar Co., 125 U. S. 18, 31 L. Ed. 607; Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 77, 46 L. Ed. 86.

46. Misconstruction of state statute by state court.—Central Land Co. *v.* Laidley, 159 U. S. 103, 109, 110, 40 L. Ed. 91; Henderson Bridge Co. *v.* Henderson City, 141 U. S. 679, 689, 35 L. Ed. 900; Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 602, 43 L. Ed. 835.

Where an agreed case presented no issue as to the validity of a state statute, but simply the question of its construction, and only the question of construction was considered by the highest court of the state on appeal, this court cannot take jurisdiction upon the ground that the statute, as construed by that court, impaired the obligation of a contract, and denied the equal protection of the law. Louisville, etc., R. Co. *v.* Louisville, 166 U. S. 709, 41 L. Ed. 1173, reaffirmed in Baltimore, etc., R. Co. *v.* Ocean City, 179 U. S. 681, 45 L. Ed. 384.

state court has done nothing more than construe its own constitution and statutes existing at the time when the bonds were issued, there being no subsequent legislation touching the subject. This court is bound by the decision of the state court in regard to the meaning of the constitution and laws of its own state, and its decision upon such a state of facts raises no federal question. Other principles obtain when the writ of error is to a federal court.[47]

ii. *Where Court Applies General Law.*—When a decision holding a contract void is made by the highest court of a state upon the general principles by which courts determine that a transaction is good or bad on principles of public policy, the decision is one which this court is not authorized to review.[48]

jj. *Exemptions from Taxation.*—A decision by the highest state court that a statute exempting a corporation from taxation is void, raises a federal question,

47. Turner *v.* Wilkes County Commissioners, 173 U. S. 461, 463, 43 L. Ed. 768.

"The difference in the jurisdiction of this court upon writs of error to a state as distinguished from a federal court, in questions claimed to arise out of the contract clause of the constitution, is set forth in the opinion of the court in Central Land Co. *v.* Laidley, 159 U. S. 103, 40 L. Ed. 91; and from the opinion in that case the following extract is taken (p. 111): 'The distinction, as to the authority of this court, between writs of error to a court of the United States and writs of error to the highest court of a state, is well illustrated by two of the earliest cases relating to municipal bonds, in both of which the opinion was delivered by Mr. Justice Swayne, and in each of which the question resented was whether the constitution of the state of Iowa permitted the legislature to authorize municipal corporations to issue bonds in aid of the construction of a railroad. The supreme court of the state, by decisions made before the bonds in question were issued, had held that it did; but, by decisions made after they had been issued, held that it did not. A judgment of the district court of the United States for the district of Iowa, following the later decisions of the state court, was reviewed on the merits and reversed by this court, for misconstruction of the constitution of Iowa. Gelpecke *v.* Dubuque, 1 Wall. 175, 206, 17 L. Ed. 520. But a writ of error to review one of those decisions of the supreme court of Iowa was dismissed for want of jurisdiction, because, admitting the constitution of the state to be a law of the state, within the meaning of the provision of the constitution of the United States forbidding a state to pass any law impairing the obligation of contracts, the only question was of its construction by the state court. Railroad Co. *v.* McClure, 10 Wall. 511, 515, 19 L. Ed. 997. An example of the jurisdiction exercised by this court when reviewing a decision of a federal court with regard to the same contract clause is found in the same volume. Folsom *v.* Ninety-Six, 159 U. S. 611, 625, 40 L. Ed. 278." Turner *v.* Wilkes County Commissioners, 173 U. S. 461, 463, 464, 43 L. Ed. 768.

48. Where court applies general law.—Tarver *v.* Keach, 15 Wall. 67, 21 L. Ed. 82, following Delmas *v.* Merchants' Ins. Co., 14 Wall. 661, 20 L. Ed. 757.

On a writ of error to a state court, this court cannot revise a decision founded on the ground that a contract is void on the general principles of public policy or morality, when that is the only ground on which the contract is held to be void. But if the decision of a state court is based upon a constitutional or legislative enactment, passed after the contract was made, this court has jurisdiction to inquire whether such legislation does not impair the obligation of the contract, and thereby violate the federal constitution. In the prosecution of that inquiry, this court must decide for itself, whether any valid contract existed when the legislation complained of was had, and in the making up its judgment on that question is not concluded by the decisions of the state court. Delmas *v.* Merchants' Ins. Co., 14 Wall. 661, 20 L. Ed. 757.

Statute avoiding slave contracts.—The supreme court of Arkansas ordered judgment for a plaintiff suing on a note given for the price of slaves. Subsequently to this the state of Louisiana ordained as part of its constitution, "that all contracts for the sale or purchase of slaves were null and void, and that no court of the state should take cognizance of any suit founded upon such contracts, and that no amount should ever be collected or recovered on any judgment or decree which had been, or should thereafter be, rendered on account of any such contract or obligation." On application by the defendant in the suit to supersede and perpetually stay all proceedings on the judgment against him, the supreme court overruled the application. The case being brought here under an assumption that it was within the 25th section, held that it was not so; and the case was dismissed for want of jurisdiction accordingly. Sevier *v.* Haskell, 14 Wall. 12, 20 L. Ed. 827.

although the contract clause of the federal constitution was not discussed.[49] Where the state court sustains a statute exempting a railroad from taxation, but the decision is put not on the ground that there was not a valid contract between the state and the company exempting its property from taxation, but that the exemption did not extend to a certain class of property, the writ of error to the state court must be dismissed, because this does not amount to a denial of any right under that provision of the constitution which declares that no state shall pass any law impairing the obligation of contracts.[50] Although

49. Exemptions from taxation.—Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 41, 45 L. Ed. 415; Stearns *v.* Minnesota, 179 U. S. 223, 45 L. Ed. 162.

An insurance company conformed to the requirements of the act of the legislature of Georgia, and received from the comptroller general a certificate authorizing it to transact business in that state for one year from Jan. 1, 1874. That act does not, expressly or by implication, limit or restrain the exercise of the taxing power of the state, or of any municipality. An ordinance of the city council of Augusta, passed Jan. 5, 1874, imposed from that date an annual license tax "on each and every fire, marine, or accidental insurance company located, having an office or doing business within" that city. Held, that the ordinance is not in violation of that clause of the constitution of the United States which declares that "no state shall pass any law impairing the obligations of contracts." Home Ins. Co. *v.* Augusta Council, 93 U. S. 116, 23 L. Ed. 825.

Where a question is raised as to whether a bank at the time of the imposition of a license tax sued for, had a contract with the state exempting the bank from such tax, the supreme court has jurisdiction. Citizens' Bank *v.* Parker, 192 U. S. 73, 77, 48 L. Ed. 346.

Exemption of railroads.—This court has jurisdiction to review, on writ of error, a decision of the highest court of a state, in which it is decided that a provision in a tax act of the state that it shall not apply to railroad corporations exempted from taxation by their charters is not applicable to a particular corporation, party to the suit, although its charter contains a provision respecting exemption from taxation. Yazoo, etc., R. Co. *v.* Thomas, 132 U. S. 174, 33 L. Ed. 302.

Exemption of colleges and schools.—This court has jurisdiction to review the decision of the supreme court of Illinois, upon the question whether the statute of that state, passed in 1855, exempting all the property of the Northwestern University for ever from taxation, is a valid contract, or is void by reason of its conflicting with the state constitution of 1848. University *v.* People, 99 U. S. 309, 25 L. Ed. 387.

An act was passed by the legislature in 1840, by which certain lands held under conveyances from the president and trustees of the Ohio University, at Athens, were directed to be assessed and taxed for county and state purposes. A bill was filed by the purchasers of the land against the tax collector, praying that he should be perpetually enjoined from enforcing the payment of the taxes, because the lands had been exempted by a statute of Ohio, of 1804; which the bill alleged entered into the conditions of sale, under which the complainants held the land. It was insisted that the act of 1840 violates the contract with the purchasers, and is void, being contrary to the clause of the constitution of the United States which prohibits the states from passing any law violating the obligation of contracts. The supreme court of Ohio dismissed the bill of the complainants. Held, a writ of error will lie. Armstrong *v.* The Treasurer, 16 Pet. 281, 10 L. Ed. 965.

A statute of Illinois, passed in 1855, declares that all the property of the Northwestern University shall be forever free from taxation. As construed by the assessors and by the supreme court of the state, a statute of 1872, conforming taxation to the new constitution of 1870, limiting this exemption to land and other property in immediate use by the institution. Held, that whether the statute of 1855 is a valid contract, or is void by reason of its conflicting with the state constitution of 1848, under which it was made, is a question on which the judgment of that court can be reviewed here. University *v.* People, 99 U. S. 309, 25 L. Ed. 387, citing Jefferson Branch Bank *v.* Skelley, 1 Black 436, 17 L. Ed. 173; Bridge Proprietors *v.* Hoboken, etc., 1 Wall. 116, 17 L. Ed. 571; Delmas *v.* Merchants' Ins. Co., 14 Wall. 661, 668, 20 L. Ed. 757.

A bill which alleges contract exemptions of a railroad company from taxation, which existed and were recognized for many years and that the contract has been impaired by the subsequent acts of the state legislature, presents a federal question. Illinois Central R. Co. *v.* Adams, 180 U. S. 28, 45 L. Ed. 410.

50. St. Paul, etc., R. Co. *v.* Todd County, 142 U. S. 282, 35 L. Ed. 1014, citing with approval New Orleans, etc., Co. *v.* Louisiana Sugar Refin. Co., 125 U. S. 18, 30, 31 L. Ed. 607; Railroad *v.* Rock, 4 Wall. 177, 181, 18 L. Ed. 381; Knox *v.* Exchange Bank, 12 Wall. 379, 383, 20 L. Ed. 414; Bank *v.* Tennessee, 104 U. S. 493, 26 L. Ed. 810.

the decision of the state court concedes the validity of a contract of exemption from taxation contained in the state statute, only denying that particular property is embraced by its terms, yet if, in arriving at its conclusions, it holds that the contract does not confer the right of exemption from its operation, and gives effect to a subsequent law, its obligation is impaired by the subsequent law, and if the inquiry whether it did or did not was necessarily directly passed upon, this court has jurisdiction.[51]

Repeal of Exemption.—The question whether the ruling of the supreme court of a state, that a repealable exemption from taxation has been in fact repealed by a subsequent statute, is one which turns upon the construction of the state law, and is not reviewable by the United States supreme court, although if the exemption were irrepealable and thus constituted a contract, it would be the duty of the supreme court of the United States to decide whether the subsequent act had repealed it or impaired its obligation.[52]

kk. *Determination as to Validity, Interpretation and Existence of Contract.*—**In General.**—Where the jurisdiction of the supreme court to review the decision of the highest court of the state is dependent upon whether a state statute impairs the obligation of contracts, it must appear that there was a legal contract subject to impairment, and some ground to believe that it has been impaired.[53] Accordingly the doctrine that this court possesses paramount authority when reviewing the final judgment of a state court, upholding a state enactment, alleged to be in violation of the contract clause of the constitution, to determine for itself the existence or nonexistence of the contract set up, its validity and construction and whether its obligation has been impaired by the state enactment, has been affirmed in numerous cases.[54] This court must

51. Wilmington, etc., R. Co. *v.* Alsbrook, 146 U. S. 279, 36 L. Ed. 972, citing New Orleans, etc., Co. *v.* Louisiana Sugar Refin. Co., 125 U. S. 18, 31 L. Ed. 607, and distinguishing Henderson Bridge Co. *v.* Henderson City, 141 U. S. 679, 35 L. Ed. 900; St. Paul, etc., R. Co. *v.* Todd County, 142 U. S. 282, 35 L. Ed. 1014.

52. Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 46 L. Ed. 86.

53. Determination as to validity, interpretation and existence of contract.—Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 46 L. Ed. 86; New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 86, 35 L. Ed. 946.

54. Ohio Life Ins., etc., Co. *v.* Debolt, 16 How. 416, 452, 14 L. Ed. 997; Wright *v.* Nagle, 101 U. S. 791, 794, 25 L. Ed. 921; Louisville Gas Co. *v.* Citizens Gas Light Co., 115 U. S. 683, 697, 29 L. Ed. 510; Vicksburg, etc., R. Co. *v.* Dennis, 116 U. S. 665, 667, 29 L. Ed. 770; New Orleans, etc., Co. *v.* Louisiana Sugar Refin. Co., 125 U. S. 18, 36, 31 L. Ed. 607; Bryan *v.* Board of Education, 151 U. S. 639, 650, 38 L. Ed. 297; Mobile, etc., R. Co. *v.* Tennessee, 153 U. S. 486, 493, 38 L. Ed. 793; Bacon *v.* Texas, 163 U. S. 207, 219, 41 L. Ed. 132; Douglas *v.* Kentucky, 168 U. S. 488, 502, 42 L. Ed. 553; Waggoner *v.* Flack, 188 U. S. 595, 600, 47 L. Ed. 609; Muhlker *v.* New York, etc., R. Co., 197 U. S. 544, 49 L. Ed. 872; Jefferson Branch Bank *v.* Skelley, 1 Black 436, 443, 17 L. Ed. 173; Rogers *v.* Alabama, 192 U. S. 226, 230, 48 L. Ed. 417; Chicago R. Co. *v.* Nebraska, 170 U. S. 57, 42 L. Ed. 948; McCullough *v.* Virginia, 172 U. S. 102, 43 L. Ed. 382; Wilson *v.* Standefer, 184 U. S. 399, 411, 46 L. Ed. 612; Walsh *v.* Columbus, etc., R. Co., 176 U. S. 469, 44 L. Ed. 548; Kies *v.* Lowrey, 199 U. S. 233, 50 L. Ed. 167; Stearns *v.* Minnesota, 179 U. S. 223, 233, 45 L. Ed. 162; Houston, etc., R. Co. *v.* Texas, 177 U. S. 66, 77, 44 L. Ed. 673; Bridge Proprietors *v.* Hoboken, etc., Co., 1 Wall. 116, 17 L. Ed. 571; University *v.* People, 99 U. S. 309, 25 L. Ed. 387; Fisk *v.* Jefferson Police Jury, 116 U. S. 131, 29 L. Ed. 587; Central Land Co. *v.* Laidley, 159 U. S. 103, 109, 40 L. Ed. 91; State *v.* Knoop, 16 How. 369, 14 L. Ed. 977; Gates *v.* Commissioners, 183 U. S. 693, 46 L. Ed. 393; Railroad *v.* Rock, 4 Wall. 177, 18 L. Ed. 381; Louisville, etc., R. Co. *v.* Palmes, 109 U. S. 244, 254, 257, 27 L. Ed. 922.

"While the rule is to accept the construction placed by that court upon its statutes, an exception is made in case of contracts, and that we exercise an independent judgment upon the question whether a contract was made, what its scope and terms are, and also whether there has been any law passed impairing its obligation." Douglas *v.* Kentucky, 168 U. S. 488, 42 L. Ed. 553; Powers *v.* Detroit, etc., R. Co., 201 U. S. 543, 556, 50 L. Ed. 860.

It is well settled that the decision of a state court holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract, is not binding on this court. The question of the existence or nonexistence

determine—indeed, it cannot consistently with its duty refuse to determine—upon its own responsibility, in each case as it arises, whether that which a party seeks to have protected under the contract clause of the constitution of the

of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a state, by its terms or necessary operation, gives effect to some provisions of the state law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the state law complained of impairs its obligation.

Mobile, etc., R. Co. *v.* Tennessee, 153 U. S. 486, 492, 38 L. Ed. 793, citing Jefferson Branch Bank *v.* Skelley, 1 Black 436, 443, 17 L. Ed. 173; New Orleans, etc., Co. *v.* Louisiana Sugar Refin. Co., 125 U. S. 18, 38, 31 L. Ed. 607; Wilmington, etc., R. Co. *v.* Alsbrook, 146 U. S. 279, 293, 36 L. Ed. 972; Huntington *v.* Attrill, 146 U. S. 657, 684, 36 L. Ed. 1123; East Hartford *v.* Hartford Bridge Co., 10 How. 511, 531, 13 L. Ed. 518; Ohio Life, etc., Ins. Co. *v.* Debolt, 16 How. 416, 431, 14 L. Ed. 997; Bridge Proprietors *v.* Hoboken, etc., Co., 1 Wall. 116, 144, 17 L. Ed. 571; Delmas *v.* Merchants' Ins. Co., 14 Wall. 661, 20 L. Ed. 757; University *v.* People, 99 U. S. 309, 321, 25 L. Ed. 387; Louisville, etc., R. Co. *v.* Palmes, 109 U. S. 244, 256, 27 L. Ed. 922; Louisville Gas Co. *v.* Citizens Gas Light Co., 115 U. S. 683, 697, 29 L. Ed. 510; Vicksburg, etc., R. Co. *v.* Dennis, 116 U. S. 665, 29 L. Ed. 770; Yazoo, etc., R. *v.* Thomas, 132 U. S. 174, 33 L. Ed. 302; Bryan *v.* Board of Education, 151 U. S. 639, 650, 38 L. Ed. 297.

When a cause is brought here by writ of error to a state court, on the ground that the obligation of a contract has been impaired and property taken for public use without due compensation, in violation of the provisions of the constitution of the United States, the first duty of this court is to inquire whether the alleged contract or taking of property exists. "The existence of the contract or of the right is part of the federal question itself. The Bridge Proprietors *v.* The Hoboken, etc., Co., 1 Wall. 116, 145, 17 L. Ed. 571." Hoadley *v.* San Francisco, 124 U. S. 639, 645, 31 L. Ed. 553.

Where an impairment of a contract by state legislation is charged, the existence or nonexistence of the contract is a federal question. Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 41, 45, 45 L. Ed. 415.

Chief Justice Taney.—As early as Ohio Life Ins., etc., Co. *v.* Debolt, 16 How. 416, 432, 14 L. Ed. 997, Chief Justice Taney said: "The writ of error to a state court would be no protection to a contract, if we were bound to follow the judgment which the state court had given, and which the writ of error brings up for revision here." McCullough *v.* Virginia, 172 U. S. 102, 43 L. Ed. 382; Jefferson Branch Bank *v.* Skelley, 1 Black 436, 17 L. Ed. 173; Douglas *v.* Kentucky, 168 U. S. 488, 501, 42 L. Ed. 553, and cases cited. Deposit Bank *v.* Frankfort, 191 U. S. 499, 517, 48 L. Ed. 276.

Mr. Justice Harlan.—In Douglas *v.* Kentucky, 168 U. S. 488, 501, 42 L. Ed. 553, Mr. Justice Harlan, delivering the opinion, deals with the question as follows: "The defendant insists that his rights having been acquired when these decisions of the highest court of Kentucky were in full force, should be protected according to the law of the state as it was adjudged to be when those rights attached. But is this court required to accept the principles announced by the state court as to the extent to which the contract clause of the federal constitution restricts the powers of the state legislatures? Clearly not. The defendant invokes the jurisdiction of this court upon the ground that the rights denied to him by the final judgment of the highest court of Kentucky, and which the state seeks to prevent him from exercising, were acquired under an agreement that constituted a contract within the meaning of the federal constitution. This contention is disputed by the state. So that the issue presented makes it necessary to enquire whether that which the defendant asserts to be a contract was a contract of the class to which the constitution of the United States refers. This court must determine—indeed, it cannot consistently with its duty refuse to determine—upon its own responsibility, in each case as it arises, whether that which a party seeks to have protected under the contract clause of the constitution of the United States is a contract, the obligation of which is protected by that instrument against hostile state legislation." Mobile, etc., R. Co. *v.* Tennessee, 153 U. S. 486, 38 L. Ed. 793; Knox County *v.* Ninth National Bank, 147 U. S. 91, 37 L. Ed. 93; McGahey *v.* Virginia, 135 U. S. 662, 34 L. Ed. 304; Deposit Bank *v.* Frankfort, 191 U. S. 499, 518, 48 L. Ed. 276.

A leading case.—In Jefferson Branch Bank *v.* Skelley, 1 Black 436, 443, 17 L. Ed. 173, which involved the contract clause of the constitution, it was contended that this court should accept as conclusive the interpretation placed by the supreme court of Ohio upon the constitution and laws of that state as affecting certain state legislation which, it was alleged, constituted a contract, the obligation of which could not be impaired by legislation. Mr. Justice Wayne, de-

United States is a contract, the obligation of which is protected by that instrument against hostile state legislation.[55] If there was no such contract, as is alleged, then no right has been denied by the decree below.[56]

Mr. Justice White states the rule as follows: "Where subsequent state legislation is asserted to be repugnant to the constitution of the United States because such legislation impairs the obligations of a contract, the power to determine whether there be such impairment imposes also on this court the duty, when necessary, to ascertain whether there was a contract and its import. And this, though it be in a given case, the state court has decided that there was no impairment either because the contract had never existed or because from an interpretation of its provisions it was found that the obligations which it is asserted were impaired, never arose. In cases of this nature, therefore, the questions to be considered are these: Was there a contract, and if yes, what

livering the unanimous judgment of the court said: "The constructions given by the courts of the states to state legislation and to state constitutions have been conclusive upon this court with a single exception, and that is when it has been called upon to interpret the contracts of states, 'though they have been made in forms of law,' or by the instrumentality of a state's authorized functionaries in conformity with state legislation. It has never been denied, nor is it now, that the supreme court of the United States has an appellate power to revise the judgment of the supreme court of a state, whenever such a court shall adjudge that not to be a contract which has been alleged, in the forms of legal proceedings, by a litigant, to be one, within the meaning of that clause of the constitution of the United States which inhibits the states from passing any law impairing the obligation of contracts. Of what use would the appellate power be to the litigant who feels himself aggrieved by some particular state legislation if this court could not decide, independently of all adjudication by the supreme court of a state, whether or not the phraseology of the instrument in controversy was expressive of a contract and within the protection of the constitution of the United States, and that its obligation should be enforced notwithstanding a contrary conclusion by the supreme court of a state? It never was intended, and cannot be sustained by any course of reasoning, that this court should or could with fidelity to the constitution of the United States follow the construction of the supreme court of a state in such a matter, when it entertained a different opinion; and in forming its judgment in such a case it makes no difference in the obligation of this court in reversing the judgment of the supreme court of a state upon such a contract, whether it be one claimed to be such under the form of state legislation, or has been made by a covenant or agreement by the agents of a state, by its authority." Douglas *v.* Kentucky, 168 U. S. 488, 501, 42 L. Ed. 553.

Immunity of stockholders.—A railway company was incorporated by an act of the legislature of the territory of Minnesota in 1853. In 1858 the state of Minnesota by its constitution imposed liability for corporate debts upon stockholders. By the act of Minnesota of March 2, 1881 the consolidation of several railway companies was authorized. Suit was brought to enforce the stockholders' liability against the share holders of the consolidated company. The protection of § 10, art. 1, and the fourteenth amendment of the constitution of the United States was invoked in the assignment of errors on appeal to the supreme court of Minnesota. The share holders claimed the law of 1853 as the contract and not explicitly that of 1881; but they also claimed that the act of 1881 did not create a new corporation, and whether it did or not, that the act continued the immunity from liability for the corporate debts to the stock and stockholders of the consolidated corporation. It was contended that the state court did not decide the federal question, but decided that the act of 1881 created a new corporation which became subject to the constitutional provision imposing liability upon stockholders for corporate debts, and rested its judgment on that construction. The state court said: "Whatever may be the liability the several (constituent) corporations we need not inquire because the liability here sought to be enforced is one against individuals who have been and are stockholders in the new corporation." And again: "other questions have been raised and discussed by the respective counsel but a decision upon them by this court in this action is entirely unnecessary, and we express no opinion thereon." It was held that this was in effect to deny the existence of the contract claimed by plaintiffs in error; and it is the duty of the supreme court to decide for itself the fact of contract and its impairment. Minneapolis, etc., R. Co. *v.* Gardner, 177 U. S. 332, 44 L. Ed. 793.

55. Douglas *v.* Kentucky, 168 U. S. 488, 500, 42 L. Ed. 553.

56. Pryan *v.* Board of Education, 151 U. S. 639, 650, 38 L. Ed. 297.

obligations arose from it? and, Has there been state legislation impairing the contract obligations? Abstractly speaking, the duty would be first in order to determine whether the contract existed and its true meaning, before ascertaining whether any obligations of the contract had been impaired by subsequent legislation."[57]

Mr. Justice Holmes states the rule as follows: Where the state court has sustained a result which cannot be reached, except on what we deem a wrong construction of the charter, without relying on unconstitutional legislation, this court cannot decline jurisdiction of a case which certainly never would have been brought but for the passage of flagrantly unconstitutional laws, because the state court put forward the untenable construction more than the unconstitutional statutes in its judgment. To hold otherwise would open an easy method of avoiding the jurisdiction of this court.[58]

This rule also applies to a contract alleged to be raised by a state statute, although the general principle is undoubted that the construction put by state courts upon their own statutes will be followed here.[59]

In the language of Mr. Justice Brewer, "the general rule of this court is to accept the construction of a state constitution placed by the state supreme court as conclusive. One exception which has been constantly recognized is when the question of contract is presented. This court has always held that the competency of a state, through its legislation, to make an alleged contract, and the meaning and validity of such contract, were matters which in discharging its duty under the federal constitution it must determine for itself; and while the leaning is towards the interpretation placed by the state court, such leaning cannot relieve us from the duty of an independent judgment upon the question of contract or no contract."[60]

Construction of State Statute.—This court, even on writ of error to a state court, will construe for itself the meaning of a statute as affecting an alleged contract where it is claimed that a subsequent statute passed by the state has impaired the obligations of the contract as claimed by the party, and where such subsequent statute has, by the judgment of the state court, in some way been brought into play and effect been given to some or all of its provisions. In such a case this court construes the contract in order to determine whether the later statute impairs its obligation.[61]

Certain Qualifications of the General Rule.—But as the general rule is that the interpretation put on a state constitution or laws by the supreme court of such state is binding upon this court, and as our right to review and revise

57. St. Paul Gaslight Co. *v.* St. Paul, 181 U. S. 142, 147, 45 L. Ed. 788, citing Houston, etc., R. Co. *v.* Texas, 177 U. S. 66, 44 L. Ed. 673.

"Because the supreme court of the state decided the controversy solely upon its appreciation of the meaning of the original contract, it does not necessarily follow that no federal question is presented for decision." St. Paul Gaslight Co. *v.* St. Paul, 181 U. S. 142, 147, 45 L. Ed. 788.

58. Louisville Gas Co. *v.* Citizens Gas Light Co., 115 U. S. 683, 697, 29 L. Ed. 510; Terre Haute, etc., R. Co. *v.* Indiana, 194 U. S. 579, 589, 48 L. Ed. 1124.

59. Jefferson Branch Bank *v.* Skelley, 1 Black 436, 17 L. Ed. 173; McGahey *v.* Virginia, 135 U. S. 662, 34 L. Ed. 304; Douglas *v.* Kentucky, 168 U. S. 488, 42 L. Ed. 553; McCullough *v.* Virginia, 172 U. S. 102, 43 L. Ed. 382; Walsh *v.* Columbus, etc., R. Co., 176 U. S. 469, 475, 44 L. Ed. 548, reaffirmed in Gates *v.* Commissioners, 183 U. S. 693, 46 L. Ed. 393.

This court has so frequently decided, notably in the very recent case of McCullough *v.* Virginia, 172 U. S. 102, 43 L. Ed. 383, that it is the duty of this court to determine for itself the proper construction of the contract upon which the plaintiff relies, that it must be considered no longer as an open question. New Orleans, etc., Co. *v.* Louisiana Sugar Refin. Co., 125 U. S. 18, 31 L. Ed. 607; Bridge Proprietors *v.* Hoboken, etc., Co., 1 Wall. 116, 17 L. Ed. 571; Columbia Water Power Co. *v.* Columbia Street R. Co., 172 U. S. 475, 487, 43 L. Ed. 521.

60. Stearns *v.* Minnesota, 179 U. S. 223, 232, 233, 45 L. Ed. 162.

61. Louisville Gas Co. *v.* Citizens Gas Light Co., 115 U. S. 683, 697, 29 L. Ed. 510; Bacon *v.* Texas, 163 U. S. 207, 219, 41 L. Ed. 132.

decisions of the state courts in cases where the question is of an impairment by legislation of contract rights, is an exception, perhaps the sole exception, to the rule, it will be the duty of this court, even in such a case, to follow the decision of the state court when the question is one of doubt and uncertainty. Especial respect should be had to such decisions when the dispute arises out of general laws of a state, regulating its exercise of the taxing power, or relating to the state's disposition of its public lands.[62] When the jurisdiction of this court is invoked because of the asserted impairment of contract rights arising from the effect given to subsequent legislation, it is our duty to exercise an independent judgment as to the nature and scope of the contract. Nevertheless, when the contract, which it is alleged, has been impaired, arises from a state statute, "for the sake of harmony and to avoid confusion, the federal courts will lean towards an agreement of views with the state courts, if the question seems to them balanced with doubt."[63] The settled rule of the supreme court of the United States is that, even in a case where that court may exercise an independent judgment respecting the construction of a state statute claimed to infringe the contract clause, any reasonable doubt will be resolved in favor of that construction of the state statute which has been adopted by the court of last resort in that state.[64] In arriving at the meaning of a contract, Mr. Justice Peckham says: "The decision of the state court is entitled to exercise marked influence upon the question this court is called upon to decide, and where it cannot be said that the decision is in itself unreasonable or in violation of the plain language of the

62. Wilson *v.* Standefer, 184 U. S. 399, 412, 46 L. Ed. 612.

There is no doubt of the general proposition that, where a contract is alleged to have been impaired by subsequent legislation, this court will put its own construction upon the contract, though it may differ from that of the supreme court of the state. The authorities upon this point are very numerous, but they all belong to a class of cases in which it was averred that, properly construed, the contract was impaired by subsequent legislation. Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 41, 44, 45 L. Ed. 415.

But if the sole question be whether the supreme court of a state has properly interpreted the contract, and there be no question of subsequent legislative impairment, there is no federal question to be answered. Lehigh Water Co. *v.* Easton, 121 U. S. 388, 30 L. Ed. 1059; Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 41, 44, 45 L. Ed. 415.

"While the decisions of the supreme court of the state are not binding upon us in determining whether a contract was made which is entitled to protection under the federal constitution, we may notice the case of Chicago City Railway Company *v.* People ex rel. Story, 73 Illinois, 541." Blair *v.* Chicago, 201 U. S. 400, 458, 50 L. Ed. 801.

63. Board of Liquidation *v.* Louisiana, 179 U. S. 622, 638, 45 L. Ed. 347, citing Burgess *v.* Seligman, 107 U. S. 20, 27 L. Ed. 359; Tampa Water Works *v.* Tampa, 199 U. S. 241, 50 L. Ed. 170.

The state court of Louisiana held that under the statutes of that state, both the Board of Liquidation and the Drainage Commission occupy such a fiduciary relation as to empower them to assert that the enforcement of the provisions of the state constitution would impair the obligation of contracts entered into on the faith of the collection and application of the one per cent. tax, and of the surplus arising therefrom. It was held that on writ of error to the state court, the supreme court of the United States will adopt and follow the construction put upon the statutes by the supreme court of the state of Louisiana since it is a matter of local and nonfederal concern; but without implying that the reasoning by which this conclusion was deduced would command its approval if the matter was being considered as one of original impression. And the case will not be dismissed on the ground that the constitutional question was raised only by public boards which had no capacity to raise the question. Board of Liquidation *v.* Louisiana, 179 U. S. 622, 45 L. Ed. 347.

Although the construction of a local ordinance by the supreme court is not indisputable, and though there may exist conflict with other state decisions, if it does not conflict with a decision made previous to the inception of the rights involved, this court will incline to an agreement with the state court.

Burgess *v.* Seligman, 107 U. S. 20, 27 L. Ed. 359; Mead *v.* Portland, 200 U. S. 148, 50 L. Ed. 413.

64. Burgess *v.* Seligman, 107 U. S. 20, 27 L. Ed. 359; Flash *v.* Conn, 109 U. S. 371, 379, 27 L. Ed. 966; Clark *v.* Bever, 139 U. S. 96, 35 L. Ed. 88; Board of Liquidation *v.* Louisiana, 179 U. S. 622, 45 L. Ed. 347; Yazoo, etc., R. Co. *v.* Adams, 181 U. S. 580, 583, 45 L. Ed. 1011.

statute, we ought, in cases engendering a fair doubt, to follow the state court in its interpretation of the statutes of its own state."[65] In such cases it is frequently necessary to recur to the history and situation of the country in order to ascertain the reason as well as the meaning of the laws, and knowledge of such particulars will most likely be found in the tribunals whose special function is to expound and interpret the state enactments.[66]

It is also a rule that the supreme court has no jurisdiction of a writ of error to a state court upon the ground that the obligation of a contract has been impaired, when the validity of the statute under which the contract is made is admitted, and the only question is as to the construction of the statute by that court.[67] While the question of contract or no contract in a particular case is one which must be determined by ourselves, every such alleged contract is presumed to have been entered into upon the basis, and in contemplation of, the existing constitution and statutes, and upon the established construction theretofore put upon them by the highest judicial authority of the state.[68]

ll. *Showing as to Jurisdiction.*—**In General.**—It is settled that this court, on error to a state court upon the ground of denial of a right under the contract clause of the constitution, cannot consider the federal question, where the record does not show that the question was called to the attention of the state court and considered by it, especially where it was not necessarily involved in the determination of the cause.[69] The supreme court has not jurisdiction on a writ of error to the supreme court of a state, in which the judgment of the court was not, necessarily, given on a point which was presented in the case involving the constitutionality of an act of the legislature of the state asserted to violate a contract.[70] But the fact that the supreme court of the state did not expressly

65. Chicago Theological Seminary *v.* Illinois, 188 U. S. 662, 675, 47 L. Ed. 641.

In Waggoner *v.* Flack, 188 U. S. 595, 600, 47 L. Ed. 609, the court said: "As the true construction of the particular statute is not free from doubt, considering the former legislation of the state upon the same subject, we feel that we shall best perform our duty in such case by following the decision of the state court upon the precise question, although doubts as to its correctness may have been uttered by the same court in some subsequent case." Wilson *v.* Standefer, 184 U. S. 399, 412, 46 L. Ed. 612.

66. Wilson *v.* Standefer, 184 U. S. 399, 412, 46 L. Ed. 612.

67. Central Land Co. *v.* Laidley, 159 U. S. 103, 40 L. Ed. 91; Weber *v.* Rogan, 188 U. S. 10, 14, 47 L. Ed. 363.

68. Taylor *v.* Ypsilanti, 105 U. S. 60, 26 L. Ed. 1008; Wade *v.* Travis County, 174 U. S. 499, 509, 43 L. Ed. 1060; Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 71, 46 L. Ed. 86.

69. Showing as to jurisdiction.—Capital City Dairy Co. *v.* Ohio, 183 U. S. 238, 46 L. Ed. 171, reaffirmed in Herold *v.* Frank, 191 U. S. 558, 48 L. Ed. 302; Huber *v.* Jennings-Heywood Oil Syndicate, 201 U. S. 641, 50 L. Ed. 901, citing Green Bay, etc., Canal Co. *v.* Patten Paper Co., 172 U. S. 58, 77, 43 L. Ed. 364; Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 654, 655, 41 L. Ed. 1149.

Reference to Dartmouth College case.—The jurisdiction of this court to review a judgment of the highest state court on the ground that a state law implies the obligation of contracts, contrary to the federal constitution, cannot be maintained by the plaintiffs in error merely referring to passages in the opinion of the state court in which the Dartmouth College case was discussed as establishing the point. Osborne *v.* Clark, 204 U. S. 565, 51 L. Ed. 619.

70. Mills *v.* Brown, 16 Pet. 525, 10 L. Ed. 1055.

In Eustis *v.* Bolles, 150 U. S. 361, 37 L. Ed. 1111, it was ruled that a decision by the supreme judicial court of Massachusetts that a creditor of an insolvent debtor who proved his debt in insolvency proceedings under the state statutes and accepted the benefits thereof, thereby waived any right he might otherwise have had to object to the validity of the insolvency statutes as impairing the obligation of contracts, presented no federal question for review. Cited in Israel *v.* Arthur, 152 U. S. 355, 362, 38 L. Ed. 474.

Exemption from taxation.—Where a complainant alleged that a school tax, which was levied upon his land, was contrary to the spirit and meaning of a law of the state of Ohio which exempted his property from all state taxes, and conflicted also with the terms and conditions of the leases by which he held his land, and the state court dismissed the bill, this decision of the state court cannot be reviewed by this court by a writ of error issued under the twenty-fifth section of the judiciary act. Smith *v.* Hunter, 17 How. 738, 12 L. Ed. 894.

refer to the contract clause of the constitution does not prevent our taking jurisdiction, if the applicability of such clause were necessarily involved in its decision.[71]

Where Decision Rests on Rules of General Law.—Where it is charged that the obligation of a contract has been impaired by a state law, as by the general tax law of the state, as administered by the state authorities, and the state courts justify such impairment by the application of some general rule of law to the facts of the case, it is our duty to inquire whether the jurisdiction is well grounded. If it is not, the party is entitled to the benefit of the constitutional protection.[72]

Where Decision Rests on Independent Grounds.—If the judgment of the state court gives no effect to the subsequent law of the state, and the state court decides the case upon grounds independent of that law, a case is not made for review by this court upon any ground of the impairment of a contract.[73] In short, although the state has passed an act which the defendants as-

71. Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 1, 15, 45 L. Ed. 395.

The record of a case and the opinion of the court therein showed that the defendant railway company relied upon rights acquired under its charter and certain state legislation which it contended was impaired by subsequent legislation. The case turned upon the existence of such contract and no question was made that if there had been a contract it was impaired by the state legislation. It was held that it sufficiently appeared that a federal question as to the impairment of the obligation of the contract was necessarily involved in the case, and not only must have been, but was actually passed upon by the supreme court of the state. Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 1, 45 L. Ed. 395, reaffirmed in Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 26, 45 L. Ed. 408.

72. Given *v.* Wright, 117 U. S. 648, 655, 29 L. Ed. 1021, citing Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429.

73. Bacon *v.* Texas, 163 U. S. 207, 216, 41 L. Ed. 132, distinguishing Louisiana *v.* Pilsbury, 105 U. S. 278, 26 L. Ed. 1090; Baker *v.* Brickell, 166 U. S. 717, 41 L. Ed. 1186; Goodsell *v.* Delta, etc., Land Co., 166 U. S. 718, 41 L. Ed. 1186; Wheelan *v.* Brickell, 166 U. S. 718, 41 L. Ed. 1186.

Where both parties, who are respectively plaintiffs and defendants in the court below, derive title from the state by patents which were issued in execution of the grant to it of swamp and overflowed lands, but the decision of the state court merely determines the extent of the grant to the state, and interpreting the contending patents as conveyances, decides that the lands described in that of plaintiff did not embrace the lands in controversy, and that the lands described in that of defendant did embrace it, this is but an interpretation of written instruments, and even if it were apparent to us to be wrong, this court would be without power to review it. In short when a state court has passed its decision on a local or state question, the logical course is to dismiss the writ of error. White *v.* Leovy, 174 U. S. 91, 43 L. Ed. 904.

The case of Wilmington, etc., Co. *v.* Alsbrook, 146 U. S. 279, 36 L. Ed. 972, decides nothing that is repugnant to it. In that case the jurisdiction of this court was questioned on the ground that the contract of exemption mentioned in the act of 1834 was acknowledged to be valid by the supreme court of North Carolina, and it simply denied that particular property was embraced by its terms, and as a consequence it was claimed that the decision did not involve a federal question. To which this court replied, speaking by Mr. Chief Justice Fuller, as follows: "In arriving at this conclusion, however, the state court gave effect to the revenue law of 1891, and held that the contract did not confer the right of exemption from its operation. If it did, its obligation was impaired by the subsequent law, and as the inquiry whether it did or not, was necessarily directly passed upon, we are of opinion that the writ of error was properly allowed." Bacon *v.* Texas, 163 U. S. 207, 217, 41 L. Ed. 132.

So in Mobile, etc., R. Co. *v.* Tennessee, 153 U. S. 486, 38 L. Ed. 793, in that case it was contended that this court had no jurisdiction to review the judgment of the supreme court of Tennessee, because the decision of that court proceeded upon the ground that there was no contract in existence between the railroad company and the state to be impaired, and that the supposed contract was in violation of the state constitution of 1834, and hence not within the power of the legislature to make. In truth, however, the court in its decree gave effect to the subsequent statute of Tennessee, which it was claimed impaired the obligation of the contract entered into between the state and the railroad company, and under those circumstances this court exercised jurisdiction to review the decision of the state court on the question as to whether there

sert impair the obligation of their contract, so long as the court, in deciding their case holds that they never had a contract as they never had complied with the provisions of the original statute, and so long as it gives judgment wholly without reference to the subsequent act and without upholding or in any manner giving effect to any provision thereof, this court has no jurisdiction to review that decision of the state court, however erroneous it may be regarded by us.[74]

The result of the authorities, applying to cases of contracts the settled rules, that in order to give this court jurisdiction of a writ of error to a state court, a federal question must have been, expressly or in effect, decided by that court, and, therefore, when the record shows that a federal question and another question were presented to that court and its decision turned on the other question only, this court has no jurisdiction, may be summed up as follows: When the state court decides against a right claimed under a contract, and there was no law subsequent to the contract, this court clearly has no jurisdiction. When the existence and the construction of a contract are undisputed, and the state court upholds a subsequent law, on the ground that it did not impair the obligation of the admitted contract, it is equally clear that this court has jurisdiction. When the state court holds that there was a contract conferring certain rights, and that a subsequent law did not impair those rights, this court has jurisdiction to consider the true construction of the supposed contract, and, if it is of opinion that it did not confer the rights affirmed by the state court, and therefore its obligation was not impaired by the subsequent law, may on that ground affirm the judgment. So, when the state court upholds the subsequent law, on the ground that the contract did not confer the right claimed, this court may inquire whether the supposed contract did give the right, because, if it did, the subsequent law cannot be upheld. But when the state court gives no effect to the subsequent law, but decides, on grounds independent of that law, that the right claimed was not conferred by the contract, the case stands just as if the subsequent law had not been passed, and this court has no jurisdiction.[75]

was a contract or not, and as to the meaning of the contract if there were one, and whether it had been impaired by the subsequent legislation to which effect had been given. Bacon *v.* Texas, 163 U. S. 207, 217, 41 L. Ed. 132.

74. Bacon *v.* Texas, 163 U. S. 207, 41 L. Ed. 132.

75. New Orleans, etc., Co. *v.* Louisiana Sugar Refin. Co., 125 U. S. 18, 38, 31 L. Ed. 607.

The distinction between the two classes of cases—those in which the state court has, and those in which it has not, given effect to the statute drawn in question as impairing the obligation of a contract—as affecting the consideration by this court, on writ of error, of the true construction and effect of the previous contract, is clearly brought out in Kennebec R. Co. *v.* Portland R. Co., 14 Wall. 23, 20 L. Ed. 850. That was a writ of error to the supreme judicial court of Maine, in which a foreclosure, under a statute of 1857, of a railroad mortgage made in 1852, was contested upon the ground that it impaired the obligation of the contract, and the parties agreed that the opinion of that court should be considered as part of the record. Mr. Justice Miller, in delivering judgment, after stating that it did appear that the question whether the statute of 1857 impaired the obligation of the mortgage contract "was discussed in the opinion of the court, and that the court was of the opinion that the statute did not impair the obligation of the contract," said: "If this were all of the case, we should undoubtedly be bound in this court to inquire whether the act of 1857 did, as construed by that court, impair the obligation of the contract. Bridge Proprietors *v.* Hoboken, etc., Co., 1 Wall. 116, 17 L. Ed. 571. But a full examination of the opinion of the court shows that its judgment was based upon the ground that the foreclosure was valid, without reference to the statute of 1857, because the method pursued was in strict conformity to the mode of foreclosure authorized, when the contract was made, by the laws then in existence. Now, if the state court was right in their view as it stood when the contract was made, it is obvious that the mere fact that a new law was made does not impair the obligation of the contract. And it is also clear that we cannot inquire whether the supreme court of Maine was right in that opinion. Here is, therefore, a clear case of a sufficient ground on which the validity of the decree of the state court could rest, even if it had been in error as to the effect of the act of 1857 in impairing the obligation of the contract. And when there is such distinct and sufficient ground for the support of

Subsequent Legislation Must Be Shown.—Where no legislative act is shown to exist, from the enforcement of which an impairment of the obligations of the contract—within the purview of the constitution—did or could result, but the record involves solely an interpretation of the contract, this presents no controversy within the jurisdiction of the supreme court of the United States on writ of error to a state court.[76]

Invalidity of Legislation Must Be "Specially Set Up and Claimed."—Jurisdiction by writ of error to the supreme court of a state from the supreme court of the United States cannot be sustained when the only question involved is the construction of a charter or contract, although it appears that there were statutes subsequent thereto which might have been, but were not, relied upon as raising a federal question concerning the construction of the contract.[77] Where a state court gives a certain construction to a contract, it is not the duty of the supreme court of the United States to search the subsequent statutes of the state to find out whether there be one which, under a different construction of the contract, may be held to impair it when no such statute is set up in a pleading or in the opinion of the court.[78]

the judgment of the state court, we cannot take jurisdiction, because we could not reverse the case, though the federal question was decided erroneously in the court below against the plaintiff in error. Rector *v.* Ashley, 6 Wall. 142, 18 L. Ed. 733; Klinger *v.* Missouri, 13 Wall. 257, 20 L. Ed. 635; Steines *v.* Franklin County, 14 Wall. 15, 20 L. Ed. 846. The writ of error must therefore be dismissed for want of jurisdiction." Kennebec R. Co. *v.* Portland R. Co., 14 Wall. 23, 25, 26, 20 L. Ed. 850; New Orleans, etc., Co. *v.* Louisiana Sugar Refin. Co., 125 U. S. 18, 37, 31 L. Ed. 607.

76. St. Paul Gas Light Co. *v.* St. Paul, 181 U. S. 142, 151, 45 L. Ed. 788.

When, however, the authority to review the judgment of the supreme court of a state, and in doing so to interpret the contract and enforce its obligations, arises solely because of the assertion that the obligations of the contract have been impaired by subsequent legislation, the supreme court of the United States will first consider, whether, under any view which may be taken of the contract, there is shown on the record any act of state legislation which can be properly said to have impaired the obligations of the contract in the constitutional import of these words. That is to say, the court will first consider, even, although it be conceding arguendo that the supreme court of the state erroneously interpreted the contract relied upon, whether there has been any state legislation impairing the obligation of such contract. St. Paul Gas Light Co. *v.* St. Paul, 181 U. S. 142, 147, 45 L. Ed. 788.

A contention of impairment of the obligation of a contract, arising from the provisions of a municipal ordinance the enforcement of which could not constitute such impairment, does not present a federal question, determinable ultimately in the supreme court of the United States on the writ of error to a state court. St. Paul Gas Light Co. *v.* St. Paul, 181 U. S. 142, 45 L. Ed. 788.

77. Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 41, 44, 45 L. Ed. 415.

Granting that, as the case arose under the second clause of Rev. Stat., § 709, the invalidity of the statute need not be "specially set up and claimed," it must appear under the most liberal construction of that section that it was necessarily involved, and must indirectly, at least, have been passed upon in the opinion of the supreme court. Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 41, 45, 46, 45 L. Ed. 415.

78. Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 41, 45 L. Ed. 415.

Case distinguished.—The case of Yazoo, etc., Co. *v.* Thomas, 132 U. S. 174, 32 L. Ed. 302, was a bill to enjoin a collection of taxes. "'The illegality complained of was that the tax was in violation of the company's charter, by which it was insisted the property of the company incident to its railroad operations was exempted from taxation; and it was averred that the charter, as respects the exemption claimed, was a contract irrevocable, and protected by the contract clause of the constitution of the United States; that the unwarranted application of the general laws subsequently passed, as well as the application of the general laws in force at the time, is equivalent to a direct repeal of the charter exemption; that it is an effectual abrogation of its privilege of exemption by means of authority exercised under the state.' Not only does it appear from the opinion that the taxes in question were assessed under an act passed in 1888, subsequent to the charter, but on reference to the original bill, which we have consulted for that purpose, we find that this act of April 3, 1888, was specially set up and pleaded in the bill, and was charged to be a violation of the charter contract, which exempted the orator's road from taxation, and that

A bare averment in an amended and supplemental answer that an ordinance of a city impairs the obligation of a contract, is not in all cases sufficient It must not be wholly without foundation. There must at least be color of ground for such averment, otherwise a federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay.[79]

Raising Question for First Time in This Court.—Where the contention that a decision of a state court impairs the obligation of a contract, is raised for the first time in this court, it comes too late. The record must show that such proposition was set up in, or considered by the state court.[80]

(56) *Questions Arising under the Shipping Laws.*—The denial by a state court of a right set up and claimed under the acts of congress regulating shipping is reviewable by this court.[81]

Attachment of Money Due Seaman.—A decision of a state court, sanctioning an attachment of money in the hands of a purser, although it may be due to seamen, by the creditors of those seamen, may be revised by this court under the 25th section of the judiciary act.[82]

(57) *Review of Mandamus Proceedings.*—A writ of error will not lie to review mandamus proceedings in a state court, or in any court of appeals of the District of Columbia, where no federal question is involved.[83]

such application of said act was the same as a repeal or revocation of the granted exemption, and therefore in violation of the constitution of the United States forbidding such violation. In other words, the bill in that case not only pointed out the exemptions contained in the plaintiff's charter, but also set up the subsequent statute, which it was contended impaired the obligation of that contract. The bill thus contained the allegation which is wanting in this case, and put it in the power of this court to say whether the contract set up in the bill had been properly construed by the state court. This was also the case in Columbia Water Power Co. *v.* Columbia Street Railway Co., 172 U. S. 475, 43 L. Ed. 521, and McCullough *v.* Virginia, 172 U. S. 102, 43 L. Ed. 382." Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 41, 47, 48, 45 L. Ed. 415.

79. New Orleans *v.* New Orleans Water Works Co., 142 U. S. 86, 35 L. Ed. 946.

80. Winona, etc., R. Co. *v.* Plainview, 143 U. S. 371, 36 L. Ed. 191.

When an objection that the obligation of a contract has been impaired by a state statute as construed, was not taken below, it is not open here. Northern Assur. Co. *v.* Building Association, 203 U. S. 106, 51 L. Ed. 109.

81. Questions arising under the shipping laws.—When the question in the highest court of law or equity of a state is whether the mortgage of a vessel, duly recorded under an act of congress, gives a better lien than an attachment issued under a state statute, and the decision is, that it does not; a proper case exists for review in this court, under the 25th section of the judiciary act. Aldrich *v.* Ætna Ins. Co., 8 Wall. 491, 19 L. Ed. 473.

The question whether the fees collected by a shipping commissioner were illegally exacted, and can be recovered back, is not one of federal law, and therefore the decision of the state court thereon cannot be reviewed in this court, it not appearing that any objection was made at the time to that payment. Young *v.* Steamship Co., 105 U. S. 41, 26 L. Ed. 966.

Collision.—Where the plaintiff in error expressly claims a right in the state court under the statutes of the United States, to navigate his vessel on the Hudson with a masthead light and side lights in accordance with the statutory rules on that subject, and also the right in such navigation to the application of those rules in certain other particulars; and if these rights are denied by the state court, the jurisdiction of this court attaches for the determination of the questions thus raised. Belden *v.* Chase, 150 U. S. 674, 37 L. Ed. 1218.

Maritime liens.—Whether the Michigan statute allowing a lien on all water crafts of above five tons burden, navigating the waters of a state, applies to a steamer not to be used in navigating the waters of Michigan, only presents a question of state law, upon which the judgment of the state court is final and conclusive. "The same may be said as to the objection because the transportation company was a bona fide purchaser without notice of complainant's lien, and because complainant did not within a year file its claim for a lien with the proper court in the county in which it resided. These are state questions, likewise concluded by the decision of the state court." The Winnebago, 205 U. S. 354, 360, 51 L. Ed. 836.

82. Buchanan *v.* Alexander, 4 How. 20, 11 L. Ed. 857.

83. Columbia Ins. Co. *v.* Wheelright, 7 Wheat. 534, 5 L. Ed. 516; Louisiana *v.*

(58) *Denial of Immunities to Receivers Appointed by Federal Courts.*—Where a receiver is exercising his authority under an order of the federal court, and claims immunity as such receiver from suit without previous leave of the state court, under the act of congress of March 3, 1887, c. 377, 24 Stat. 552, and the decision of the state court is adverse to such claim, he is entitled to a review of such ruling whether his claims be founded upon a statute or upon principles of general jurisprudence.[84] But merely because of his appointment as receiver by a circuit court, a judgment against him in a state court does not amount to a denial of the validity of an authority exercised under the United States or of a right or immunity specially set up or claimed under a statute of the United States. Although he is an officer of a circuit court, the validity of his authority as such is not drawn in question.[85] The mere order of the circuit court of the United States appointing a receiver for a corporation created by the law of a state, at the suit of a citizen of another state, and where

New Orleans, 108 U. S. 568, 27 L. Ed. 823; South Carolina *v.* Seymour, 153 U. S. 353, 38 L. Ed. 742.

Review of mandamus proceedings.—Whether a state possesses power to issue writs of mandamus, or what modifications of its power may be imposed on it, by the laws which constitute it, this court cannot be called on to decide under the 25th section of the judiciary act. But whether that court has power to issue a writ of mandamus to officers commissioned by the United States, such as a register of a land office in such state, and it is immaterial under what law that authority be asserted, the controlling power of this court may be asserted on the subject, under the description of an exemption claimed by the officer over whom it is exercised. M'Clung *v.* Silliman, 6 Wheat. 598, 5 L. Ed. 340.

84. Denial of immunities to receivers appointed by federal courts.—McNulta *v.* Lochridge, 141 U. S. 327, 35 L. Ed. 796, citing Buck *v.* Colbath, 3 Wall. 334, 18 L. Ed. 257; Feibelman *v.* Packard, 109 U. S. 421, 27 L. Ed. 984; Pacific Railroad Removal Cases, 115 U. S. 1, 29 L. Ed. 319; Etheridge *v.* Sperry, 139 U. S. 266, 35 L. Ed. 171; Bock *v.* Perkins, 139 U. S. 628, 35 L. Ed. 314. See Erb *v.* Morasch, 177 U. S. 584, 44 L. Ed. 897.

85. Bausman *v.* Dixon, 173 U. S. 113, 114, 43 L. Ed. 633, reaffirmed in Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328.

"The mere order of the circuit court appointing a receiver did not create a federal question under § 709 of the Revised Statutes, and the receiver did not set up any right derived from that order, which he asserted was abridged or taken away by the decision of the state court." Bausman *v.* Dixon, 173 U. S. 113, 114, 43 L. Ed. 633, reaffirmed in Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328.

"We have just held in Capital Nat. Bank *v.* First Nat. Bank, 172 U. S. 425, 43 L. Ed. 502, that where the receiver of a national bank was a party defendant in the state courts, contested the issues on a general denial, and set up no claim of a right under federal statutes withdrawing the case from the application of general law, this court had no jurisdiction to revise the judgment of the highest court of the state resting thereon; and, certainly, an officer of the circuit court stands on no higher ground than an officer of the United States." Bausman *v.* Dixon, 173 U. S. 113, 114, 43 L. Ed. 633, reaffirmed in Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328.

"In Bausman *v.* Dixon, 173 U. S. 113, 43 L. Ed. 633, we ruled that a judgment against a receiver appointed by a circuit court of the United States, rendered in due course in a state court, does not involve the denial of an authority exercised under the United States or of a right or immunity specially set up or claimed under a statute of the United States. That was an action to recover for injuries sustained by reason of the receiver's negligence in operating a railroad company chartered by the state of Washington, though the receiver was the officer of the circuit court, and we said: 'It is true that the receiver was an officer of the circuit court, but the validity of his authority as such was not drawn in question, and there was no suggestion in the pleadings, or during the trial, or, so far as appears, in the state supreme court, that any right the receiver possessed as receiver was contested, although on the merits the employment of plaintiff was denied, and defendant contended that plaintiff had assumed the risk which resulted in the injury, and had also been guilty of contributory negligence. The mere order of the circuit court appointing a receiver did not create a federal question under § 709 of the Revised Statutes, and the receiver did not set up any right derived from that order, which he asserted was abridged or taken away by the decision of the state court. The liability to Dixon depended on principles of general law applicable to the facts, and not in any way on the terms of the order.' And although that was the case of a writ of error to a state court, we applied the reasoning in Pope *v.* Louisville, etc., R. Co., 173 U. S. 573, 43 L. Ed. 814." Cited in Gableman *v.* Peoria, etc., R. Co., 179 U. S. 335, 340, 341, 45 L. Ed. 220.

the jurisdiction of the circuit court depended on the diverse citizenship of the parties, does not create a federal question under § 709 of the Revised Statutes.[86]

(59) *Assignment of Claims against Government.*—Where the final judgment of the highest state court denies to the plaintiffs in error a right specially set up and claimed by them under § 3477 of the Revised Statutes, providing that all transfers and assignments made of any claim upon the United States, shall be absolutely null and void, this court has jurisdiction to re-examine that final judgment under § 709 of the Revised Statutes.[87] But this court has no jurisdiction to review the judgment of a state court on the ground that it denied the plaintiff in error a title or right set up or claimed under § 3477 of the Revised Statutes of the United States, where the controversy in said court is merely as to which of the claimants had the superior equity in the fund; the statute being only collaterally involved, and the plaintiffs in error asserting no right to the money based upon it.[88]

(60) *Cruel and Unusual Punishment.*—As a federal question, it has always been ruled that the 8th amendment of the constitution of the United States, which prohibits cruel and unusual punishment, does not apply to the states. Where it is not assigned in this court as error, in the assignment of errors, or in the brief for plaintiff in error, that he was subjected to cruel and unusual punishment in violation of the constitution of the United States, the error will not be considered.[89] It is not within the province of this court upon a writ of error to a state court to consider the question of cruel and unusual punishment inflicted under the state constitution.[90]

(61) *Questions of General Law*—aa. *In General.*—It has been held repeatedly that this court has no power to review the decisions of the state court upon questions of general law alone.[91] The decisions of state tribunals in respect of

86. Baggs *v.* Martin, 179 U. S. 206, 208, 45 L. Ed. 155, citing Bausman *v.* Dixon, 173 U. S. 113, 43 L. Ed. 633.

87. Assignment of claims against government.—Price *v.* Forrest, 173 U. S. 410, 43 L. Ed. 749; Delaware City, etc., Nav. Co. *v.* Reybold, 142 U. S. 636, 35 L. Ed. 1141.

Where plaintiffs in error based their defense in part upon § 3477 Revised Statutes which declares absolutely null and void certain transfers and assignments of claims against the United States and insisted that the contract sued on was in violation of that statute and that they and the estate of another third party were protected by its provisions against any judgment whatever in favor of plaintiffs below, they asserted a right and immunity under a statute of the United States and as such right and immunity was denied to them by the state court, a writ of error lay to this court. Nutt *v.* Knut, 200 U. S. 12, 50 L. Ed. 348.

88. Conde *v.* York, 168 U. S. 642, 42 L. Ed. 611.

89. Cruel and unusual punishment.—O'Niel *v.* Vermont, 144 U. S. 323, 36 L. Ed. 450.

90. O'Niel *v.* Vermont, 144 U. S. 323, 36 L. Ed. 450.

91. Questions of general law.—United States *v.* Thompson, 93 U. S. 586, 23 L. Ed. 982, citing Bethell *v.* Demaret, 10 Wall. 537, 19 L. Ed. 1007; Delmas *v.* United States, 14 Wall. 661, 666, 20 L. Ed. 757; New York Ins. Co. *v.* Hendren, 92 U. S. 286, 287, 23 L. Ed. 709; Rockhold *v.* Rockhold, 92 U. S. 129, 130, 23 L. Ed. 507; Bank *v.* McVeigh, 98 U. S. 332, 25 L. Ed. 110; Chicago, etc., R. Co. *v.* Martin, 178 U. S. 245, 44 L. Ed. 1055; Chemical Nat. Bank *v.* City Bank, 160 U. S. 646, 653, 40 L. Ed. 568, 573.

This court in reviewing the final judgment of the highest court of a state will not pass upon a federal question, however distinctly presented by the pleadings, if the judgment of the state court was based upon some ground of local or general law manifestly broad enough in itself to sustain the decision independently of any view that might be taken of such federal question. Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 608, 43 L. Ed. 835.

Where a decision of the highest court of a state in a case is made on its settled pre-existent rules of general jurisprudence, the case cannot be brought here under the 25th section; notwithstanding the fact that the state has subsequently made those rules one of the articles of its constitution, and the case be one where if the decision had been made on the constitution alone, a writ of error under the said section might have lain. Bank of West Tennessee *v.* Citizens' Bank, 14 Wall. 9, 20 L. Ed. 514, reaffirmed in Palmer *v.* Marston, 14 Wall. 10, 20 L. Ed. 826, citing Bethell *v.* Demaret, 10 Wall. 537, 19 L. Ed. 1007. See West Tenn. Bank *v.* Citizens' Bank, 13 Wall. 432, 20 L. Ed. 514.

In order to sustain the judgment of this court upon the ground that a federal ques-

matter of general law cannot be reviewed on the theory that the law of the land is violated unless their conclusions are absolutely free from error.[92] Moreover, the supreme court cannot reverse the decisions of state courts in regard to questions of general justice and equitable considerations in the taking of property.[93]

bb. *Various Specific Applications of the General Rules.*—And these rules have been applied to defenses based on adverse possession,[94] to a question concerning the right of prescription,[95] to the proper degrees of guilt in homicide,[96] to the question whether a sale of mortgaged property under a decree of foreclosure should be set aside,[97] to the validity of a grant of Pueblo lands,[98] to the validity

tion is presented, it should appear either that such question was apparent in the record, and that a decision was made thereon, or that, from the facts stated, such question must have arisen, and been necessarily involved in the case. If it appear either that the decision of the state court was made upon rules of general jurisprudence, or that the case was disposed of upon other grounds, broad enough in themselves to sustain the judgment without considering the federal question, and that such question was not necessarily involved, the jurisdiction of this court will not attach. New Orleans *v.* New Orleans Water Works Co., 142 U. S. 86, 35 L. Ed. 946.

This court has no appellate power over the decision of a state court grounded upon principles of law and equity, as recognized and administered in the state courts, without reference to the construction or effect of any provision of the constitution, or any act of congress. Hoyt *v.* Sheldon, 1 Black 518, 17 L. Ed. 65.

"It has been frequently held that the contention, even if formally made, that plaintiffs in error were seeking to avail themselves of some right or immunity under the constitution or laws of the United States does not give us jurisdiction to review the judgment of the supreme court of a state where that judgment was based upon a doctrine of general law sufficient of itself to determine the case." Beaupre *v.* Noyes, 138 U. S. 397, 34 L. Ed. 991; Eustis *v.* Bolles, 150 U. S. 361, 37 L. Ed. 1111; Pierce *v.* Somerset R. Co., 171 U. S. 641, 43 L. Ed. 316; Remington Paper Co. *v.* Watson, 173 U. S. 443, 43 L. Ed. 762; Seeberger *v.* McCormick, 175 U. S. 274, 280, 44 L. Ed. 161.

92. Sayward *v.* Denny, 158 U. S. 180, 186, 39 L. Ed. 941, reaffirmed in Texas, etc., R. Co. *v.* Gay, 167 U. S. 745, 42 L. Ed. 1209.

93. Fallbrook Irrig. Dist. *v.* Bradley, 164 U. S. 112, 41 L. Ed. 369; Hooker *v.* Los Angeles, 188 U. S. 314, 47 L. Ed. 487.

94. Various specific applications of the general rules.—O'Conor *v.* Texas, 202 U. S. 501, 50 L. Ed. 1120.

Adverse possession.—An action brought in a California court to recover of one of the plaintiffs in error a crop of wheat raised by him on land claimed by the plaintiff in error as pre-emptor, where the question of the title to the land is not necessarily involved in the case, but the decision was put entirely on the ground that the owner of land out of possession cannot recover from one in possession, holding adversely under claim of title, the crops raised by him in cultivating the soil, does not present a federal question. Martin *v.* Thompson, 120 U. S. 376, 30 L. Ed. 679.

This court has no jurisdiction upon a writ of error to the supreme court of the state of California, where it appears that all the court below decided was "that in California the title of the true owner of lands is extinguished by an adverse possession under color of right for the length of time which would be a bar to a recovery in ejectment. This is not a federal question." Poppe *v.* Langford, 104 U. S. 770, 26 L. Ed. 922.

95. Brand Gulf, etc., R., Co. *v.* Marshall, 12 How. 165, 13 L. Ed. 938.

96. Homicide.—"Assignments of error that the court instructed the jury that they might find the defendant guilty of murder in the first degree if they were satisfied from the evidence that he did kill and murder the person named in the indictment "in the manner and form charged in either of the counts," when one of the counts was bad. As presented to the trial court at the time, the question involved in this part of the charge was one of general law only, and not in any manner dependent upon the constitution or laws of the United States." Brooks *v.* Missouri, 124 U. S. 394, 396, 31 L. Ed. 454.

97. Mode of sale under mortgage foreclosure.—In French *v.* Hopkins, 124 U. S. 524, 31 L. Ed. 536; the only question below was, whether a sale of mortgaged property under a decree of foreclosure should be set aside because the property had been sold "as a whole and in one parcel," when it was capable of division into parts. The court of original jurisdiction set aside the sale, but the supreme court, on appeal, confirmed it, and gave judgment accordingly. In doing this, it was held to be "within the jurisdiction of the court by its judgment to direct that the property should be sold in one or several parcels," and that there was nothing in the statutes of the state to the contrary of this. That was the only decision in the case, and it certainly involved no question of federal law.

98. Mexican laws.—This court has no

of the entry of a judgment in favor of a defendant in ejectment for rents and profits,[99] to the effect of war upon contracts,[1] to the liability of a corporation for the indebtedness of a company whose property it has acquired,[2] to the construction of pleadings,[3] to a decision upon questions of boundaries,[4] to the right to recover back money paid,[5] to a decision as to the liability of a railroad for injuries, sustained by a plaintiff during the time the road was in the hands of a receiver,[6] to questions of local or general law relating to mortgages,[7] to the ques-

jurisdiction of a writ of error to the supreme court of the state of California determining whether, after the conquest and before the incorporation of the city of San Francisco, and before the adoption of the constitution of the state of California, a person exercising the functions of an alcalde of the pueblo of San Francisco could make a valid grant of pueblo lands, as such officers had been before such conquest accustomed to do. "This does not depend on any legislation of congress, or on the terms of the treaty, but on the effect of the conquest upon the powers of local government in the pueblo under the Mexican laws. That is a question of general public law, as to which the decisions of the state court are not reviewable here. This has been many times decided. Delmas *v.* Merchants' Ins. Co., 14 Wall. 661, 20 L. Ed. 757; Tarver *v.* Keach, 15 Wall. 67, 21 L. Ed. 82; New York Ins. Co. *v.* Hendren, 92 U. S. 286, 23 L. Ed. 709; Dugger *v.* Bocock, 104 U. S. 596, 26 L. Ed. 846; Allen *v.* McVeigh, 107 U. S. 433, 27 L. Ed. 572." San Francisco *v.* Scott, 111 U. S. 768, 769, 28 L. Ed. 593.

99. Allowance of rents and profits in ejectment.—Upon a writ of error to the state court, any inadvertence in the entering of judgment in favor of the defendant for rents and profits, is not a matter for revision by this court, but only for consideration by the court below. Tubbs *v.* Wilhoit, 138 U. S. 134, 34 L. Ed. 887.

1. Effect of war upon contracts.—This court has no jurisdiction to re-examine the judgment of a state court in a case where the pleadings and the instructions asked for and refused present questions as to the effect, under the general public law, of a sectional civil war upon the contract which was the subject of the suit, and when it was not contended that that law, as applicable to the case, had been modified or suspended by the constitution, laws, treaties, or executive proclamations of the United States, because no federal question was decided or necessarily involved. Mr. Justice Bradley dissenting. New York Ins. Co. *v.* Hendren, 92 U. S. 286, 23 L. Ed. 709, citing Bethell *v.* Demaret, 10 Wall. 537, 19 L. Ed. 1007; Delmas *v.* Merchants' Ins. Co., 14 Wall. 661, 666, 20 L. Ed. 757; Tarver *v.* Keach, 15 Wall. 67, 21 L. Ed. 82; Rockhold *v.* Rockhold, 92 U. S. 129, 23 L. Ed. 507.

2. Liability of corporation for debt of successsor.—The question whether the successor of a corporation becomes bound for all the indebtedness of the company whose property it has acquired, does not involve a federal question. National Foundry, etc., Works *v.* Oconto Water Supply Co., 183 U. S. 216, 46 L. Ed. 157.

3. Libel for matters in a pleading.—Abbott *v.* Tacoma Bank of Commerce, 175 U. S. 409, 44 L. Ed. 217.

4. Boundaries.—In the case of Doe *v.* Mobile, 9 How. 451, 13 L. Ed. 212, it was held that under the twenty-fifth section of the judiciary act this court "cannot re-examine the decision of a state court upon a question of boundary between coterminous proprietors of lands depending upon local laws." Bushnell *v.* Crooke Min. Co., 148 U. S. 682, 689, 37 L. Ed. 610.

5. Recovery of taxes.—Where an action was commenced in the state court of Iowa to recover taxes that had been paid by the Iowa Homestead Company, while in possession and occupancy of land in Iowa, which was afterwards adjudged to have been at that time property of the defendant, and the judgment in the trial court was for the plaintiff, which was affirmed by the supreme court of the state on appeal, the writ of error sued out to this court by the defendant below was dismissed because no federal question was involved. Wells *v.* Goodnow, 150 U. S. 84, 37 L. Ed. 1007, following Chapman *v.* Goodnow, 123 U. S. 540, 31 L. Ed. 235.

Recovery of voluntary payments.—In Young *v.* Steamship Co., 105 U. S. 41, 26 L. Ed. 966, it was held, in an opinion delivered by Mr. Justice Field, that the question whether fees exacted in violation of a statute of the United States, and paid without objection, could be recovered back, was not a federal question, the decision of which by the highest court of a state could be reviewed by this court on writ of error. Rutland R. Co. *v.* Central Vermont R. Co., 159 U. S. 360, 641, 40 L. Ed. 284.

6. Personal judgments.—Where an action is brought against a receiver of a railroad company to recover for injuries sustained during the receivership, the contention of the railway company that a personal judgment could not be rendered against it because it was not liable for acts of negligence committed by the receiver, is a question of general law for the state court to pass upon. Texas, etc., R. Co. *v.* Johnson, 151 U. S. 81, 38 L. Ed. 81.

7. Chattel mortgages.—Whether and to what extent a chattel mortgage covering

tion whether a receiver can be validly appointed for an entire railroad at the suit of a creditor holding bonds secured by a mortgage whose lien is restricted to a part only of the road,[8] to the question whether the evidence is sufficient to justify a verdict,[9] to the question whether one holding the office of receiver can be held responsible for the acts of his predecessor,[10] to the question whether as between vendor and vendee there can be a sale and delivery so as to pass title to the buyer,[11] where the question is as to the right of a holder of a banker's check,[12] to the decision of a state court holding a contract valid or void when made upon general principles of law,[13] to a decision as to the sufficiency of no-

after acquired property is valid, is a local question, and the decisions of the state court will be followed by this court in such case. Dooley *v.* Pease, 180 U. S. 126, 45 L. Ed. 457; Thompson *v.* Fairbanks, 196 U. S. 516, 522, 49 L. Ed. 577.

Right of selection as between mortgagor and mortgagee.—"Whether the right of selection recognized as between mortgagor and mortgagee is also applicable as between a purchaser upon execution and the mortgagee, is not a federal question, if no discrimination be made against executions from federal courts. This was a question either of local law or of general law. If of local law, of course the decision of the supreme court of Texas is binding upon us. If of general law, as it involves no federal element, it is equally binding in this proceeding, since only federal rights are capable of being raised upon writs of error to state courts. Conceding that, if the question had arisen on appeal from a circuit court of the United States, we might have come to a different conclusion, it by no means follows that we can do so upon a writ of error to a state court, whose opinion upon a question of general law is not reviewable here." Avery *v.* Popper, 179 U. S. 305, 315, 45 L. Ed. 203.

8. Appointment of receiver.—Whether a receiver can be validly appointed for an entire railroad at the suit of a creditor holding bonds secured by a mortgage whose lien is restricted to part only of the road, is a question for the state court to decide, and we cannot be called upon to answer it. St. Louis, etc., R. Co. *v.* Merriam, 156 U. S. 478, 484, 39 L. Ed. 502.

9. The question whether the evidence in the case was sufficient to justify the verdict of the jury, and the question whether the constitution of the state was complied with or not in the proceedings on the trial which are challenged, are not federal questions which this court can review. Baldwin *v.* Kansas, 129 U. S. 52, 57, 32 L. Ed. 640.

10. Whether one person holding the office of receiver can be held responsible for the acts of his predecessor in the same office, is not a federal question, but a question of general law. McNulta *v.* Lochridge, 141 U. S. 327, 35 L. Ed. 796.

11. Sales.—Where the court below decides that as between vendor and vendee there could be a sale and delivery of cotton so as to pass title to the vendee before the payment of the government tax assessed upon the cotton, under the act of July 1, 1862, 12 Stat. at Large 465, the writ of error will be dismissed for want of jurisdiction, because the record presents no federal question. This is a case of general law only. The plaintiff in error claims no right or title under the tax laws or treasury regulations. The court was not called upon to decide whether the lien of the tax was valid or invalid, but only whether, so long as the lien existed, the ownership of the property subject to the lien could be transferred. Carson *v.* Ober, 131 U. S. appx. clx, 25 L. Ed. 1157, following Long *v.* Converse, 91 U. S. 105, 112, 23 L. Ed. 233.

12. Rights of holder of banker's check.—Where the whole controversy in the state court is as to the right of a holder of a banker's check to recover against a bank having funds of the drawer when presentation has been duly made and payment demanded, the writ of error will be dismissed, because the record does not show that some title, right, privilege or immunity under the constitution or laws of the United States was set up in the pleading. Boatmen's Savings Bank *v.* State Savings Ass'n, 114 U. S. 265, 29 L. Ed. 174.

13. Validity of contracts.—Bethell *v.* Demaret, 10 Wall. 537, 19 L. Ed. 1007; West Tenn. Bank *v.* Citizens' Bank, 13 Wall. 432, 20 L. Ed. 514; Delmas *v.* Merchants' Ins. Co., 14 Wall. 661, 20 L. Ed. 757, in which it was expressly held that this court cannot review the decision of a state court holding a contract valid or void when "made upon the general principles by which courts determine whether a consideration is good or bad on principles of public policy." Tarver *v.* Keach, 15 Wall. 67, 21 L. Ed. 82; Rockhold *v.* Rockhold, 92 U. S. 129, 23 L. Ed. 507; New York Life Ins. Co. *v.* Hendren, 92 U. S. 286, 23 L. Ed. 709; United States *v.* Thompson, 93 U. S. 586, 23 L. Ed. 982; Bank *v.* McVeigh, 98 U. S. 332, 25 L. Ed. 110; Dugger *v.* Bocock, 104 U. S. 596, 601, 26 L. Ed. 846; Allen *v.* McVeigh, 107 U. S. 433, 27 L. Ed. 572; San Francisco *v.* Scott, 111 U. S. 768, 28 L. Ed. 593; Grame *v.* Mutual Ins. Co., 112 U. S. 273, 28 L. Ed. 716; Chicago,

tice of dishonor,[14] to the validity of a foreign divorce,[15] to the question whether cross-examination must be confined to matters pertinent to the direct examination,[16] to the question whether an insurance company is liable on its policies of insurance,[17] to the decision of a state court as to what shall be deemed a fraudulent conveyance,[18] to the decision of a state court as to the authority of national bank officers,[19] to decisions dealing with the general law of negligence,[20] to a

etc., R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615, 624, 30 L. Ed. 519.

Validity of Confederate transactions.—The decision of a state court which simply held that promissory notes, given for the loan of "Confederate currency," together with a mortgage to secure the notes, were nullities, on the ground that the consideration was illegal, according to the law of the state, at the time the contract was entered into, is not a decision repugnant to the constitution. Bethell *v.* Demaret, 10 Wall. 537, 19 L. Ed. 1007, reaffirmed in West Tenn. Bank *v.* Citizens' Bank, 13 Wall. 432, 433, 20 L. Ed. 514; Hernan *v.* Texas, 198 U. S. 679, 49 L. Ed. 1171.

Stipulation on appeal—Sureties on bail bonds.—The ruling by the highest court of a state that a stipulation given by the plaintiff on an appeal to that court in a prior action brought to foreclose the mortgage does not operate to prevent a recovery, and that it is not a part of the public policy of the state to insist upon personal liability of sureties on bail bonds and forbid bail to become indemnified, and therefore a bond and mortgage given to indemnify bail in a criminal case are not void because contrary to public policy, involve no federal question. Nelson *v.* Moloney, 174 U. S. 164, 43 L. Ed. 934.

14. Sufficiency of notice of dishonor.—The decision of a state court as to the sufficiency of a notice of dishonor to an indorser resting within the Confederate lines during the war, presents no federal question reviewable by this court. Allen *v.* McVeigh, 107 U. S. 433, 27 L. Ed. 572.

Constitutionality of ordinance of secession.—A federal question is not presented by the decision of the supreme court of appeals of the state of Virginia, that by the general principles of commercial law, if, during the late civil war, an indorser of a promissory note left his residence in loyal territory and went to remain permanently within the Confederate lines before the note matured, a notice of protest left at his former residence was not sufficient to charge him, if his change of residence was known, or by the exercise of reasonable diligence might have been known, to the holder of the note when it matured. Bank *v.* McVeigh, 98 U. S. 332, 25 L. Ed. 110.

15. Validity of foreign divorce.—A decree of a state court in favor of the validity of the decree of a foreign court annulling a marriage, presents no question of which we can take cognizance under § 709 of the Revised Statutes. Roth *v.* Ehman, 107 U. S. 319, 27 L. Ed. 499, cited and aproved in Mutual Life Ins. Co. *v.* McGrew, 188 U. S. 291, 312, 47 L. Ed. 480.

16. Extent of cross-examination.—Whether a cross-examination must be confined to matters pertinent to the testimony in chief, or may be extended to the matters in issue, is certainly a question of state law as administered in the courts of the state, and not of federal law. Spies *v.* Illinois, 123 U. S. 131, 180, 31 L. Ed. 80.

17. The question whether an insurance company was liable on its policies for losses resulting from fire purposely set by the Confederate authorities within the meaning of a clause in the policy providing against fire resulting "from civil commotion, insurrections, or the invasion of a foreign enemy," is a question of general, not federal law and is not reviewable here upon a writ of error to the state court. Grame *v.* Mutual Ins. Co., 112 U. S. 273, 28 L. Ed. 716.

18. The decision of the state court as to what should be deemed a fraudulent conveyance does not present any federal question, nor does the application by the court of the evidence in reaching that decision raise one. McKenna *v.* Simpson, 129 U. S. 506, 512, 32 L. Ed. 771; Thompson *v.* Fairbanks, 196 U. S. 516, 49 L. Ed. 577.

19. False assumption of power as national bank.—The judgment of the highest court of a state holding that by reason of a false assumption of corporate authority, the officers, directors and shareholders of a national bank which had no authority to transact business, become liable as partners for contracts assumed in the corporate name, presents no federal question, but is a question of general law, and not federal law, and hence a writ of error will not lie to review such decision. Seeberger *v.* McCormick, 175 U. S. 274, 44 L. Ed. 161.

20. Law of negligence.—A writ of error will not lie from this court to a state court to review its ruling in an action brought under a statute of the state, to recover damages for wrongful death, upon the ground that it resulted from the carelessness and negligence of the defendant in navigating a steamboat, where the plaintiff in error simply set up the defense of contributory negligence on the part of the deceased, but did not set up any claim of right, privilege or immunity under the navigation laws of the United States. Staten Island R. Co. *v.* Lambert, 131 U. S. appx. ccxi, 24 L. Ed. 615.

An action upon an insurance policy to

decision as to when a judge may be held liable for acts done in his judicial capacity,[21] and to many other questions instances of which will be found set out in the notes.[22]

recover for the loss of a steamboat by fire, the defense to which action is that the fire was caused by the gross negligence of the plaintiff and the use of turpentine, on board as freight, to increase steam while racing with another boat, presents no federal question, although an act of congress prohibited the transportation of turpentine as freight on steamboats carrying passengers, except in cases of special license for that purpose. The plaintiff in error claimed below no title, right, privilege or immunity under the constitution, laws or treaties of the United States, and no such title, right, privilege or immunity has been denied him. Marsh *v.* Citizens' Ins. Co., 131 U. S. appx. ccxiii, 25 L. Ed. 9.

21. Liability of judge in judicial capacity.—The decision of a state court, in an action of tort against certain persons constituting a court of commissioners of Alabama to recover damages for being prevented from acting as an attorney and chancellor in or before the court, that the defendant was not liable in damages, because in concurring with the order complained of, he acted in his judicial capacity, does not of itself involve a federal question. Manning *v.* French, 133 U. S. 186, 33 L. Ed. 583, citing Lange *v.* Benedict, 99 U. S. 68, 25 L. Ed. 469; Spies *v.* Illinois, 123 U. S. 131, 31 L. Ed. 80; Chappell *v.* Bradshaw, 128 U. S. 132, 32 L. Ed. 369.

This court having in Ex parte Lange, 18 Wall. 163, 21 L. Ed. 872, held that the judgment against him, rendered Nov. 8, 1873, was not authorized by law, he brought an action against the judge who pronounced it. The court below decided that even though the judgment was unauthorized, the defendant having, in pronouncing it, acted, in his judicial capacity, and it not being so entirely in excess of his jurisdiction as to make it the arbitrary and unlawful act of a private person, was not liable in damages. Held, that such decision does not present a federal question. Cited in Lange *v.* Benedict, 99 U. S. 68, 25 L. Ed. 469.

22. Assessments under drainage laws.—Where upon a writ of error to the supreme court of Louisiana, the record showed that the defendants in error sought to enjoin the collection of a judgment against their property to enforce an assessment under the drainage laws of Louisiana, it was held that no federal question was involved. Crossley *v.* New Orleans, 108 U. S. 105, 27 L. Ed. 667.

Mandamus to compel city to pay debt.—Where a party seeks a writ of mandamus from a state court to compel a city government of which he is a creditor to apply to the payment of his debt the proceeds of a proposed sale of city property, and to exhaust its powers of taxation, and continue to do so until the relator's debt is paid, and the state court denies the prayer as to the application of the proceeds of sale of the property, on the ground that the state laws require it to be applied to the retirement of other debts of the city, and grants the writ as to the residue of the prayer, no federal question arises. Louisiana *v.* New Orleans, 108 U. S. 568, 27 L. Ed. 823.

Instructions.—The same is true of an instruction that the jury were to be governed by the law as given them in charge by the court, and of the refusal to allow counsel to read in his argument parts of the opinion of the supreme court of the state, in a case decided by that court, which, as was claimed, stated correctly the legal principles bearing upon a part of the defense. No reference was made to any provision of the constitution or laws of the United States which gave to the defendant any rights in this behalf. Brooks *v.* Missouri, 124 U. S. 394, 396, 31 L. Ed. 454.

Construction of contract.—The question of the proper construction of a contract nonfederal in its nature, is not subject to review. Commercial Pub. Co. *v.* Beckwith, 188 U. S. 567, 571, 47 L. Ed. 598.

Liability for assessing shares of national bank stock.—The decision of the court of appeals of the state of New York, that, in the absence of fraud or intentional wrong, the members of the board of assessors for the city of Albany are not personally liable in damages to a party for any error they commit in officially assessing his shares of national bank stock, does not present a federal question, and cannot be reviewed here. It is a question of general municipal law, to be governed either by the common law or the statute law of the state. Williams *v.* Weaver, 100 U. S. 547, 25 L. Ed. 708.

A proceeding by quo warranto to exclude the plaintiffs in error, from the further use of the franchises of a lottery, on the ground that the event had happened which fixed the period for the termination of the grant under which they were acting, presents no federal question. France *v.* Missouri, 154 U. S., appx. 667, 26 L. Ed. 86.

The question as to whether a covenant of warranty of land has been broken, does not present the question of federal law which this court can review in a judgment of a state court. Kansas Pacific R. Co. *v.* Dunmeyer, 113 U. S. 629, 28 L. Ed. 1122.

Forfeitures of corporate charter.—It has

Questions Respecting the Remedy and Admissibility of Evidence.—The general rule is that all matters respecting the remedy and admissibility of evidence depend upon the law of the state where the suit is brought.[23]

Contempt of Court.—What constitutes contempt, as well as the time during which it may be committed, is a matter of local law.[24] An objection that the information in criminal contempt was not supported by an affidavit until after it was filed cannot be considered by this court upon a writ of error to review a judgment of the state court upon an information for contempt, because this is a question of local law.[25]

cc. *Administration of the Common Law.*—The highest court of a state may administer the common-law according to its understanding and interpretation of it, being only amenable to review in the federal supreme court where some right,

been held that a decision by the highest court in Tennessee that under the provisions of their statutes a failure of the company to complete its road within the time limited is such a substantial noncompliance with the requirements and conditions of the charter as subjects the company to a decree of forfeiture, is a question of state law alone, as to which the judgment of the state court is final. Nonconnah Turnpike *v.* Tennessee, 131 U. S., appx. clviii, 24 L. Ed. 368.

Incidents of lease.—A decision by a state court as to what are the incidents of a lease is not reviewable here, upon a writ of error to a state court on the ground that a subsequent contract of a state had impaired the obligation of a contract. Columbia Water Power Co. *v.* Columbia Street R. Co., 172 U. S. 475, 43 L. Ed. 521.

23. Northern Pacific R. Co. *v.* Babcock, 154 U. S. 190, 38 L. Ed. 958; Wilcox *v.* Hunt, 13 Pet. 378, 10 L. Ed. 209; Pritchard *v.* Norton, 106 U. S. 124, 27 L. Ed. 104; Bank of United States *v.* Donnally, 8 Pet. 361, 8 L. Ed. 974; Knights of Pythias *v.* Meyer, 198 U. S. 508, 517, 49 L. Ed. 1146; Lewis *v.* Campaw, 3 Wall. 106, 18 L. Ed. 211.

Rulings of a state court as to the admission of an award or of a receipt in evidence involve the application either of the general or the local law of evidence, and as such furnish no ground for our interposition. Sherman *v.* Grinnell, 144 U. S. 198, 202, 36 L. Ed. 403, citing New Orleans *v.* New Orleans Water Works Co., 142 U. S. 86, 79, 35 L. Ed. 946; Hammond *v.* Johnston, 142 U. S. 73, 35 L. Ed. 941.

This court has no jurisdiction to review the ruling of the highest court of a state, in a suit to remove cloud from plaintiff's title, excluding from the evidence a letter written by the secretary of the interior to the commissioner of the general land office, expressing an opinion as to the character of land lying between a meander line and the main course of a river, written when there was no contest before the department relating to the matter, on the ground that it was res inter alios acta. This presents no federal question. Chapman, etc., Land Co. *v.* Bigelow, 206 U. S. 41, 51 L. Ed. 953.

The question whether a statutory remedy is cumulative or exclusive, is for the state court to determine, and its action in that regard raises no federal question for our consideration. Northern Pacific R. Co. *v.* Patterson, 154 U. S. 130, 38 L. Ed. 934.

"It is contended, on the other hand, that where taxes are levied upon property which is by law exempt from taxation, the statutory remedy by application to a board of review is only cumulative and that the taxpayer may at his election seek his remedy by injunction in the first instance. But it was for the supreme court of Montana to determine whether the statute was exclusive and whether plaintiff came within its terms or not, and its action in that regard raises no federal question for our consideration." Northern Pacific R. Co. *v.* Patterson, 154 U. S. 130, 133, 38 L. Ed. 934.

Form of action.—Where the state courts have recognized the action brought as a proper one under the laws of the state for the relief sought by the plaintiff, the supreme court of the United States has to consider only the controlling questions of a federal nature presented by the record and decided by the state court. An objection that the form of action is not the proper remedy will not be considered. Scranton *v.* Wheeler, 179 U. S. 141, 151, 45 L. Ed. 126.

Remedy legal or equitable.—The question as to whether the plaintiff's remedy was at law or in equity is a matter dependent entirely upon local law, and involves no federal right whatever. Loeber *v.* Schroeder, 149 U. S. 580, 585, 37 L. Ed. 856.

The question concerning the nature and effect of a writ of error in the courts of Illinois would seem not to be reviewable here, or, if it were, we should follow the decisions of that court on the subject. Jenkins *v.* International Bank, 106 U. S. 571, 572, 27 L. Ed. 304.

24. Patterson *v.* Colorado, 205 U. S. 454, 461, 51 L. Ed. 879.

25. Patterson *v.* Colorado, 205 U. S. 454, 51 L. Ed. 879.

title, immunity or privilege, the creation of the federal power, has been asserted and denied.[26] The question what facts constitute a common-law marriage is purely a local, and not a federal, question, and will not sustain a writ of error from this court to a state court.[27]

dd. *General Principles of Equity.*—Whether the plaintiff in error is entitled to relief upon general principles of equitable jurisdiction is not a matter for us to inquire into, so long as the question does not involve the constitutional rights of the plaintiff.[28]

ee. *Principles of Comity.*—Whether, aside from the federal questions discussed, the courts of one state should permit an action to be maintained upon principles of comity between the states, is a question within the exclusive jurisdiction of the state court.[29]

ff. *Res Adjudicata, Laches and Estoppel.*—As a general rule, questions of res judicata and estoppel are not federal questions, but are rather questions of general law.[30] A question of estoppel or quasi estoppel does not raise a federal

26. Administration of the common law.—Bethell *v.* Demaret, 10 Wall. 537, 19 L. Ed. 1007; Delmas *v.* Merchants' Ins. Co., 14 Wall. 661, 20 L. Ed. 757; New York Ins. Co. *v.* Hendren, 92 U. S. 286, 23 L. Ed. 709; United States *v.* Thompson, 93 U. S. 586, 587, 23 L. Ed. 982; Pennsylvania R. Co. *v.* Hughes, 191 U. S. 477, 486, 48 L. Ed. 268; West *v.* Louisiana, 194 U. S. 258, 261, 48 L. Ed. 965; Murdock *v.* Memphis, 20 Wall. 590, 626, 22 L. Ed. 429.

At the trial it was conceded that the law of the state where the contract was made permitted the making of a contract limiting the liability of a carrier for negligence to an agreed valuation in consideration of a lower freight rate for carriage. The highest court of a state where the trial was had refused to apply the law of the place of contract to a controversy respecting the right of a carrier to so limit its liability. It was held that this decision of the state court did not present a federal question which will sustain jurisdiction of a writ of error from the supreme court of the United States to the court. Pennsylvania R. Co. *v.* Hughes, 191 U. S. 477, 48 L. Ed. 268.

27. Keen *v.* Keen, 201 U. S. 319, 50 L. Ed. 772.

28. General principles of equity.—Skaneateles Waterworks Co. *v.* Skaneateles, 184 U. S. 354, 46 L. Ed. 585.

Liability of trustee to cestui que trust.—This court has not jurisdiction to reexamine the decree of a state court affirming the nonliability of a trustee to his cestui que trust for the loss of a fund not occasioned by his laches or bad faith, but by his payment of the same into the hands of the receiver of the Confederate states in obedience to a military order which he could not resist. This is not a federal question, but one of general law only. Rockhold *v.* Rockhold, 92 U. S. 129, 23 L. Ed. 507, citing Bethell *v.* Demaret, 10 Wall. 537, 19 L. Ed. 1007; Delmas *v.* Merchants' Ins. Co., 14 Wall. 661, 20 L. Ed. 757; Tarver *v.* Keach, 15 Wall. 67, 21 L. Ed. 82.

What amounts to a trust.—Where a complainant alleging himself to be a bona fide purchaser, and setting out a case in the highest state court for equitable relief against a sale to other parties which an owner of land had undertaken to make, alleged that the party in making such second sale had violated an act of congress which made such sale void, and that the purchaser knew this; and alleged also that the sale was made through fraud and imposition on the vendor, with a prayer that the purchaser at such second sale might be held a trustee for the complainant—if, in such case, the court, holding that there was no fraud and no trust proved, dismiss the bill in consequence of that want of proof, and consequently for want of equitable jurisdiction, the fact that it says: "The most that can be said is that the transaction was in violation of an act of congress, but that would not give a court of chancery jurisdiction to hold the second purchaser a trustee and make him accountable as such," does not show that there has been drawn in question the construction of a statute of the United States, and that the decision has been against the title or right set up or claimed by the complainant under such statute. The case rested on the fact of a trust proved, and on the extent of the state court's equitable jurisdiction; matters not the subject of review under § 709 of the Revised Statutes, the 25th section of the judiciary act of 1789. The case, which was between the same persons as those mentioned in Smith *v.* Adsit, 16 Wall. 185, 21 L. Ed. 310, held to be undistinguishable from that one. Smith *v.* Adsit, 23 Wall. 368, 22 L. Ed. 114.

29. Principles of comity.—Finney *v.* Guy, 189 U. S. 335, 47 L. Ed. 839; Allen *v.* Alleghany Co., 196 U. S. 458, 49 L. Ed. 551.

30. Res adjudicata, laches and estoppel.—Beals *v.* Cone, 188 U. S. 184, 47 L. Ed. 435, reaffirmed in Stuart *v.* Hauser, 203 U. S. 585, 51 L. Ed. 328; Mobile Transportation Co. *v.* Mobile, 187 U. S. 479, 47 L. Ed. 266; Pierce *v.* Somerset R. Co., 171

question.[31] Where it is plain that the decision in the court below, adverse to plaintiffs in error, was made upon the principles of laches and estoppel, and that there was no decision against a right, title, privilege or immunity, claimed under the constitution, or any statute of, or authority exercised under, the United States, no federal question is involved, and this court is without jurisdiction.[32]

Therefore, the decision of the supreme court of a state as to the weight to be given a former judgment rendered by it is not reviewable by

U. S. 641, 648, 43 L. Ed. 316; Pittsburgh, etc., R. Co. *v.* Cleveland Min. Co., 178 U. S. 270, 44 L. Ed. 1065; O'Conor *v.* Texas, 202 U. S. 501, 50 L. Ed. 1120; Gillis *v.* Stinchfield, 159 U. S. 658, 40 L. Ed. 295; Phœnix Ins. Co. *v.* Tennessee, 161 U. S. 174, 40 L. Ed. 660; Schaefer *v.* Werling, 188 U. S. 516, 519, 47 L. Ed. 570; Michigan *v.* Flint, etc., R. Co., 152 U. S. 363, 38 L. Ed. 478; Adams County *v.* Burlington, etc., R. Co., 112 U. S. 123, 28 L. Ed. 678; Israel *v.* Arthur, 152 U. S. 355, 38 L. Ed. 474.

Where the decision of the state court was that the grantor of a mining claim was estopped, under the law of California, from claiming priority of title to the space of vein-intersection by reason of the location which he had made after the execution of the deed, but before the location by the grantee of the ground conveyed to him, it was held that this was an independent ground broad enough to maintain the judgment, and therefore, according to well settled principles the writ of error must be dismissed. Gillis *v.* Stinchfield, 159 U. S. 658, 40 L. Ed. 295, citing Eustis *v.* Bolles, 150 U. S. 361, 37 L. Ed. 1111; Rutland R. Co. *v.* Central Vermont R. Co., 159 U. S. 360, 40 L. Ed. 284; Speed *v.* McCarthy, 181 U. S. 269, 275, 45 L. Ed. 855; Pittsburgh, etc., R. Co. *v.* Cleveland Min. Co., 178 U. S. 270, 44 L. Ed. 1065. See Carothers *v.* Mayer, 164 U. S. 325, 41 L. Ed. 453.

If the supreme court of the state affirms the decree of the trial court primarily on the ground of laches, and if this be an independent ground, involving no question under the federal statutes, the decision of the supreme court must be sustained and the writ of error dismissed. Eustis *v.* Bolles, 150 U. S. 361, 37 L. Ed. 1111; Moran *v.* Horsky, 178 U. S. 205, 207, 44 L. Ed. 1038.

The sufficiency of a defense of a former adjudication or res adjudicata set up in a state court is a question of general law as to which the decision of the state court is not reviewable here. For example, the question whether an equitable title could be set up in bar of the action at law, and the same is true of the question whether the pleadings in the former action were such as to present the equitable defense in proper form for final adjudication. Chouteau *v.* Gibson, 111 U. S. 200, 28 L. Ed. 400; California *v.* Holladay, 159 U. S. 415, 40 L. Ed. 202; San Francisco *v.* Itsell, 133 U. S. 65, 33 L. Ed. 570; Beatty *v.* Benton, 135 U. S. 244, 34 L. Ed. 124; Eustis *v.* Bolles, 150 U. S. 361, 37 L. Ed. 1111; Hoadley *v.* San Francisco, 94 U. S. 4, 24 L. Ed. 34; Hoadley *v.* San Francisco, 124 U. S. 639, 31 L. Ed. 553; Henderson Bridge Co. *v.* Henderson, 173 U. S. 592, 43 L. Ed. 835.

Where the record of the pleadings, findings of fact and judgment shows that it was unnecessary for that court to decide, and its opinion filed in the case and copied in the record shows that it did not decide, any question against the plaintiff in error, except the issue whether the former judgment rendered against it and in favor of the grantor of the defendants in error was a bar to this action, the writ of error will be dismissed for want of jurisdiction. That is a question of general law only, in nowise depending upon the constitution, treaties or statutes of the United States. Chouteau *v.* Gibson, 111 U. S. 200, 28 L. Ed. 400; San Francisco *v.* Itsell, 133 U. S. 65, 66, 33 L. Ed. 570.

Where the question decided in the state court against the plaintiff in error was that a woman who has been divorced from her husband by an invalid decree which does not bind her, and who takes unto herself another husband, is estopped by her conduct after the death of her former husband to dispute or contest the validity of said decrees, and to assert the property rights conferred by law upon the widow, raises no federal question. Because to review that judgment would be to overhaul the application by a state court of principles of public policy and of estoppel, which it is not within our province to do. Israel *v.* Arthur, 152 U. S. 355, 38 L. Ed. 474, citing Marrow *v.* Brinkley, 129 U. S. 178, 32 L. Ed. 654; Adams County *v.* Burlington, etc., R., 112 U. S. 123, 28 L. Ed. 678; Chouteau *v.* Gibson, 111 U. S. 200, 28 L. Ed. 400; Beaupre *v.* Noyes, 138 U. S. 397, 34 L. Ed. 991.

The judgment of a state court in a suit to compel the funding of state bonds, that a former adverse judgment upon bonds of the same series could be pleaded as an estoppel, presents no Federal question. Adams *v.* Louisiana Board of Liquidation, 144 U. S. 651, 36 L. Ed. 577.

31. Leonard *v.* Vicksburg, etc., R. Co., 198 U. S. 416, 423, 49 L. Ed. 1108, reaffirmed in South Carolina *v.* Jennings, 204 U. S. 667, 668, 51 L. Ed. 671.

32. Marrow *v.* Brinkley, 129 U. S. 178, 32 L. Ed. 654.

us because it is not a federal question. "The refusal to accord to it all that was claimed for it in the nature of an estoppel by counsel for plaintiffs in error was, in any event, no more than a refusal to give to a judgment of one of its own courts that degree of force as evidence which it was, by the general law, entitled to. In no event was it anything other than error committed by the court below in regard to the general law or rule of evidence, which has nothing of a federal question connected with it. It is entirely different from the case of a refusal of a state court to give the proper effect to a judgment of a court of the United States."[33] If it were otherwise, every decision of a state court, claimed to be erroneous, which involved the failure to give what the defeated party might claim to be the proper weight to one of its own judgments, would present a federal question, and would be reviewable here.[34]

On Second Appeal.—A judgment of the supreme court of a state that it had no power upon a second appeal to review the judgment in the case, because the rights of the parties were res adjudicata, and that it was itself, as the parties were, bound by its own former judgment, is not subject to review here. Such judgment is rendered in accordance with well-settled principles of law not involving any federal question.[35]

gg. *Qualifications of General Rules.*—While the decision by a state court of a question of local or of general law involving no federal element does not, as a matter of course present a federal question, yet where, on the contrary, a federal element is specially averred and essentially involved, the duty of this court to apply to such federal question its own conceptions of the general law, is incontrovertible.[36] Although the judgment of the state court rests partly on grounds

33. Phœnix Ins. Co. *v.* Tennessee, 161 U. S. 174, 184, 185, 40 L. Ed. 660.

34. Phœnix Ins Co. *v.* Tennessee, 161 U. S. 174, 185, 40 L. Ed. 660.

There is no question of contract in the case. It is wholly one of evidence as to whether or not a prior judgment in a state court operated as an estoppel against the plaintiff below, and prevented the state court from granting it the relief to which it would otherwise be entitled. In granting relief it was bound to consider the federal question, as to whether there was or was not a contract of immunity, and that question was open to review here and we have just reviewed it. It is moreover quite doubtful whether the court below committed any error, even if the question were to be regarded as of a federal nature, and open to us for review. Keokuk, etc., R. Co. *v.* Missouri, 152 U. S. 301, 314, 38 L. Ed. 450; Phœnix Ins. Co. *v.* Tennessee, 161 U. S. 174, 185, 186, 40 L. Ed. 660.

35. Northern Pac. R. Co. *v.* Ellis, 144 U. S. 458, 36 L. Ed. 504.

36. Qualifications of general rules.—Avery *v.* Popper, 179 U. S. 305, 315, 45 L. Ed. 203; Tullock *v.* Mulvane, 184 U. S. 497, 513, 46 L. Ed. 657.

Where the question presented and decided by the state court is not simply the scope and applicability of the doctrine of subrogation but rather as to what extent, considering the obligations cast by the revenue laws and the duties of common carriers as between themselves and the shipper, the carriers are protected by the laws of the United States in paying custom duties exacted under them, a federal question is involved which gives the supreme court jurisdiction, because the question is solved not alone upon general principles of law, but involves an inquiry as to the effect of exactions made under authority of United States Statutes. Wabash R. Co. *v.* Pearce, 192 U. S. 179, 185, 48 L. Ed. 397.

A motion to dismiss a writ of error upon the ground that no federal question is presented by the record, it being claimed that the decision and judgment of the state court sought to be reviewed was based solely upon a consideration of local statutes and the determination of a question of general law, viz, the effect as res adjudicata of a judgment of a court of the state, will be denied, where a claim of the benefit of the constitution of the United States was specially made in the state court and passed upon adversely to the moving party. Manley *v.* Park, 187 U. S. 547, 550, 47 L. Ed. 296, citing Missouri, etc., R. Co. *v.* Elliott, 184 U. S. 530, 534, 46 L. Ed. 673.

Where the determination of an alleged estoppel embodied in the ground of a demurrer to an answer, which was sustained by the highest court of a state, necessarily involved a consideration of a claim of a contract right, protected from impairment by the constitution of the United States, such question being thereby in substance if not in express terms passed upon by the court below; a federal question which gives the supreme court of the United States jurisdiction on writ of error to the state court,

of local or general law yet if, by its necessary operation, although the opinion of the state court does not expressly refer to the constitution of the United States, the judgment rejects the claim of plaintiff in error, specially set up, that the relief asked cannot, in any view of the case, be granted consistently either with the contract clause of the constitution, or with the clause prohibiting the state from depriving any one of his property without due process of law, this court has jurisdiction to review the judgment under § 709, Rev. Stat.[37] And if it is evident that a ruling purporting to deal only with local law has, for its premise or necessary concomitant, a cognizable mistake, that may be sufficient to warrant a review.[38]

(62) *Where Decision of State Court Depends upon the Construction of State Statutes and Constructions*—aa. *In General.*—The supreme court has no authority on a writ of error from a state court to declare a state law void on account of its collision with a state constitution.[39] It is axiomatic that on a writ of error to a state court, questions under the state constitution and laws cannot be considered as they might be on error to a subordinate court of the United States.[40]

arises on the record. Grand Rapids, etc., R. Co. *v.* Osborn, 193 U. S. 17, 27, 48 L. Ed. 598.

37. West Chicago, etc., R. Co. *v.* Chicago, 201 U. S. 506, 50 L. Ed. 845, citing Chicago, etc., R. Co. *v.* Illinois, 200 U. S. 561, 50 L. Ed. 596.

So far as the judgment of the state court against the validity of an authority set up by the defendants under the United States necessarily involves the decision of a question of law, it must be reviewed by this court, whether that question depends upon the constitution, laws or treaties of the United States, or upon the local law, or upon principles of general jurisprudence. For instance, if a marshal of the United States takes personal property upon attachment on mesne process issued by a court of the United States, and is sued in an action of trespass in a state court by one claiming title in the property, and sets up his authority under the United States, and judgment is rendered against him in the highest court of the state, he may bring the case by writ of error to this court; and, as his justification depends upon the question whether the title to the property was in the defendant in attachment, or in the plaintiff in the action of trespass, this court, upon the writ of error, has the power to decide that question, so far as it is one of law, even if it depends upon local law, or upon general principles. Buck *v.* Colbath, 3 Wall. 334, 18 L. Ed. 257; Etheridge *v.* Sperry, 139 U. S. 266, 35 L. Ed. 171; Bock *v.* Perkins, 139 U. S. 628, 35 L. Ed. 314. And see McNulta *v.* Lockridge, 141 U. S. 327, 331, 35 L. Ed. 796; Dushane *v.* Beall, 161 U. S. 513, 40 L. Ed. 791; Stanley *v.* Schwalby, 162 U. S. 255, 278, 40 L. Ed. 960.

38. Terre Haute, etc., R. Co. *v.* Indiana, 194 U. S. 579, 48 L. Ed. 1124; Schlemmer *v.* Buffalo, etc., R. Co., 205 U. S. 1, 11, 51 L. Ed. 681.

39. Where decision of state court depends upon the construction of state statutes and constitutions.—Withers *v.* Buckley, 20 How. 84, 15 L. Ed. 816; Medberry *v.* Ohio, 24 How. 413, 16 L. Ed. 739; Porter *v.* Foley, 24 How. 415, 16 L. Ed. 740; Satterlee *v.* Matthewson, 2 Pet. 380, 7 L. Ed. 458; Salomons *v.* Graham, 15 Wall. 208, 21 L. Ed. 37; West Tenn. Bank *v.* Citizens' Bank, 13 Wall. 432, 20 L. Ed. 514; S. C., 14 Wall. 9, 20 L. Ed. 514; Palmer *v.* Marston, 14 Wall. 10, 20 L. Ed. 826; Sevier *v.* Haskell, 14 Wall. 12, 20 L. Ed. 827; Jackson *v.* Lamphire, 3 Pet. 280, 7 L. Ed. 679.

40. Missouri *v.* Dockery, 191 U. S. 165, 171, 48 L. Ed. 133; Olsen *v.* Smith, 195 U. S. 332, 342, 49 L. Ed. 224; Cargill *v.* Minnesota, 180 U. S. 452, 466, 45 L. Ed. 619; Robertson *v.* Coulter, 16 How. 106, 107, 14 L. Ed. 864; Cook County *v.* Calumet, etc., Canal Co., 138 U. S. 635, 34 L. Ed. 1110; Miller *v.* Swann, 150 U. S. 132, 37 L. Ed. 1028; Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 41 L. Ed. 1165; Jacobson *v.* Massachusetts, 197 U. S. 11, 49 L. Ed. 643, reaffirmed in Cantwell *v.* Missouri, 199 U. S. 602, 50 L. Ed. 329; Moeschen *v.* Tenement House Department, 203 U. S. 583, 51 L. Ed. 328; National Cotton Oil Co. *v.* Texas, 197 U. S. 115, 49 L. Ed. 689; Southern Cotton Oil Co. *v.* Texas, 197 U. S. 134, 49 L. Ed. 696; Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429; Grand Gulf, etc., R. Co. *v.* Marshall, 12 How. 165, 13 L. Ed. 938; Knights of Pythias *v.* Meyer, 198 U. S. 508, 49 L. Ed. 1146; Mead *v.* Portland, 200 U. S. 148, 50 L. Ed. 413; O'Conor *v.* Texas, 202 U. S. 501, 509, 51 L. Ed. 1120, reaffirmed in Garza *v.* Texas, 205 U. S. 536, 51 L. Ed. 920; Glenn *v.* Garth, 147 U. S. 360, 37 L. Ed. 203; Lloyd *v.* Matthews, 155 U. S. 222, 38 L. Ed. 128; Banholzer *v.* New York Life Ins. Co., 178 U. S. 402, 44 L. Ed. 1124; Johnson *v.* New York Life Ins. Co., 187 U. S. 491, 47 L. Ed. 273; Eastern Building, etc., Ass'n *v.* Williamson, 189 U. S. 122, 47 L. Ed. 735; St. Louis, etc., R. Co. *v.* Paul, 173 U. S. 404, 43 L. Ed. 746; Missouri, etc., R. Co. *v.* McCann, 174 U. S. 580, 43 L. Ed. 1083; Tullis *v.* Lake Erie, etc., R. Co., 175 U. S. 348, 44 L. Ed.

The supreme court of a state is the ultimate tribunal to determine the meaning

192; Smiley *v.* Kansas, 196 U. S. 447, 49 L. Ed. 546, reaffirmed in Rose *v.* Kansas, 203 U. S. 580, 51 L. Ed. 326; Thomas *v.* Kansas, 205 U. S. 535, 536, 51 L. Ed. 919; Marchant *v.* Pennsylvania R. Co., 153 U. S. 380, 385, 38 L. Ed. 751; Allen *v.* Smith, 173 U. S. 389, 43 L. Ed. 741; Gallup *v.* Schmidt, 183 U. S. 300, 305, 46 L. Ed. 207; Osborne *v.* Florida, 164 U. S. 650, 41 L. Ed. 586; Armour Packing Co. *v.* Lacy, 200 U. S. 226, 50 L. Ed. 451; American Steel & Wire Co. *v.* Speed, 192 U. S. 500, 523, 48 L. Ed. 538; Storti *v.* Massachusetts, 183 U. S. 138, 46 L. Ed. 120; Orr *v.* Gilman, 183 U. S. 278, 46 L. Ed. 196; Louisville, etc., R. Co. *v.* Kentucky, 183 U. S. 503, 46 L. Ed. 298; Robinson *v.* Belt, 187 U. S. 41, 46, 47 L. Ed. 65; Telluride, etc., Co. *v.* Rio Grande, etc., R. Co., 187 U. S. 569, 47 L. Ed. 307, reaffirmed in Dakota, etc., R. Co. *v.* Crouch, 203 U. S. 582, 51 L. Ed. 327; Iowa Life Ins. Co. *v.* Lewis, 187 U. S. 335, 355, 47 L. Ed. 204; Manley *v.* Park, 187 U. S. 547, 47 L. Ed. 296; Turner *v.* Wilkes County Commissioners, 173 U. S. 461, 43 L. Ed. 768; Brown *v.* New Jersey, 175 U. S. 172, 44 L. Ed. 119; Erb *v.* Morasch, 177 U. S. 584, 585, 44 L. Ed. 897; Mobile Transportation Co. *v.* Mobile, 187 U. S. 479, 491, 47 L. Ed. 266; Insurance Co. *v.* The Treasurer, 11 Wall. 204, 208, 20 L. Ed. 112; Powell *v.* Brunswick County, 150 U. S. 433, 439, 37 L. Ed. 1134; Gulf, etc., R. Co. *v.* Hewes, 183 U. S. 66, 46 L. Ed. 86; Downham *v.* Alexandria Council, 10 Wall. 173, 19 L. Ed. 929; Marshall *v.* Ladd, 131 U. S. appx. lxxxix, 19 L. Ed. 153; Provident Institution for Savings *v.* Jersey City, 113 U. S. 506, 514, 28 L. Ed. 1102; Spencer *v.* Merchant, 125 U. S. 345, 352, 31 L. Ed. 763; Worthy *v.* The Commissioners, 9 Wall. 611, 613, 19 L. Ed. 565; McBride *v.* Hoey, 11 Pet. 167, 9 L. Ed. 673; Watts *v.* Washington Territory 91 U. S. 580, 23 L. Ed. 328; Jackson *v.* Lamphire, 3 Pet. 280, 7 L. Ed. 679.

We are bound by the construction which the state court gives to its own constitution and statutes and to the law which may obtain in the state. Among many of the cases to that effect see Brown *v.* New Jersey, 175 U. S. 172, 44 L. Ed. 119; West *v.* Louisiana, 194 U. S. 258, 261, 48 L. Ed. 965.

"Upon well settled principles, matters of state practice alone, and the proper construction of that statute, rests with the state court, and cannot be reviewed by this court upon a writ of error to the state court." Loeber *v.* Schroeder, 149 U. S. 580, 37 L. Ed. 856.

Where it does not appear that there was any complaint that a state act was contrary to the constitution of the United States, and the only question presented to the court, and decided by them, was, whether the provisions of the state act were consistent with those of the new state constitution, this court has no jurisdiction. Medberry *v.* Ohio, 24 How. 413, 16 L. Ed. 739.

The jurisdiction of the supreme court in cases brought up from a state court does not extend to questions of fact or of local law, which are merely preliminary to, or the possible basis of a federal question. Telluride, etc., Co. *v.* Rio Grande, etc., R. Co., 175 U. S. 639, 44 L. Ed. 305.

The supreme court of the United States has no authority to revise the statutes of a state upon any grounds of practice, policy or consistency to its own constitution, as such questions are concluded by the decision of the legislative and judicial authorities of the state. Orr *v.* Gilman, 183 U. S. 278, 283, 46 L. Ed. 196.

It is the peculiar province and privilege of the state courts to construe their own statutes; and it is no part of the functions of the supreme court to review their decisions, except when specially authorized by statute. Commercial Bank *v.* Buckingham, 5 How. 317, 12 L. Ed. 169; Adams *v.* Preston, 22 How. 473, 16 L. Ed. 273; Congdon *v.* Goodman, 2 Black 574, 17 L. Ed. 257; Scott *v.* Jones, 5 How. 343, 12 L. Ed. 181; Smith *v.* Adsit, 16 Wall. 185, 21 L. Ed. 310; Klinger *v.* Missouri, 13 Wall. 257, 20 L. Ed. 635; Murray *v.* Gibson, 15 How. 421, 14 L. Ed. 755; Nichol *v.* Levy, 5 Wall. 433, 18 L. Ed. 596; Jackson *v.* Lamphire, 3 Pet. 280, 7 L. Ed. 679.

In the language of Mr. Justice Peckham: "We are bound by the decision of the supreme court of Kansas that the statute in question violated no provision of the constitution of that state, and that it was a valid statute so far as that instrument was concerned. This doctrine is familiar, and a few of the many cases upon the subject are cited in Smiley *v.* Kansas, 196 U. S. 447, 49 L. Ed. 546." Jack *v.* Kansas, 199 U. S. 372, 379, 50 L. Ed. 234.

Construction and not validity.—Where the validity of a state law is not drawn in question, but merely its construction, no federal question arises. Lloyd *v.* Matthews, 155 U. S. 222, 227, 38 L. Ed. 128.

In order to bring a case within the reviewing power of this court, as prescribed by the 25th section of the judiciary act, it is necessary that the record should show that the point, giving jurisdiction to this court, was raised and decided in the state court. Hence, where it appears from the record that the decision of the state court turned upon the construction and not the validity of a state law, and that the question of its validity was not

of its local statutes.[41] In other words, the decision of the highest court of a state, that an act of the state is not in conflict with a provision of its constitution, is conclusive upon this court.[42] A decision of a state court sustaining the validity of a state statute when tested by the provisions of the state constitution, whatever the similarity between the language of those provisions and that of the fourteenth amendment, cannot be regarded as having decided a federal question, if it appears from the record that it was not called upon to do so, and that its decision rested on another ground.[43]

raised, this court has no jurisdiction. Grand Gulf, etc., R. Co. *v.* Marshall, 12 How. 165, 13 L. Ed. 938, citing Planters' Bank *v.* Sharp, 6 How. 301, 12 L. Ed. 447; Baldwin *v.* Payne, 6 How. 301, 332, 12 L. Ed. 447; Armstrong *v.* The Treasurer, 16 Pet. 281, 285, 10 L. Ed. 965.

That the statutes of a state are not in conflict with its constitution is settled by the decision of its highest court, and a decision of that court to that effect is conclusive on the supreme court of the United States on writ of error to the state court. Merchants' Bank *v.* Pennsylvania, 167 U. S. 461, 42 L. Ed. 236; Backus *v.* Fort Street Union Depot Co., 169 U. S. 557, 566, 42 L. Ed. 853; Rasmussen *v.* Idaho, 181 U. S. 199, 200, 45 L. Ed. 820; Carstairs *v.* Cochran, 193 U. S. 10, 16, 48 L. Ed. 596.

The supreme court of the United States will follow the state court as to the state constitution, and assume that a law which that court has held valid is not repugnant to the state constitution. The question for the supreme court of the United States is whether, if the state constitution undertakes to authorize such a law, it encounters the constitution of the United States. Rippey *v.* Texas, 193 U. S. 504, 509, 48 L. Ed. 767, citing and approving Missouri *v.* Dockery, 191 U. S. 165, 171, 48 L. Ed. 133.

In an action of ejectment, defences of estoppel, license, payment of taxes, the unconstitutionality of a state statute, because the title of the act does not describe its subject; want of power in the state to convey its title to the city, and the statute of limitations, are all of a local nature and present no federal question. Mobile Transportation Co. *v.* Mobile, 187 U. S. 479, 490, 47 L. Ed. 266, reaffirmed in Transportation Co. *v.* Mobile, 199 U. S. 604, 50 L. Ed. 330.

Dismissal of writ of error.—Where a case is brought up to this court by a writ of error issued to the supreme court of a state, under the twenty-fifth section of the judiciary act, if it appears that the judgment of the state court only involved the construction of state statutes which both parties in the cause admitted to be valid, the writ of error will be dismissed on motion. Michigan Central R. Co. *v.* Michigan Southern R. Co., 19 How. 378, 15 L. Ed. 689.

41. Bachtel *v.* Wilson, 204 U. S. 36, 40, 51 L. Ed. 357.

A controversy in which no right is claimed under the constitution or laws of the United States, but which turns entirely upon the validity or interpretation of state laws and constitution is exclusively within the jurisdiction of the state court, and this court has no appellate power over its judgment. Congdon *v.* Goodman, 2 Black 574, 17 L. Ed. 257.

42. Gut *v.* Minnesota, 9 Wall. 35, 19 L. Ed. 573, citing Randall *v.* Brigham, 7 Wall. 523, 541, 19 L. Ed. 285; Provident Institution *v.* Massachusetts, 6 Wall. 611, 630, 18 L. Ed. 907; West River Bridge *v.* Dix, 6 How. 507, 12 L. Ed. 535; Bucher *v.* Cheshire R. Co., 125 U. S. 555, 31 L. Ed. 795; Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232, 33 L. Ed. 892; Lewis *v.* Monson, 151 U. S. 545, 38 L. Ed. 265; Adams Express Co. *v.* Ohio, 165 U. S. 194, 41 L. Ed. 683; Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 41 L. Ed. 1165; Merchants', etc., Bank *v.* Pennsylvania, 167 U. S. 461, 463, 42 L. Ed. 236; Schaefer *v.* Werling, 188 U. S. 516, 47 L. Ed. 570; People's National Bank *v.* Marye, 191 U. S. 272, 276, 48 L. Ed. 180.

The construction by the state court of a statute under which a court made an exclusive grant of a franchise within designated limits, upon conditions which the grantee performed, is not conclusive here upon the question whether a subsequent conflicting grant impairs the obligation of a contract. It is true that ordinarily a construction of a state court would be conclusive on us. One exception, however, exists to this rule, and that is when the state court "has been called upon to interpret the contracts of states, 'though they have been made in the forms of law,' or by the instrumentality of a state's authorized functionaries in conformity with state legislation." Jefferson Branch Bank *v.* Skelly, 1 Black 436, 17 L. Ed. 173; Wright *v.* Nagle, 101 U. S. 791, 793, 25 L. Ed. 921.

A claim by the plaintiff in error that the supreme court of the state erred in holding that a state law was repugnant to the state constitution, raises no federal question. Upon this question the decision of the state court is conclusive. Haire *v.* Rice, 204 U. S. 291, 51 L. Ed. 490.

43. Layton *v.* Missouri, 187 U. S. 356, 360, 47 L. Ed. 214, reaffirmed in St. Louis Expanded Metal, etc., Co. *v.* Standard Fireproofing Co., 195 U. S. 627, 49 L. Ed. 351; New York, etc., R. Co. *v.* Plymouth, 193 U. S. 668, 48 L. Ed. 839.

Mr. Justice Holmes states the rule as follows: Where a state statute, as interpreted by the state court, is not in contravention of the constitution of the United States, the supreme court of the United States will not interfere with the construction adopted by the state courts.[44] Nor is it material that the state court ascertains the meaning and scope of the statute, as well as its validity, by pursuing a different rule of construction from what we recognize. The power to determine the meaning of a statute carries with it the power to prescribe its extent and limitations as well as the method by which they shall be determined.[45]

Binding Force of State Statutes.—Whether certain statutes have or have not binding force, is for the state to determine, and that determination in itself involves no infraction of the constitution of the United States, and raises no federal question giving the courts of the United States jurisdiction.[46]

Construction of Statute by State Courts Accepted.—In determining whether a state statute violates the federal constitution, the construction put upon it by the state court is to be accepted by a federal court.[47]

This court does not exercise jurisdiction under § 709 of the Revised Statutes to review a determination of a state court as to the proper construction and sufficiency of the statutes of a state. This court has no more power than formerly to review, upon a writ of error to the state court, the determination of that court in regard to the particular construction to be given to the statutes of its own state.[48]

City Ordinances.—And these general rules apply equally to city ordinances.[49]

44. Minnesota Iron Co. *v.* Kline, 199 U. S. 593, 50 L. Ed. 322, reaffirmed in Stevenson Min. Co. *v.* Kibbe, 205 U. S. 537, 51 L. Ed. 920; Tampa Waterworks Co. *v.* Tampa, 199 U. S. 241, 50 L. Ed. 170; Soper *v.* Lawrence Bros. Co., 201 U. S. 359, 50 L. Ed. 788; New York Central R. *v.* Miller, 202 U. S. 584, 595, 50 L. Ed. 1155; Strickley *v.* Highland Bay Gold Min. Co., 200 U. S. 527, 50 L. Ed. 581; Borden *v.* Trespalacious Rice and Irrigation Co., 204 U. S. 667, 51 L. Ed. 671.

45. Smiley *v.* Kansas, 196 U. S. 447, 455, 49 L. Ed. 546, reaffirmed in Rose *v.* Kansas, 203 U. S. 580, 51 L. Ed. 326; Thomas *v.* Kansas, 205 U. S. 535, 536, 51 L. Ed. 919.

46. Luther *v.* Borden, 7 How. 1, 12 L. Ed. 581; In re Duncan, 139 U. S. 449, 35 L. Ed. 219; Taylor *v.* Beckham, 178 U. S. 548, 579, 44 L. Ed. 1187.

47. Cargill *v.* Minnesota, 180 U. S. 452, 453, 45 L. Ed. 619.

License of warehousemen.—The highest court of the state having decided that the requirement of a license for a warehouse by chapter 146, Gen. Law of 1895 Minn., was separable from other provisions, it is the duty of the federal court to accept that construction of the statute. Cargill *v.* Minnesota, 180 U. S. 452, 45 L. Ed. 619.

"The questions just stated are questions of local law, and in determining whether the statute violates any right secured by the federal constitution we must, in the particulars named, accept the interpretation put upon it by the state court. In Tullis *v.* Lake Erie R. Co., 175 U. S. 348, 353, 44 L. Ed. 192, the question was as to the constitutionality of a statute of Indiana relating to railroads and other corporations, except municipal corporations. The supreme court of that state held that the statute was capable of severance, and that its provisions as to railroads were not so connected in substance with the provisions relating to other corporations that their validity could not be separately determined. This court followed that view, declaring it to be an elementary rule that it should adopt 'the interpretation of a statute of a state affixed to it by the court of last resort thereof.' See, also, Missouri Pac. R. Co. *v.* Nebraska, 164 U. S. 403, 414, 41 L. Ed. 489; Chicago, etc., R. Co. *v.* Minnesota, 134 U. S. 418, 456, 33 L. Ed. 970; St. Louis, etc., R. Co. *v.* Paul, 173 U. S. 404, 408, 43 L. Ed. 746." Cargill Co. *v.* Minnesota, 180 U. S. 452, 466, 467, 45 L. Ed. 619.

48. Osborne *v.* Florida, 164 U. S. 650, 41 L. Ed. 586, distinguishing Horner *v.* United States, 143 U. S. 570, 36 L. Ed. 266; Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 37 L. Ed. 1041; on the ground that they both refer to the jurisdiction of this court under the 5th section of the act of March 3, 1891, upon appeals or writs of error taken direct from the circuit or district court of the United States to this court.

49. Construction of city ordinances.—The decision of a state court, on the construction of a municipal ordinance, where the charter prohibited the erection of cow stables and drains "within the prescribed limits," holding it to be equally possible to declare that those limits should be coincident with the limits of the city presents no federal question reviewable by this court. Fischer *v.* St. Louis, 194 U. S. 361, 48 L. Ed. 1018; Schefe *v.* St. Louis, 194 U. S. 373, 48 L. Ed. 1024.

The decision of a state supreme court

Whether a municipal ordinance is or is not valid, and the extent to which it is so, having regard to the state constitution and laws, is wholly a state and not a federal question, which the supreme court of the United States has no jurisdiction to review on writ of error to the state supreme court.[50]

Distinguished from Cases Brought from Federal Courts.—There is a vast difference in this regard between cases which come to this court from the United States circuit courts, and cases which come up by writ of error to the supreme court of a state. The former are clearly distinguishable, and cannot be relied upon as authority to this court to review the decisions of state courts depending upon an act of its own legislature and upon its conformity to the constitution of the state.[51]

bb. *Various Specific Applications of the General Rules.*—And these general rules have been applied to contests over state offices, dependent for their solution upon the construction or application of the state statutes and constitution,[52] to the construction of state statutes and constitutions on the subject of reading depositions to witnesses,[53] to the question whether the state court possessed power to grant a writ of prohibition under the state constitution and laws,[54] to the question as to what property is subject to be attached and sold under the constitution and statutes of the state,[55] to the decisions of state courts construing the state statutes with respect to corporations,[56] to questions depending upon the con-

that defendant was guilty of maintaining a dairy and cow stable without permission within the meaning of an ordinance of the municipality, involves no federal question reviewable by this court. Fischer *v.* St. Louis, 194 U. S. 361, 48 L. Ed. 1018; Schefe *v.* St. Louis, 194 U. S. 373, 48 L. Ed. 1024.

50. Lombard *v.* West Chicago, 181 U. S. 33, 43, 45 L. Ed. 731.

The supreme court of the United States will, on writ of error to the supreme court of a state, accept the conclusion of that court as to the existence of a municipal ordinance by virtue of the state law and constitution. Lombard *v.* West Chicago, 181 U. S. 33, 43, 45 L. Ed. 731.

51. Mobile Transportation Co. *v.* Mobile, 187 U. S. 479, 47 L. Ed. 266, reaffirmed in Transportation Co. *v.* Mobile, 199 U. S. 604, 624, 50 L. Ed. 330, distinguishing Illinois Central R. Co. *v.* Illinois, 146 U. S. 387, 36 L. Ed. 1018.

52. Various specific applications of the general rules.—A mere contest over a state office, dependent for its solution exclusively upon the application of the constitution of a state or upon a mere construction of a provision of a state law, involves no possible federal question. Taylor *v.* Beckham, 178 U. S. 548, 44 L. Ed. 1187; Elder *v.* Colorado, 204 U. S. 85, 89, 51 L. Ed. 381.

53. Reading depositions to witnesses.—Whether the state court erred in its construction of the state constitution and statutes and the common law on the subject of reading depositions of witnesses, is not a federal question, reviewable by this court on writ of error to a state court. West *v.* Louisiana, 194 U. S. 258, 261, 48 L. Ed. 965.

54. Prohibition to inferior court.—Whether, under the state constitution and laws, the supreme court of Missouri possessed the power to grant a writ of prohibition directed to one of the subordinate courts of that state, and what were the legal scope and effect of the writ when granted, were questions for that court to decide, and its judgment in those particulars is not subject to our revision. St. Louis, etc., R. Co. *v.* Merriam, 156 U. S. 478, 484, 39 L. Ed. 502.

55. Attachment—Property subject.—We must accept then as undeniable the ruling of the highest court of Kansas, that under the constitution and statutes of Kansas real estate situated in that state, the title to which was vested in a nonresident executor, to whom letters testamentary had been issued by a court of another jurisdiction, might be attached and sold, in an action of debt against the nonresident executor. The construction adopted by the supreme court of Kansas of the pertinent provisions of such constitution and laws, is binding upon this court as a decision upon a matter of purely local law, not presenting a federal question. Manley *v.* Park, 187 U. S. 547, 551, 47 L. Ed. 296.

56. The rulings in the highest state court which involve only questions of state law, such as the question whether the statutes of the state authorize the incorporation of a bridge company to build a bridge across a navigable river, whether the laws of the state confer the right of eminent domain on the corporation of another state, whether a foreign corporation can only exercise in another state such powers as are conferred upon it by the state of its creation, are concluded by the adjudication of the state court. Stone *v.* Southern Illinois, etc., Bridge Co., 206 U. S. 267, 51 L. Ed. 1057.

Where a state court construing a state

struction or application of the state laws with respect to taxation. As, for example, whether a state tax is in accordance with the state law,[57] to decisions of

statute and constitution, decides that a corporation has no existence in the state and can therefore acquire no rights as a corporation, the decision is not reviewable as involving a federal question as it only expresses the meaning and effect of local statutes. Telluride, etc., Co. *v.* Rio Grande, etc., R. Co., 187 U. S. 569, 47 L. Ed. 307, reaffirmed in Dakota, etc., R. Co. *v.* Crouch, 203 U. S. 582, 51 L. Ed. 327.

A corporation may be formed in any manner that a state sees fit to adopt; and when the highest court of a state decides that, by certain legislation, a corporation has been created, such decision concludes not only the courts of the state, but also those of the United States. It is a matter over which we have no review, and in respect to which the decision of the state court is final. It is a matter of a purely local nature. Hancock *v.* Louisville, etc., R. Co., 145 U. S. 409, 415, 36 L. Ed. 755.

Laws regulating building and loan associations.—The construction of the laws of New York regarding building and loan associations, by the state of South Carolina, involves no federal question reviewable by this court. Eastern Building, etc., Ass'n *v.* Williamson, 189 U. S. 122, 47 L. Ed. 735.

Carriers.—A state railroad corporation voluntarily formed cannot exempt itself from the control reserved to itself by the state by its constitution, and if not protected by a valid contract, cannot successfully invoke the interposition of the federal courts, in respect to the long and short haul clause in the state constitution, on the ground simply that the railroad is property. Louisville, etc., R. Co. *v.* Kentucky, 183 U. S. 503, 513, 46 L. Ed. 298.

This court must accept as final the decision of the highest court of a state holding that a certain statute determining the liability of a common carrier, is applicable to shipments made beyond the state. Central of Georgia R. Co. *v.* Murphey, 196 U. S. 194, 49 L. Ed. 444.

Whether an order of a state corporation commission was arbitrary and unreasonable, because beyond the scope of the authority delegated to the corporation commission by the state law, involves no federal question and is concluded by the judgment entered below. Atlantic Coast Line R. Co. *v.* North Carolina Corporation Commission, 206 U. S. 1, 51 L. Ed. 933.

Whether a given corporation comes within the law of the state, and is entitled to assert its power, presents only a question of state law. Stone *v.* Southern Illinois, etc., Bridge Co., 206 U. S. 267, 273, 51 L. Ed. 1057.

57. Whether a state tax is in accordance with the state law is a question on which the decision of the highest court of the state is conclusive. Pullman's Palace Car Co. *v.* Pennsylvania, 141 U. S. 21, 35 L. Ed. 613.

The question whether a state statute regarding taxation violates the state constitution in not stating distinctly the tax and the object to which it is to be applied, is a purely local question, and hence is not reviewable by us on writ of error to a state court. Hodge *v.* Muscatine County, 196 U. S. 276, 282, 49 L. Ed. 477.

What the constitution of the state of Ohio requires, or what the statutes of the state require as to taxation, must be left to be decided by the supreme court of the state, and whether that court has decided, logically or illogically, that a tax authorized by the laws of the United States on the shares of the company satisfies the constitution of the state as a tax on the corporation, is not open to our review or objection. The manner of taxation being legal under the statutes of the United States, its effect cannot be complained of in the federal tribunals. Cleveland Trust Co. *v.* Lander, 184 U. S. 111, 115, 46 L. Ed. 456.

Taxable interest.—The question whether under the state statute, a railroad has any taxable interest in lands, under the act of congress authorizing states to tax railroad land grants for which no patent is issued, and upon which the costs of surveying have not been paid, is not a federal question, but a question as to the proper construction of words used in the state statute. "It does explicitly appear that authority was given by congress to the states to tax these lands; but whether, under the state laws, the railroad had any taxable interest therein, or whether the decision of the court that it had no such interest in the unsurveyed lands is consistent with its opinion that it had such interest in the surveyed lands, is immaterial, so long as no federal right was denied to it." Central Pacific R. Co. *v.* Nevada, 162 U. S. 512, 523, 40 L. Ed. 1057.

Exemption from taxation.—A petitioner who admits that his own tax is correct, cannot have a writ of error from the United States supreme court to review a judgment by the supreme court of the state construing the statutes thereof as exempting express companies from a tax and substituting another, on the ground that he will be deprived of property without due process of law, and denied the equal protection of laws under the 14th amendment of the constitution of the United States. Missouri *v.* Dockery, 191 U. S. 165, 48 L. Ed. 133.

The question whether lands acquired from the United States are taxable within a year after the title passed out of

state courts depending upon the construction of state statutes relating to assessments for street improvements,[58] to a plea setting up an immunity under a state law,[59] to decisions of state courts construing the state registration laws,[60] to the

the United States is not a federal question. It relates only to the construction of a state statute which is in no way in conflict with the constitution or any law of the United States. The judgment of the state court on that question is final, and not reviewable here. Stryker *v.* Goodnow, 123 U. S. 527, 31 L. Ed. 194.

Repugnancy between tax acts and state constitution.—The laws of Louisiana impose a tax of ten per cent. upon what an heir, legatee, or donee may receive upon the succession of an estate of a person deceased, where such heir, legatee, or donee is not domiciliated in Louisiana, and is not a citizen of any state or territory of the Union. They also provide that the executor, etc., shall pay the tax. Where the state court decided that this tax was properly imposed upon the succession accruing to persons who were born in France, had always lived in France, without ever having been in Louisiana, this is not such a decision as can be reviewed by this court under the 25th section of the judiciary act. No question was made in the court below that these laws conflicted with any provision of the constitution of the United States. Poydras *v.* Treasurer of Louisiana, 18 How. 192, 15 L. Ed. 350.

Order of board of equalization.—Where the highest court of a state decided that the order of the board of equalization was legal under the constitution and statutes of the state, the decision, constituting as it does an interpretation of the constitution and laws of the state, is not open to dispute in the supreme court of the United States on writ of error to the state court. Western Union Tel. Co. *v.* Gottlieb, 190 U. S. 412, 425, 47 L. Ed. 1116.

Privilege taxes.—Where the levy of a merchant's tax violates no federal right, the mere determination of who are merchants within the state law involves no federal question. The construction of the state law is conclusive upon this court, where it embraces all persons doing a like business with the plaintiff in error, because in such case there is no discrimination. American Steel, etc., Co. *v.* Speed, 192 U. S. 501, 48 L. Ed. 538.

The construction placed upon the statute of North Carolina imposing a tax on every meat packing house doing business in this state, by the highest court of that state, that the tax was exacted from a foreign corporation doing both an interstate and domestic business only by virtue of the latter, is not subject to review in this court. Armour Packing Co. *v.* Lacy, 200 U. S. 226, 50 L. Ed. 451.

58. Special or local assessments.—The construction placed by the supreme court of a state upon its statutes relating to street assessments is, as a general rule, binding upon federal courts. Forsyth *v.* Hammond, 166 U. S. 506, 518, 41 L. Ed. 1095; Schaefer *v.* Werling, 188 U. S. 516, 518, 47 L. Ed. 570; Waggoner *v.* Flack, 188 U. S. 595, 600, 47 L. Ed. 609.

In Schaefer *v.* Werling, 188 U. S. 516, 47 L. Ed. 570, the principle was reiterated that the construction placed by the highest court of a state upon a statute providing for paving the streets and distributing the assessment therefor was conclusive upon this court. Hibben *v.* Smith, 191 U. S. 310, 321, 48 L. Ed. 195. See, also, Merchants', etc., Bank *v.* Pennsylvania, 167 U. S. 461, 42 L. Ed. 236.

The supreme court of a state held that "it was competent on a new assessment to determine the questions of benefit from the proof, even though in so doing a different result was reached from that which had been arrived at when the former assessment which had been set aside was made." On writ of error to the supreme court of the United States, it was held, that the state court had decided a local and not a federal question. Lombard *v.* West Chicago, 181 U. S. 33, 44, 45 L. Ed. 731.

This court has no power to correct the error of the state court in respect to the details of assessments made by municipal corporations upon private property to defray the expenses of street improvements. Upon all such questions the action of the state court is final. Corry *v.* Campbell, 154 U. S. appx., 629, 24 L. Ed. 926.

59. A plea made in a state court which sets up a defense under the state law or state constitution, presents no matter of which this court has jurisdiction, and however much the party may be aggrieved by the decision of the state court, if he sets up in his plea an immunity under a state law and not under the constitution, laws or treaties of the United States, no federal question is presented. Mitchell *v.* Clark, 110 U. S. 633, 28 L. Ed. 279.

60. Construction of registration laws.—The state supreme court of Missouri having decided that the provision of the state constitution respecting the enactment of registration laws does not limit the power of the general assembly to create more than one class composed of cities having a population in excess of one hundred thousand inhabitants, and hence that the Nesbit registration law was not repugnant to the state constitution, this conclusion must be accepted by this court. Backus *v.* Fort Street Union Depot Co., 169 U. S. 557, 566, 42 L. Ed. 853; Merchants', etc., Bank *v.* Pennsylvania, 167 U. S. 461, 462, 42 L. Ed. 236; Mason *v.* Missouri, 179 U. S. 328, 334, 45 L. Ed. 214.

construction of state laws enacted to dispose of the swamp and overflowed lands granted to the state by federal government,[61] to questions arising under the administration of the criminal laws of the state,[62] to decisions construing the constitution and laws of a state in regard to the selection of grand and petit jurors,[63] to a question as to whether a judgment binding the ward's estate binds also the sureties on the guardian's bond,[64] to the construction of state statutes concerning pilotage,[65] to the powers of a mayor under a city charter,[66] to the question whether a defendant in a suit for the foreclosure of a mortgage has fully complied with the requirements of the state statute in order to make a complete tender,[67] to the construction of state statutes with respect to divorce and alimony,[68]

61. Grants of land by state to county.—On the 22d of June, 1852, an act of the general assembly of the state of Illinois was approved, entitled an act to dispose of the swamp and overflowed lands, and to pay the expenses of selecting and surveying the same, which provided that all such lands granted to the state by the act of congress were thereby granted to the county. Upon a writ of error to the state court, it was held, that where the judgment of the court was upon the construction of the terms and conditions of the grant of the state to the county by this act, and the validity of this enactment was not drawn in question, there was no decision against the claim of title under the United States, but simply that the county did not obtain title under the grant from the state. Cook County *v.* Calumet, etc., Canal Co., 138 U. S. 635, 34 L. Ed. 1110.

62. Administration of criminal laws of state.—Where it appears by the statement of the plaintiffs in error in their petition for a reargument that no federal question was raised or considered in the circuit court or in the superior court of a state, in respect to the admission of the evidence, so that there was no basis on which to claim error in this respect in those courts, and that the supreme court did not, in passing upon the contention, deal with it as a federal question, but as a mere question arising under the administration of the criminal law of the state, there is, therefore, nothing in its action for the supreme court of the United States to review. Mallett *v.* North Carolina, 181 U. S. 589, 601, 45 L. Ed. 1015.

63. Selection of jury.—Where the constitution and laws of a state in regard to jury selection, as construed by the court of the state, are consistent with the fourteenth amendment, this court can go no further, and the decision of the state court as to whether the local law has been complied with will not be revised. Rawlins *v.* Georgia, 201 U. S. 638, 50 L. Ed. 899.

Selection of grand jury.—The refusal by a state court to quash an indictment on the ground that a state statute, under the provisions of which the grand jury was drawn, was unconstitutional, in that it was alleged to be a local or special law, and not enacted according to the constitutional requirement of previous public notice, presents no federal question. Murray *v.* Louisiana, 163 U. S. 101, 41 L. Ed. 87.

64. Guardian and ward.—A suit by a guardian to restrain the collection of taxes levied on the estate of his ward being finally settled in favor of the state, and the only federal question presented in the case determined in favor of the right of the state to enforce the tax upon the property of the ward; the supreme court of the United States will not consider the purely local question as to whether a judgment binding the estate binds also the sureties on the guardian's bond. Baldwin *v.* Maryland, 179 U. S. 220, 45 L. Ed. 160, citing and approving Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429; Myrick *v.* Thompson, 99 U. S. 291, 297, 25 L. Ed. 324, and Swope *v.* Leffingwell, 105 U. S. 3, 26 L. Ed. 939.

65. Pilotage laws.—Whether certain clauses in a state statute concerning pilotage, illegal because in contravention of § 4237 of the Revised Statutes prohibiting discrimination with respect to pilotage by states in favor of domestic over foreign vessels, can be eliminated without destroying the other provisions of the statute, is a state and not a federal question. Olsen *v.* Smith, 195 U. S. 332, 342, 49 L. Ed. 224.

66. Power of mayor under city charter.—Whether the provisions of a city charter enabled the council to delegate any power to the mayor is not within our competency to decide. That is necessarily a state question, and we are confined to a consideration of whether the power conferred does or does not violate the constitution of the United States. Wilson *v.* Eureka City, 173 U. S. 32, 35, 43 L. Ed. 603.

67. Sufficiency of tender.—The question whether a defendant in a suit for the foreclosure of a mortgage has fully complied with the requirements of the state statute in order to make a complete tender, is not a federal question. Hooker *v.* Burr, 194 U. S. 415, 48 L. Ed. 1046.

68. Alimony and divorce.—The action of the courts of a state with respect to the provisions of a decree in another state for the payment of alimony in the future, for bond, sequestration, receiver and injunction, which being in the nature of ex-

to the question whether there is a conflict between the state statutes authorizing the condemnation of property,[69] as to the power of a municipality under a state statute to change the grade of streets,[70] to the decisions of a state court depending upon the construction of state banking laws,[71] to a decision of a state court upon the question whether the governor of the state was authorized by the state statute to sell the state bonds,[72] to a decision of a state court as to whether a municipality within the state has the power, under the constitution and laws of the state, to make certain contracts,[73] and to many other decisions of state courts

ecution, and not of judgment, can have no extra territorial operation, and depend on the local statutes and practice of the state, involves no federal question which may be reviewed on writ of error to a state court from the supreme court of the United States. Lynde *v.* Lynde, 181 U. S. 183, 45 L. Ed. 810, reaffirmed in Jones *v.* Vane, 200 U. S. 614, 50 L. Ed. 621.

69. Eminent domain.—A decision of the state court is conclusive upon the question whether there is a conflict between the statutes of the state authorizing condemnation of property or proceedings had there under, and the constitution of the state. Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 41 L. Ed. 1165, citing West River Bridge Co. *v.* Dix, 6 How. 507, 12 L. Ed. 534; Bucher *v.* Cheshire R. Co., 125 U. S. 555, 31 L. Ed. 795; Adams Express Co. *v.* Ohio, 165 U. S. 194, 41 L. Ed. 683.

70. Change of grade of streets by city.—The construction of a state statute, where no federal question is involved by the highest court of a state, as to the power thereunder, of authorizing a municipality to change the grade of streets, must be accepted as conclusive by this court. Mead *v.* Portland, 200 U. S. 148, 50 L. Ed. 413.

The interpretation by the supreme court of Oregon, of the local act of October 18th 1878, in regard to the change of the grade of Morrison street in Portland involves no federal question, nor does it become such by the circumstances of the case. Mead *v.* Portland, 200 U. S. 148, 50 L. Ed. 413.

71. Banking laws.—Where an assignment by a bank to trustees was adjudged by the state court of Louisiana to be void under the act of the state court of Mississippi, of 1840, providing that it should not be lawful for any bank in Mississippi to transfer by endorsement or otherwise any note, bill receivable or other debt, and that this act is a violation of the charter granted to the bank and impairs the obligation of the contract which the charter created between the state and corporation, it was held that in order to bring the case within the reviewing power of this court as prescribed by the 25th § of the judiciary act, the record must show that the decision of the state court turned upon the constitutionality or validity of this act of Mississippi, and was decided. If it appears from the record that the decision of the state court turned merely upon the construction of a state law, and that the question of its validity was not raised, this court has no jurisdiction. Grand Gulf, etc., R. Co. *v.* Marshall, 12 How. 165, 13 L. Ed. 938, citing Planter's Bank *v.* Sharp, 6 How. 301, 12 L. Ed. 447; Baldwin *v.* Payne, 6 How. 301, 332, 12 L. Ed. 447; Armstrong *v.* Athens Co., 16 Pet. 281, 10 L. Ed. 965.

Where the legislature of Ohio, in the year 1824, passed a general law relating to banks, and afterwards, in 1829, chartered another bank; and the question before the state court was, whether or not some of the provisions of the act of 1824 applied to the bank subsequently chartered, the question was one of construction of the state statutes, and not of their validity. This court has no jurisdiction over such a case. Commercial Bank *v.* Buckingham, 5 How. 317, 12 L. Ed. 169.

In 1816, the legislature of Ohio passed an "Act to prohibit the issuing and circulation of unauthorized bank paper," and in 1839, an act amendatory thereof; and the question was, whether or not a canal company, incorporated in 1837, was subject to these acts. In deciding that it was, the supreme court of Ohio only gave a construction to an act of Ohio, which neither of itself, nor by its application, involved in any way a repugnancy to the constitution of the United States, by impairing the obligation of a contract. Lawler *v.* Walker, 14 How. 149, 14 L. Ed. 364.

72. Power of governor to sell state bonds.—A judgment of the state court upon the question whether bonds of the state were sold by the governor of the state within the authority vested in him by the statute of the state under which they were issued, involves no federal question. "There is, in the consideration and determination of this question, no resort to any federal law; it is purely a question of the construction of a state statute and of the power which was conferred by it upon her agents—nothing more nor less. The govenor, acting in their disposal, was limited by the language of the statute. He could sell the bonds or exchange them for treasury notes, state or confederate; he could not dispose of them in any other way." Sage *v.* Louisiana Board of Liquidation, 144 U. S. 647, 650, 651, 36 L. Ed. 577.

73. Ultra vires contracts by municipalities.—No federal question is involved

depending upon the construction of the state statutes and constitution, instances of which will be found in the notes.[74]

when the supreme court of a state decides that a municipal corporation within the state had not power, under the constitution and laws of the state, to make the contract sued on. Missouri *v.* Harris, 144 U. S. 210, 36 L. Ed. 409, citing Railroad *v.* Rock, 4 Wall. 177, 181, 18 L. Ed. 381; Lehigh Water Co. *v.* Easton, 121 U. S. 388, 30 L. Ed. 1059; New Orleans, etc., Co. *v.* Louisiana Sugar Refin. Co., 125 U. S. 18, 30, 31 L. Ed. 607; and St. Paul R. Co. *v.* Todd County, 142 U. S. 282, 35 L. Ed. 1014.

74. Extent of powers of trustee.—In the state of Mississippi, a judgment of forfeiture was rendered against the Commercial Bank of Natchez, and a trustee appointed to take charge of all promissory notes in possession of the bank. The trustee brought an action upon one of these promissory notes. The defendant pleaded that the plaintiff, as trustee, had collected and received of the debts, effects, and property of the bank, an amount of money sufficient to pay the debts of the bank, and all costs, charges, and expenses incident to the performance of the trust. To this plea the plaintiff demurred. The action was brought in a state court, and the highest court of the state overruled the demurrer, and gave judgment for the defendant. This court has no jurisdiction under the twenty-fifth section of the judiciary act to review this decision. The question was merely one of construction of a statute of the state, as to the extent of the powers of the trustee under the statute. Robertson *v.* Coulter, 16 How. 106, 14 L. Ed. 864.

Forfeiture of corporate charter.—A writ of error will not lie from this court to a state court, to reverse a decree of the state court decreeing that a charter of a turnpike company be forfeited, and annulled and vacated under a state statute, and that the company be perpetually enjoined from exercising any of the powers, franchises, rights and privileges granted by the charter. This is a question of state law alone. Nonconnah Turnpike Co. *v.* Tennessee, 131 U. S. appx. clviii, 24 L. Ed. 368.

State insolvent laws.—In 1839 a treaty was made between the United States and Mexico, providing for the "adjustment of claims of citizens of the United States on the Mexican Republic." Under this treaty a sum of money was awarded to be paid to the members of the Baltimore Mexican Company, who had subscribed in money to fit out an expedition against Mexico, under General Mina, in 1816. See the case of Gill *v.* Oliver's Executors, 11 Howard 529. The proceeds of one of the shares of this company were claimed by two parties; one as being the second permanent trustee of the insolvent owner of the share, and the other as being the assignee of the first permanent trustee. The court of appeals of Maryland decided that the plaintiff, viz; of the second permanent trustee, did not take the claim under the insolvent laws of Maryland. This decision is not reviewable by this court, under the 25th section of the judiciary act. Williams *v.* Oliver, 12 How. 111, 13 L. Ed. 915, reaffirmed at p. 921, citing Gill *v.* Oliver, 11 How. 529, 13 L. Ed. 799.

Whether a deed is fraudulent under a state statute against fraudulent conveyances is not a federal question but one dependent entirely upon local laws. Cramer *v.* Wilson, 195 U. S. 408, 416, 49 L. Ed. 256.

Conformity of ordinance to constitution.—In error to a state court, this court cannot pass upon the question of the conformity of a municipal ordinance with the requirements of the constitution of the state. Barbier *v.* Connolly, 113 U. S. 27, 28 L. Ed. 923.

State statute regulating jurisdictional amount of its courts.—Where the state court dismissed the case upon the ground that the matters involved were purely pecuniary and that the amount in controversy in each case was less than sufficient to give the court jurisdiction under the constitution of the state, a writ of error from this court to the state court must be dismissed. Callan *v.* Bransford, 139 U. S. 197, 35 L. Ed. 144.

Construction of territorial law.—The plaintiff and the defendant in an action of ejectment in a state court in Colorado both claimed title under a valid entry of the original site of the city of Denver, made by the probate judge under the town site act of May 23, 1844, 5 Stat. 657, c. 17, as extended to Arapahoe County in Colorado by the act of May 28, 1864, 13 Stat. 94, c. 99. The deed under which the defendant claims was executed by the probate judge and delivered several years before that executed and delivered by his successor to the plaintiff. The elder deed was assailed as defective by reason of failure in the performance by the grantee of some of the requirements of a territorial statute, prescribing rules for the execution of the trust arising under the act of congress. The supreme court of the state held that that deed, being regular on its face, and purporting to have been executed in pursuance of authority, was not open to attack in a collateral proceeding for defects or omissions in the initiatory proceedings. Held, that this decision proceeded upon the proper construction of a territorial law, without regard to any right, title or privilege of the plaintiff under an act of congress, and that the

cc. *Enactment of State Statutes.*—The question whether a state statute was passed in conformity with the constitution of the state is a question for the determination of the state court, and its judgment is final.[75]

dd. *Construction of Objection That State Statute Is "Unconstitutional and Void."*—We have no jurisdiction on a writ of error to a state court to declare a state law void on account of its collision with a state constitution, and it was

writ of error must be dismissed for want of jurisdiction. Chever *v.* Horner, 142 U. S. 122, 35 L. Ed. 959.

Statute of limitations.—The question as to what time the cause of action brought by a corporation against a subscriber for shares accrues, within the meaning of the statute of limitations of the state, is not a federal question, but a local question, upon which the judgment of the highest court of the state cannot be reviewed by this court. Great Western Telegraph Co. *v.* Purdy, 162 U. S. 329, 40 L. Ed. 986.

"Carothers *v.* Mayer, 164 U. S. 325, 41 L. Ed. 453, is worthy of notice, for in that case, although not under precisely similar circumstances, it was held that a question arising under the statute of limitations as against a title asserted under the federal law presented no federal question, and so also as to equitable rights asserted as against an original right under the laws of congress. See, also, The Pittsburgh, etc., R. Co. *v.* Cleveland Min. Co., 178 U. S. 270, 44 L. Ed. 1065." Moran *v.* Horsky, 178 U. S. 205, 214, 44 L. Ed. 1038.

Statute of limitations.—Where suit was commenced, Nov. 16, 1868, for rent claimed to be due up to Aug. 8, 1865, and where, throughout the whole intervening time, the district within which the cause of action, if any arose, was under the control of the federal authorities, and the defendant could not be served there with process. Held, "It is quite clear that it was competent for the supreme court of the state to construe and apply the statute of limitations enacted by the state legislature, and that their decision in that regard is not subject to re-examination here under a writ of error to a state court." Harrison *v.* Myer, 92 U. S. 111, 23 L. Ed. 606.

A case brought here as within the 25th section of the judiciary act will be dismissed, where neither the record nor the opinion of the supreme court show any question before that court, except one relating to the interruption of a "prescription" (statute of limitations) set up as a defense, and the opinion showing that this question was decided exclusively upon the principles of the jurisprudence of the state. Marqueze *v.* Bloom, 16 Wall. 351, 21 L. Ed. 280.

The administration of the law by the officers or the courts of the state involves no questions of which we can take jurisdiction. The law being valid, the courts of the state have exclusive jurisdiction, appellate or otherwise, of all cases brought before them involving proceedings for its enforcement. Southwestern R. Co. *v.* Wright, 116 U. S. 231, 237, 29 L. Ed. 626.

Power of city to lease public utilities.—Where by the laws of the state the board of public works were authorized to sell or lease, for hydraulic purposes, surplus water in the canals of the state not required for the purposes of navigation, the question whether the city has acted in excess of the grant, and violated the provisions of the statute, so as to render itself liable for damages on that account, is for the state court to determine, and its decision on that question is not reviewable here. Fox *v.* Cincinnati, 104 U. S. 783, 26 L. Ed. 928.

75. **Enactment of state statutes.**—Smith *v.* Jennings, 206 U. S. 276, 51 L. Ed. 1061, citing Burt *v.* Smith, 203 U. S. 129, 135, 51 L. Ed. 121; Haire *v.* Rice, 204 U. S. 291, 51 L. Ed. 490.

Whether statutes of a legislature of a state have been duly enacted in accordance with the requirements of the constitution of such state, is not a federal question, and the decision of state courts as to what are the laws of the state is binding upon the courts of the United States. South Ottawa *v.* Perkins, 94 U. S. 260, 268, 24 L. Ed. 154; Post *v.* Supervisors, 105 U. S. 667, 26 L. Ed. 1204; Norton *v.* Shelby County, 118 U. S. 425, 440, 30 L. Ed. 178; Railroad Co. *v.* Georgia, 98 U. S. 359, 366, 25 L. Ed. 185; Baldwin *v.* Kansas, 129 U. S. 52, 57, 32 L. Ed. 640; Leeper *v.* Texas, 139 U. S. 462, 467, 35 L. Ed. 225, affirmed in Davis *v.* Texas, 139 U. S. 651, 652, 35 L. Ed. 300.

It is the duty of the federal court to follow the rulings of the highest court of the state on the question whether a particular enactment found in the printed statutes had been passed in such a manner as to become, under its constitution, a law of the state. Wilkes County *v.* Coler, 180 U. S. 506, 524, 45 L. Ed. 642; citing and approving South Ottawa *v.* Perkins, 94 U. S. 260, 267, 24 L. Ed. 154; Post *v.* Supervisors, 105 U. S. 667, 26 L. Ed. 1204, and distinguishing Field *v.* Clark, 143 U. S. 679, 36 L. Ed. 294.

Whether a different principle would apply in cases where rights had accrued under a statute previously adjudged by the state court to have been passed as to become a law, was not decided. Wilkes County *v.* Coler, 180 U. S. 506, 524, 45 L. Ed. 642.

long ago held, that where it was objected in the state courts that an act of the state was "unconstitutional and void," the objection was properly construed in those courts as raising the question whether the state legislature had the power under the state constitution to pass the act and not as having reference to any repugnance to the constitution of the United States.[76]

76. Construction of objection that state statute is "unconstitutional and void."—Porter *v.* Foley, 24 How. 415, 16 L. Ed. 740; Kipley *v.* Illinois, 170 U. S. 182, 186, 42 L. Ed. 998. Miller *v.* Cornwall R. Co., 168 U. S. 131, 134, 42 L. Ed. 409, reaffirmed in Charleston, etc., Bridge Co. *v.* West Virginia, 168 U. S. 704, 42 L. Ed. 1212; Kipley *v.* Illinois, 170 U. S. 182, 187, 42 L. Ed. 998.

Where it is merely alleged that the state law is invalid and unconstitutional, but it is not alleged that the law is repugnant to any particular provision of the constitution of the United States, nor that the court of original jurisdiction rendered any decision upon that subject, it is not sufficient to show jurisdiction in the supreme court under § 709 of the Revised Statutes. The reason for this rule is that a mere assignment that the law is invalid and unconstitutional is satisfied if held to refer to the constitution of the state, in which event the question raised is not one cognizable here under a writ of error to a state court. Messenger *v.* Mason, 10 Wall. 507, 509, 19 L. Ed. 1028; Bridge Proprietors *v.* Hoboken, etc., Co., 1 Wall. 116, 17 L. Ed. 571; Furman *v.* Nichol, 8 Wall. 44, 19 L. Ed. 370; Maxwell *v.* Newbold, 18 How. 511, 516, 15 L. Ed. 506; Farney *v.* Towle, 1 Black 350, 351, 17 L. Ed. 216; Hoyt *v.* Sheldon, 1 Black 521; Railroad *v.* Rock, 4 Wall. 177, 180, 18 L. Ed. 381; Edwards *v.* Elliott, 21 Wall. 532, 22 L. Ed. 487.

In a writ of error to a state court, something more must be set forth, to raise the federal question, than the mere allegation that the law is invalid and unconstitutional, as such an assignment is satisfied if held to refer to the constitution of the state, in which event the question raised is not cognizable here under a writ of error to a state court. Therefore, complaint made that the subordinate court improperly decided that the lien law of the state is valid and constitutional, but where it is not alleged that the law is repugnant to any particular provision of the constitution of the United States, nor that the court of original jurisdiction rendered any decision upon that subject, the writ of error will be dismissed for want of jurisdiction. Edwards *v.* Elliott, 21 Wall. 532, 22 L. Ed. 487.

Where it appears from the proceedings on the trial, and the grounds assigned for the motion for a new trial, that the unconstitutionality of the act was relied on in defense, but the record does not show that it was contended in the trial court that the act was in contravention of the constitution of the United States, the supreme court cannot review the decision as it is settled that the objection in the state courts that an act of the state is "unconstitutional and void," relates only to the power of the state legislature under the state constitution. Miller *v.* Cornwall R. Co., 168 U. S. 131, 42 L. Ed. 409; Jacobi *v.* Alabama, 187 U. S. 133, 47 L. Ed. 106; Layton *v.* Missouri, 187 U. S. 356, 358, 47 L. Ed. 214, reaffirmed in St. Louis Expanded Metal, etc., Co. *v.* Standard Fireproofing Co., 195 U. S. 627, 49 L. Ed. 351; New York, etc., R. Co. *v.* Plymouth, 193 U. S. 668, 48 L. Ed. 839.

Where an act of assembly of the state of Kentucky was objected to in the state court because said act and supplement were unconstitutional and void, the court properly considered the question as relating to the power of the legislature to pass the act under the constitution of the state, and not under the constitution of the United States. There is, therefore, no ground for the exercise of jurisdiction by this court under the 25th section of the judiciary act. Porter *v.* Foley, 24 How. 415, 16 L. Ed. 740.

The averment in an answer, that the statute of Illinois is unconstitutional and void, must be taken as intended to apply to the constitution of that state, and not to the constitution of the United States. Miller *v.* Cornwall R. Co., 168 U. S. 131, 134, 42 L. Ed. 409; Kipley *v.* Illinois, 170 U. S. 182, 187, 42 L. Ed. 998, reaffirmed in Harkins *v.* Ashville, 180 U. S. 635, 45 L. Ed. 709; Ross *v.* King, 172 U. S. 641; Jones *v.* Vane, 200 U. S. 614, 50 L. Ed. 621.

Where no federal right is specially set up or claimed at the proper time or in the proper way, nor is any such right in issue and necessarily determined, but the judgment rests on nonfederal grounds entirely sufficient to support it, and a motion for a new trial pursues a common formula, and one of the grounds assigned is that the judgment is "contrary to law," this cannot be construed as having a single meaning, and distinctly referring to the denial of a right claimed under an act of congress, consistently with the requirements of § 709 of the Revised Statutes. Capital Nat. Bank *v.* First Nat. Bank, 172 U. S. 425, 43 L. Ed. 502.

Right of confrontation.—Where, in a trial of a criminal case in a state court, the former testimony of an absent witness for the state is objected to by the defendant upon the ground that he has the right to be confronted by the wit-

ee. *Qualifications of General Rules.*—But where a question involved in the construction of state statutes practically affects those remedies of creditors which are protected by the constitution, this court will exercise its own judgment on the meaning of the statutes, irrespective of the decisions of the state courts, and if it deems these decisions wrong, will not follow them; and this whether the case come here from the circuit court in ordinary course, or from the supreme court of the state under the 25th section of the judiciary act.[77]

(63) *Where Decision of State Court Depends upon Questions of State Practice and Procedure.*—**In General.**—So far as respects any matter of procedure, the decision of the state court is conclusive.[78]

ness against him, but no reference is made in the objection to the constitution of the United States, and the constitution of the state in which the trial takes place, also provides that the accused shall be confronted by the witness against him, it will be deemed that the objection was based upon the state rather than the federal constitution, and the supreme court of the United States will not review the judgment of the state court. Jacobi *v.* Alabama, 187 U. S. 133, 47 L. Ed. 106, citing Spies *v.* Illinois, 123 U. S. 131, 31 L. Ed. 80; Brooks *v.* Missouri, 124 U. S. 394, 31 L. Ed. 454; Baldwin *v.* Kansas, 129 U. S. 52, 32 L. Ed. 640.

77. Qualifications of general rules.—Butz *v.* City of Muscatine, 8 Wall. 575, 19 L. Ed. 490, followed in United States Army *v.* Burlington, 154 U. S. 568, 19 L. Ed. 495.

78. Where decision of state court depends upon questions of state practice and procedure.—Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 41 L. Ed. 1165, citing West River Bridge Co. *v.* Dix, 6 How. 507, 12 L. Ed. 535; Bucher *v.* Cheshire R. Co., 125 U. S. 555, 31 L. Ed. 795; Adams Express Co. *v.* Ohio, 165 U. S. 194, 41 L. Ed. 683; Johnson *v.* Drew, 171 U. S. 93, 98, 43 L. Ed. 88.

The decision of a state court holding that no cause of action is set forth in the pleadings, and that it is against the public policy of the state to permit an action for a certain purpose, involves no federal question. Finney *v.* Guy, 189 U. S. 335, 47 L. Ed. 839.

Questions of variance, and whether the judgment should be one of dismissal or simply for a new trial, involve merely questions of state procedure. California Nat. Bank *v.* Thomas, 171 U. S. 441, 43 L. Ed. 231.

Where the question decided by the supreme court of Louisiana was, that the introduction of a judgment obtained in Mississippi for the same cause of action which was then before the court of Louisiana was not such an alteration of the substance of the demand as was forbidden by the code of practice, this is not a question which can be revised by this court under the twenty-fifth section of the judiciary act; it being merely a question of pleading and evidence in support of a new allegation, arising according to the practice in Louisiana so as to reach the merits of the case. "There is no complaint that the obligation of a contract has been impaired, nor that any right has been claimed and refused under any treaty or act of congress. The cause must therefore be dismissed, for want of jurisdiction." White *v.* Wright, 22 How. 19, 23, 16 L. Ed. 279.

The decision of the supreme court of California, that as no appeal was prosecuted from the final judgments, the order denying the application to remove was not open to review, and its judgment thereupon dismissing the appeal from the orders refusing to set aside the judgments of the court below rest upon grounds of states procedure with which it is not our province to interfere, and presents no federal question. Tripp *v.* Santa Rosa St. R. Co., 144 U. S. 126, 130, 36 L. Ed. 371.

Upon a writ of error to a state court, the question whether on the death of a party after judgment another party was properly substituted in that court, before the suing out of the writ of error, is a question of practice which the state court has exclusive right to determine, and is not reviewable here. Renaud *v.* Abbott, 116 U. S. 277, 29 L. Ed. 629.

Whether a case shall be regarded as pending while it is possible that a petition for rehearing may be filed, or, if in an appellate court, until the remittitur is issued, are questions which the local law can settle as it pleases without interference from the constitution of the United States. Patterson *v.* Colorado, 205 U. S. 454, 460, 51 L. Ed. 879.

Allowance of appeal.—This court will not review or reverse the action of a state court in allowing an appeal in the nature of a bill of review, on the ground that it was improperly allowed under the practice of the state in such cases. Central Nat. Bank *v.* Stevens, 169 U. S. 432, 433, 42 L. Ed. 807.

Premature appeals.—The court of appeals of Maryland, in dismissing this case, said: "The defendant, long after the time fixed by the rule of court, demanded a jury trial, and, without waiting for the action of the court upon his motion, and indeed before there was any trial of the case upon its merits and before any judgment, final or otherwise, was rendered, this appeal was taken from what the or-

Questions relating to matters of pleading and practice under the laws of the state, involve no federal question, and are not proper for our consideration.[79]

Pleading and Proof of Fraud.—A decision by a state court that, in an action for fraud and deceit, the plaintiff is bound to prove the fraud, as alleged in the declaration, in order to maintain the action, involves no federal question.[80]

Discretionary Matters.—The decision of a state court upon a matter of practice under state procedure, as, for example, that a certain application being addressed to the court's discretion, could not be revised, raises no federal question.[81]

Sufficiency of Pleadings.—A decision by a state court that the pleadings were sufficient to permit of the examination and determination of the point on

der of appeal calls the order of court of the 6th of February, 1896, denying the defendant the right of a jury trial; but no such order appears to have been passed. On the day mentioned in the order of appeal there was an order passed by the court below fixing the case for trial, but there was no action taken in pursuance of such order until subsequent to this appeal. There is another appeal pending here from the orders which were ultimately passed." Held, that no federal question was disposed of by this decision. Chappell Chemical Co. *v.* Sulphur Mines Co., 172 U. S. 472, 43 L. Ed. 517.

Reprieve.—Whether, when the governor of a state has issued a reprieve in a capital case which carried the date of execution beyond the time fixed in the decision of the state supreme court, such action rendered unnecessary the fixing by the court of a new day for execution, was purely a question of state practice, not controlled by the federal constitution or laws, and upon which the state court had final jurisdiction. Rogers *v.* Peck, 199 U. S. 425, 435, 50 L. Ed. 256; Lambert *v.* Barrett, 159 U. S. 697, 699, 39 L. Ed. 865.

Place of sitting of state court.—Whether the state supreme court should be held in each county or at the state capital for all the counties, is entirely a question of state procedure, presenting no federal question. Rogers *v.* Peck, 199 U. S. 425, 435, 50 L. Ed. 256.

79. Buena Vista County *v.* Iowa Falls, etc., R. Co., 112 U. S. 165, 177, 28 L. Ed. 680.

Whether the pleadings in a cause in a state court justified a grant of affirmative relief, considered as a mere question of practice, presents no federal question. National Foundry, etc., Works *v.* Oconto Water Supply Co., 183 U. S. 216, 237, 46 L. Ed. 157.

80. Forsyth *v.* Vehmeyer, 177 U. S. 177, 180, 44 L. Ed. 723, followed in Bullis *v.* O'Beirne, 195 U. S. 606, 617, 49 L. Ed. 340.

Where it is claimed that a judgment rendered by a state court is not released by a discharge of the debtor in bankruptcy because it is one rendered in an action for fraud, whether the complaint in the state court sufficiently charged fraud is not a federal question, this being purely a question of state procedure. Bullis *v.* O'Beirne, 195 U. S. 606, 49 L. Ed. 340, citing Forsyth *v.* Vehmeyer, 177 U. S. 177, 44 L. Ed. 723.

Special pleas setting up a federal question were filed after the case had been decided by the supreme court of a state and remanded to the lower court for a new trial. No leave was applied for or granted to file these additional pleas as required by the state practice. It was held, that "even if leave had been asked to file them, it was a matter of discretion with the trial court to permit it, and a matter of state practice which cannot be inquired into here." Carr *v.* Nichols, 157 U. S. 370, 39 L. Ed. 736; Mexican Central Railway Co. *v.* Pinkney, 149 U. S. 194, 199, 37 L. Ed. 699; Long Island Water Co. *v.* Brooklyn, 166 U. S. 685, 688, 41 L. Ed. 1165; Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 1, 45 L. Ed. 395, reaffirmed in Yazoo, etc., R. Co. *v.* Adams, 180 U. S. 26, 45 L. Ed. 408.

Nature of foreclosure proceeding.—The question whether an action to foreclose a lien for unpaid assessments for street improvements is in rem, or in personam, under the practice in California, is one upon which the decision of the supreme court is binding, and its ruling that plaintiff, being no party to defendants' suits to foreclose, had a right to show by evidence aliunde the invalidity of the judgments obtained by them, is not a proper subject for review by this court. In no aspect does the case present a federal question. Wood *v.* Brady, 150 U. S. 18, 23, 37 L. Ed. 981, followed in Dougherty *v.* Nevada Bank, 160 U. S. 171, 40 L. Ed. 382.

What constitutes the commencement of an action in a state court being matter of state law, the decision of that court on this point is not a federal question, and is not therefore reviewable here. Richmond Min. Co. *v.* Rose, 114 U. S. 576, 583, 29 L. Ed. 273.

81. Thorington *v.* Montgomery, 147 U. S. 490, 37 L. Ed. 252.

which its decision turned, involves no federal question.[82]

Contempt.—No decision of this court has gone so far as to hold that the construction which the highest court of a state places upon its own judgment, and under which construction it holds that a party thereto has not been guilty of contempt, presents a federal question, such as would confer jurisdiction upon this court to re-examine or reverse such a judgment.[83]

Review of Facts by State Appellate Court.—The supreme court of the United States cannot review the decision of the highest court of a state on controverted questions of fact, even where, under the statutes of that state, the court does not re-examine such controverted questions.[84]

Criminal Practice.—A ruling by a state court to the effect that the accused shall be deemed to have waived compliance with the statute, if the record does not show that he objected at the time to the action of the court, is an adjudication simply of a question of criminal practice and local law, and is not reviewable by the supreme court of the United States.[85]

(64) *Decision That Right under Constitution Has Been Waived.*—There is nothing to prevent a party from waiving a federal right if he chooses to do so, either in express terms or as a necessary implication from his manner of proceeding in the cause.[86] The decision of a state court holding that the right a person claims under the constitution has been waived, does not present a federal question, which will sustain a writ of error to the state court. "A person may, by his acts or omission to act, waive a right which he might otherwise have under the constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action, is not a federal one."[87]

82. Grand Rapids, etc., R. Co. *v.* Butler, 159 U. S. 87, 40 L. Ed. 85.

It is manifest that it was never contemplated by the framers of the constitution that this court should sit in review as an appellate court, of such a question as that presented by the record in the case at bar, viz, whether or not the highest court of a state erred in holding that it could rightfully determine from the statements in the pleadings filed by both parties to a controversy pending before it that the averments of an answer set forth no defense to the claim of the plaintiff. Iowa Central R. Co. *v.* Iowa, 160 U. S. 389, 393, 40 L. Ed. 467, reaffirmed in Stallcup *v.* Tacoma, 165 U. S. 719, 41 L. Ed. 1185.

83. Newport Light Co. *v.* Newport, 151 U. S. 527, 539, 38 L. Ed. 259.

84. Chemical Nat. Bank *v.* City Bank, 160 U. S. 646, 40 L. Ed. 568.

85. Dreyer *v.* Illinois, 187 U. S. 71, 47 L. Ed. 79, reaffirmed in Moss *v.* Glenn, 189 U. S. 586, 47 L. Ed. 921.

86. Decision that right under constitution has been waived.—Harding *v.* Illinois, 196 U. S. 78, 88, 49 L. Ed. 394, reaffirmed in Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171; Seale *v.* Georgia, 201 U. S. 642, 50 L. Ed. 902.

87. Pierce *v.* Somerset R. Co., 171 U. S. 641, 649, 43 L. Ed. 316, citing Clay *v.* Smith, 3 Pet. 411, 7 L. Ed. 723; Eustis *v.* Bolles, 150 U. S. 361, 37 L. Ed. 1111; Hale *v.* Lewis, 181 U. S. 473, 45 L. Ed. 959.

"In Pierce *v.* Somerset R., 171 U. S. 641, 648, 43 L. Ed. 316, we said: 'A person may by his acts or omission to act waive a right which he might otherwise have under the constitution of the United States as well as under a statute, and the question whether he has or has not lost such right by his failure to act or by his action, is not a federal one.' Eustis *v.* Bolles, 150 U. S. 361, 37 L. Ed. 1111; Rutland R. Co. *v.* Central Vermont R. Co., 159 U. S. 630, 40 L. Ed. 284, and Seneca Nation of Indians *v.* Christy, 162 U. S. 283, 40 L. Ed. 970, were cited." Leonard *v.* Vicksburg, etc., R. Co., 198 U. S. 416, 422, 49 L. Ed. 1108, reaffirmed in South Carolina *v.* Jennings, 204 U. S. 667, 668, 51 L. Ed. 671.

Eustis *v.* Bolles, 150 U. S. 361, 37 L. Ed. 1111, was an action to recover the residue of a note, the holder having received one-half of the amount under certain insolvency proceedings in Massachusetts. Defendants pleaded the proceedings in insolvency, an offer of composition, its acceptance by plaintiff and the receipt of the amount coming to him under the composition. Plaintiff demurred, and insisted that the statute, which had been enacted after the note had been executed, impaired the obligation of his contract. The supreme court held, that the action of plaintiff in accepting his dividend under the insolvency proceedings was a waiver of his right to object to the validity of the statute. Upon writ of error from this court, we held that, in deciding that it was competent for plaintiff to waive his

(65) *Sufficiency of Showing in State Court.*—The question whether a right or privilege, claimed under the constitution or laws of the United States, was distinctly and sufficiently pleaded and brought to the notice of a state court, is itself a federal question, in the decision of which this court, on writ of error, is not concluded by the view taken by the highest court of the state.[88]

r. *Amount in Controversy.*—No value is required to bring cases to this court from state courts under the 25th section of the judiciary act.[89]

s. *Transfer of Cause*—(1) *In General.*—Writs of error to a state court remove the suit to this court, and whether or not jurisdiction may be entertained, it is for this court to determine when the question properly arises. And so if there be a controversy in respect of the form of the writs, parties, citation and service, or otherwise, these are matters for the disposition of this court without interference from any other. Therefore, the circuit court cannot prevent this court, or a justice thereof, or the presiding judge of the state court, from granting writs of error, by restraining the parties from applying therefor; nor can it properly direct their dismissal, after it has been granted. In short, cases transferred to this court must be dealt with by this court.[90]

(2) *What Law Governs.*—The judgment or decree of the state court may be re-examined by writ of error in the same manner as if rendered in a circuit court.[91] A writ of error, under the 25th section of the judiciary act, so far

legal rights, and that accepting his dividend under the insolvency proceedings was such a waiver, the court did not decide a federal question, and the writ of error was dismissed. Citing Beaupre *v.* Noyes, 138 U. S. 397, 34 L. Ed. 991. See, also, Electric Co. *v.* Dow, 166 U. S. 489, 41 L. Ed. 1088; Pierce *v.* Somerset R. Co., 171 U. S. 641, 43 L. Ed. 316; Seneca Nation of Indians *v.* Christy, 162 U. S. 283, 40 L. Ed. 970, Hale *v.* Lewis, 181 U. S. 473, 480, 45 L. Ed. 959.

In Moran *v.* Horsky, 178 U. S. 205, 44 L. Ed. 1038, a defense under the laws of the United States was held by the supreme court of Montana to have been waived by the laches of the plaintiff. This was also held to be a nonfederal ground sufficient to support the judgment, and the writ of error was dismissed. Hale *v.* Lewis, 181 U. S. 473, 480, 45 L. Ed. 959.

Construction of New Hampshire mill act.—A decision of the supreme court of New Hampshire that the plaintiff in error, by availing itself of the power conferred by the general mill act of that state, approved July 3, 1868, which provides that in proceedings against mill owners to recover damages resulting from overflows of land caused by dams erected by them, "if either party shall so elect, said court shall direct an issue to the jury to try the facts alleged in the said petition and assess the damages; and judgment rendered on the verdict of such jury, with fifty per cent. added, shall be final, and said court may award costs to either party at its discretion," and join in a trial for the assessment of damages, is precluded from denying the validity of that provision which prescribes that fifty per cent. shall be added to the amount of the verdict, cannot be reviewed by this court on a writ of error, because its judgment is not based on any federal question. Electric Co. *v.* Dow, 166 U. S. 489, 41 L. Ed. 1088, citing Beaupre *v.* Noyes, 138 U. S. 397, 34 L. Ed. 991; Eustis *v.* Bolles, 150 U. S. 361, 37 L. Ed. 1111, reaffirmed in Minneapolis, etc., R. Co. *v.* Gano, 190 U. S. 557, 47 L. Ed. 1183.

88. Sufficiency of showing in state court.—Neal *v.* Delaware, 103 U. S. 370, 396, 397, 26 L. Ed. 567; Mitchell *v.* Clark, 110 U. S. 633, 645, 28 L. Ed. 279; Boyd *v.* Thayer, 143 U. S. 135, 180, 36 L. Ed. 103; Carter *v.* Texas, 177 U. S. 442, 447, 44 L. Ed. 839; Erie R. Co. *v.* Purdy, 185 U. S. 148, 152, 46 L. Ed. 847.

89. Amount in controversy.—Weston *v.* Charleston, 2 Pet. 449, 7 L. Ed. 481; Holmes *v.* Jennison, 14 Pet. 540, 10 L. Ed. 579; The Paquette Habana, 175 U. S. 677, 44 L. Ed. 320.

The appellate jurisdiction of this court, in cases brought from the state courts, arising under the constitution, laws, and treaties of the union, is not limited by the value of the matter in dispute. Its jurisdiction in such cases extends to a case where both parties claim a right or title under the same act of congress, and the decision is against the right or title claimed by either party. Buel *v.* Van Ness, 8 Wheat. 312; 5 L. Ed. 624.

90. Transfer of cause.—In re Chetwood, 165 U. S. 443, 41 L. Ed. 782.

91. What law governs.—Martin *v.* Hunter, 1 Wheat. 304, 305, 4 L. Ed. 97.

Section 1003 provides that "writs of error from the supreme court to a state court, in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a court of the United States." This is almost the exact language of a

as it depends on the form of proceeding and the nature of the judgment, must be governed by the same rules that apply to similar rights under the 22d section and under the act relating to the District of Columbia.[92]

(3) *Remedy for Transferring Cause.*—**Writ of Error.**—Appeals do not lie from a state court to this court in any case, as the act of congress gives no such remedy.[93] The only appellate jurisdiction which has ever been conferred by congress upon this court to review the judgments or decrees, at law or in equity, of the highest court of a state, has been by writ of error.[94]

Mandamus.—A writ of error is the proper remedy and is an adequate one, to review decisions of a state court, under § 709 of the Revised Statutes.[95] The remedy for alleged errors in the decree of a state court, if any, is by writ of error and not by mandamus. The remedy on error is not only entirely adequate and

similar provision in the twenty-fifth section of the judiciary act of 1789, and we are not aware it was ever supposed that writs issued to the state court under that section were not subject to the limitation prescribed for writs to the circuit courts by the twenty-second section. In Brooks *v.* Norris, 11 How. 204, 13 L. Ed. 665, this seems to have been assumed, and a writ to a state court was dismissed "on the ground that it is barred by the limitation of time prescribed by the act of congress." Cummings *v.* Jones, 104 U. S. 419, 26 L. Ed. 824.

The language of the statute of 1867 is that "the judgment (of the state court) may be re-examined and reversed or affirmed on writ of error in the same manner and under the same regulations, and the writ of error shall have the same effect as if the judgment or decree complained of had been rendered or passed in the court of the United States." It was held, that the phrase "'in the same manner and under the same regulations, and the writ shall have the same effect' is intended to furnish the rule by which the court shall be guided in the considerations which should enter into the judgment that it shall render. That the writ of error shall have the same effect as if directed to a circuit court can mean no more than that it shall transfer the case to the supreme court, and with it the record of the proceedings in the court below. This is the effect of the writ and its function and purpose. When the court comes to consider the case, it may be limited by the nature of the writ, but what it shall review, and what it shall not, must depend upon the jurisdiction of the court in that class of cases as fixed by the law governing that jurisdiction. So the regulations here spoken of are manifestly the rules under which the writ is issued, served, and returned; the notice to be given to the adverse party, and time fixed for appearance, argument, etc." Murdock *v.* Memphis, 20 Wall. 590, 623, 22 L. Ed. 429.

92. Holmes *v.* Jennison, 14 Pet. 540, 565, 10 L. Ed. 579.

93. Remedy for transferring cause.—Slaughter House Cases, 10 Wall. 273, 297, 19 L. Ed. 915.

No appeal can be taken from the final decision of a state court of last resort, under the 25th section of the judiciary act, to the supreme court of the United States. A writ of error alone can bring up the cause. Verden *v.* Coleman, 22 How. 192, 16 L. Ed. 336.

94. Cohens *v.* Virginia, 6 Wheat. 264, 410, 5 L. Ed. 257; Verden *v.* Coleman, 22 How. 192, 16 L. Ed. 336; Act of September 24, 1789, c. 20, § 25; 1 Stat. 85; Act of February 5, 1867, c. 28, § 2; 14 Stat. 386; Rev. Stat., § 709; Act of March 3, 1891, c. 517, § 5; 26 Stat. 827; Dower *v.* Richards, 151 U. S. 658, 666, 38 L. Ed. 305; Leeper *v.* Texas, 139 U. S. 462, 35 L. Ed. 225.

A writ of error is the proper remedy to revise a judgment of the state court, refusing to obey the mandate of the United States supreme court, because it is a final judgment in a suit in a state court, denying the validity of the statute of the United States; and there is no legal distinction between proceedings under a mandate, and proceedings in an original suit. Furthermore, in cases of mandate to the circuit courts if the mandate be not correctly executed, a writ of error or appeal has always been supposed to be a proper remedy, and has been recognized as such in the former decisions of this court. Opinion of Story, J., in Martin *v.* Hunter, 1 Wheat. 304, 4 L. Ed. 97. (A case in which the court of appeals of Virginia refused to obey the mandate of the United States supreme court.)

"It is, therefore, too obvious to need comment, that this statute was designed to bring equity suits to this court from the state courts by writ of error, as well as law cases, and that it was not intended that they should be re-examined in the same manner as if brought here from a court of the United States, in the sense of the proposition we are considering." Murdock *v.* Memphis, 20 Wall. 590, 622, 22 L. Ed. 429.

95. In re Blake, 175 U. S. 114, 44 L. Ed. 94; Stanley *v.* Schwalby, 162 U. S. 255, 40 L. Ed. 960.

open to be sought unrestrained by the amount involved, but, in respect of dealing with state tribunals, is manifestly the proper remedy.[96]

(4) *Allowance of Writ of Error*—aa. *In General.*—In allowing a writ of error from this court to the highest court of a state, and in issuing a citation, the chief justice of that court does but exercise an authority vested by congress in him concurrently with each of the justices of this court. When counsel applying for the allowance of the writ of error insist that a federal question has been decided against the plaintiff in error, the chief justice of the state court may feel bound to allow the writ, for the purpose of submitting to the final determination of this court whether such a question was necessarily involved in the judgment sought to be reviewed.[97] A writ of error to the highest court of a state is not allowed as of right, and ought not to be sent out when the court in session, after hearing, is of opinion that it is apparent upon the face of the record that the issue of the writ could only result in the affirmance of the judgment.[98] Applications to this court for a writ of error to a state court are not entertained unless at the request of one of the members of the court, concurred in by his associates.[99]

bb. *Necessity for Allowance.*—This court has repeatedly decided that an allowance of a writ of error, either by a justice of this court or by a judge of the state court, is necessary, upon a writ of error addressed to the highest court of the state by which the judgment or decree could be rendered.[1]

96. In re Blake, 175 U. S. 114, 44 L. Ed. 94.

97. Allowance of writ of error.—Parmelee *v.* Lawrence, 11 Wall. 36, 39, 20 L. Ed. 48; Brown *v.* Atwell, 92 U. S. 327, 330, 23 L. Ed. 511; Adams County *v.* Burlington, etc., R., 112 U. S. 123, 129, 28 L. Ed. 678; Felix *v.* Scharnweber, 125 U. S. 54, 59, 31 L. Ed. 687; Gleason *v.* Florida, 9 Wall. 779, 19 L. Ed. 730; Bartemeyer *v.* Iowa, 14 Wall. 26, 20 L. Ed. 792.

In our opinion a writ ought not to be allowed by this court, to a state court, if it appears from the face of the record that the decision of the federal question which is complained of was so plainly right as not to require argument, and especially if it is in accordance with our well-considered judgments in similar cases. That is in effect what was done in Twitchell *v.* Pennsylvania, 7 Wall. 321, 19 L. Ed. 223, where the writ was refused, because the questions presented by the record were "no longer subjects of discussion here," although if they had been in the opinion of the court "open," it would have been allowed. Spies *v.* Illinois, 123 U. S. 131, 164, 31 L. Ed. 80.

98. Spies *v.* Illinois, 123 U. S. 131, 31 L. Ed. 80; In re Kemmler, 136 U. S. 436, 438, 34 L. Ed. 519; Craemer *v.* Washington, 164 U. S. 704, 41 L. Ed. 1183; Krug *v.* Washington, 164 U. S. 704, 41 L. Ed. 1183.

In Spies *v.* Illinois, 123 U. S. 131, 143, 31 L. Ed. 80, Mr. Chief Justice Waite made the following announcement: "Following the precedent in Twitchell *v.* The Pennsylvania, 7 Wall. 321, 19 L. Ed. 223, we have permitted this motion to be made in open court, at the suggestion of Mr. Justice Harlan, to whom the application was first presented, on account of the urgency of the case and its importance. But, as was said in that case 'writs of error to the state courts have never been allowed as of right,' that is to say, as of course, and it is the duty of him to whom an application for such a writ is made to ascertain from an examination of the record of the state court, 'whether any question, cognizable here on appeal, was made and decided in the proper court of the state, and whether the case on the face of the record will justify the allowance of the writ."

99. In re Robertson, 156 U. S. 183, 184, 39 L. Ed. 389.

1. Necessity for allowance.—Northwestern Union Packet Co. *v.* Home Ins. Co., 154 U. S. 588, 20 L. Ed. 463, citing Callan *v.* May, 2 Black 541, 543, 17 L. Ed. 281; Twitchell *v.* Pennsylvania, 7 Wall. 321, 19 L. Ed. 223; Gleason *v.* Florida, 9 Wall. 779, 19 L. Ed. 730, and distinguishing Davidson *v.* Lanier, 4 Wall. 447, 453, 18 L. Ed. 377, because that was a writ of error addressed to an inferior court of the United States. Downes *v.* Scott, 4 How. 500, 502, 11 L. Ed. 1075.

The foundation of the jurisdiction of this court over the judgments of state courts is the writ of error; and no writ of error to a state court can issue without allowance, either by the proper judge of the state court or by a judge of this court, after examination as just stated. Gleason *v.* Florida, 9 Wall. 779, 784, 19 L. Ed. 730, citing Twitchell *v.* Pennsylvania, 7 Wall. 321, 19 L. Ed. 223.

Writs of error to state courts cannot issue without the allocatur of a judge of this court. But this allocatur is not conclusive upon the court. "There is hardly a term in which a case of that description has not been dismissed upon the ground that the transcript did not show a case in which a writ of error would lie. A contrary doctrine would be exceedingly in-

cc. *By Whom Allowed.*—It is essential to the exercise by this court of revisory jurisdiction over the final judgments or decrees of the courts of the states, that the writ of error should be allowed either by a justice of this court, or by the proper judge of the state court, after ascertaining by an examination of the record that a question cognizable here was made and decided in the state court, and that such allowance was justified.[2] It is the settled doctrine of this court that a writ of error to a state court must be allowed by one of the justices of this court, or by the chief justice of the state court, or it will be dismissed for want of jurisdiction.[3] But in case of a writ to a court composed of a single judge or chancellor, the writ may be allowed by that judge or chancellor, or by a justice of the supreme court of the United States.[4] Where it appears from the record that the chief justice of the state court was absent when the writ or error was allowed, and it is stated an associate justice allowed it, it is to be presumed that its associate justice was the presiding justice of the court in the absence of chief justice.[5]

convenient if it could be maintained, and would throw upon a single judge the responsibility which properly belongs to the court. And it does not by any means follow that the judge who authorizes the appeal has made up his own mind that the party is legally entitled to it." Callan *v.* May, 2 Black 541, 543, 17 L. Ed. 281.

No writ of error to a state court can issue without allowance, either by the proper judge of the state court or by a judge of this court, after examination of the record, in order to see whether any question cognizable here on appeal was made and decided in the proper court of the state, and whether the case, upon the face of the record, will justify the allowance of the writ; and this is to be considered as the settled construction of the judiciary act on this subject. Gleason *v.* Florida, 9 Wall. 779, 19 L. Ed. 730.

Writs of error to state courts have never been allowed, as of right. It has always been the practice to submit the record of the state courts to a judge of this court, whose duty has been to ascertain upon examination whether any question, cognizable here upon appeal, was made and decided in the proper court of the state, and whether the case upon the face of the record will justify the allowance of the writ. Twitchell *v.* Pennsylvania, 7 Wall. 321, 324, 19 L. Ed. 223.

2. By whom allowed.—Gleason *v.* Florida, 9 Wall. 779, 19 L. Ed. 730; Butler *v.* Gage, 138 U. S. 52, 55, 34 L. Ed. 869.

3. Bartemeyer *v.* Iowa, 14 Wall. 26, 20 L. Ed. 792, three justices dissenting, reaffirmed in Havnor *v.* New York, 170 U. S. 408, 411, 42 L. Ed. 1087.

A writ of error to the highest court of a state must be allowed either by a justice of the United States court or by a judge of such state court. Northwestern Union Packet Co. *v.* Home Ins. Co., 154 U. S. 588, 20 L. Ed. 463. See, also, Callan *v.* May, 2 Black 541, 17 L. Ed. 281; Butler *v.* Gage, 138 U. S. 52, 55, 34 L. Ed. 869. Barrel *v.* Western Transp. Co., 3 Wall. 424, 18 L. Ed. 168; Gleason *v.* Florida, 9 Wall. 779, 19 L. Ed. 730, and note, 784.

When a supreme court of a state is composed of a chief justice and several associates, writs of error to the court under the 25th section of the judiciary act must be signed by the chief justice; and if signed by one of the associates only, it will be dismissed for want of jurisdiction. Bartemeyer *v.* Iowa, 14 Wall. 26, 20 L. Ed. 792. The Chief Justice and Mr. Justice Bradley and Mr. Justice Swayne, dissenting.

And it was held in Bartemeyer *v.* Iowa, 14 Wall. 26, 20 L. Ed. 792, that when the supreme court of a state is composed of a chief justice and several associates, and the judgment complained of was rendered by such court, the writ could only be allowed by the chief justice of that court or by a justice of this court. Cited in Butler *v.* Gage, 138 U. S. 52, 56, 34 L. Ed. 869.

An allowance of a writ of error by the chief judge of the court in which the judgment was, in fact, rendered, is not ground for dismissing the writ of error, though the record, by order of such court, may have been sent to an inferior court, and an additional entry of what was adjudged in the appellate one there entered. Aldrich *v.* Ætna Ins. Co., 8 Wall. 491, 19 L. Ed. 473.

4. Bartemeyer *v.* Iowa, 14 Wall. 26, 28, 20 L. Ed. 792.

5. Butler *v.* Gage, 138 U. S. 52, 34 L. Ed. 869.

A writ of error to a state court will be dismissed on the ground that it is not properly allowed, where it appears that the state court was composed of a chief judge and several associate judges, and the writ of error is allowed and the citation signed by an associate judge who did not purport to act as chief judge or chief judge pro tem. of the court. For example, the signature to the allowance of the writ was as follows: "Edward T. Bartlett, Asso. Judge, N. Y. Court of Appeals;" while following the signature to

dd. *Proof of Allowance.*—It has been doubted whether in any case the affidavit of a party to the record can be used as evidence of the fact of such allowance. And the affidavit of such a party was refused in a case where the court thought it highly probable that he was mistaken in his recollection.[6]

(5) *Form and Requisites of Writ of Error*—aa. *In General.*—The appellate jurisdiction of this court, under the 25th section of the judiciary act of 1789, c. 20, may be exercised by a writ of error issued by the clerk of a circuit court, under the seal of that court, in the form prescribed by the act of the 8th of May, 1792, c. 137, § 9.[7]

bb. *Specifications in Writ.*—The writ of error need not state that it is directed to a final judgment of the highest court in the state,[8] nor that it is directed to the highest court of law or equity in the state in which a decision in the suit could be had.[9]

cc. *Teste of Writ.*—Writs of error from this court must bear the teste of the chief justice.[10]

dd. *Signature.*—**Signed by Clerk of State Court Only.**—A writ of error to a state court will not be dismissed because it is issued and signed by the clerk of that court only; such error would be amendable under § 1005, which provides that the supreme court may allow an amendment of a writ of error in all particulars of form.[11]

(6) *Issuance and Service of Writ of Error*—aa. *In General.*—The issuance of a writ of error is absolutely necessary before this court can take jurisdiction over a state court.[12]

bb. *From Whence Issued.*—The appellate jurisdiction of this court under the 25th section of the judiciary act of 1789 may be exercised by a writ of error issued by the clerk of the circuit court, under the seal of that court, in the form prescribed by the act of May 8th, 1792, ch. 137, § 9.[13]

cc. *To What Court the Writ Should Be Directed.*—**In General.**—As this court can only revise the judgment of the highest court in the state which can exercise

the citation was the designation: "Asso. Judge, Court of Appeals, State of New York." There is nothing contained in the record warranting an inference that the associate judge was at the time acting as chief judge pro tem. of the court. Havnor *v.* New York, 170 U. S. 408, 42 L. Ed. 1087, citing Bartemeyer *v.* Iowa, 14 Wall. 26, 36, 20 L. Ed. 792; Butler *v.* Gage, 138 U. S. 52, 55, 34 L. Ed. 869.

In Butler *v.* Gage, 138 U. S. 52, 34 L. Ed. 869, however, the judge allowing the writ described himself as "Presiding Judge of the Supreme Court of the State of Colorado." As the constitution of Colorado provided that when the chief justice was absent, the judge having the next shortest term should preside in his stead, and as the record showed that the chief justice was absent at the time the writ was allowed, and counsel conceded that the judge who allowed the writ had the next shortest term to serve, it was held, that the writ was properly allowed. Cited in Havnor *v.* New York, 170 U. S. 408, 411, 42 L. Ed. 1087.

6. Proof of allowance.—Gleason *v.* Florida, 9 Wall. 779, 19 L. Ed. 730.

7. Form and requisites of writ of error.—Buel *v.* Van Ness, 8 Wheat. 312, 5 L. Ed. 624.

On error to the supreme court of Louisiana, the only paper in the case purporting to be the writ of error is in the name and bears the teste of the chief justice of the supreme court of Louisiana and is signed by the clerk and sealed with the seal of that court. Held, that the suit must be dismissed for want of jurisdiction. The writ cannot be amended. Bondurant *v.* Watson, 103 U. S. 281, 26 L. Ed. 447.

The exact form of a writ of error to a state court will be found in Worcester *v.* Georgia, 6 Pet. 515, 531, 8 L. Ed. 483.

8. Specifications in writ.—Buel *v.* Van Ness, 8 Wheat. 312, 5 L. Ed. 624.

9. Buel *v.* Van Ness, 8 Wheat. 312, 5 L. Ed. 624.

10. Teste of writ.—Mussina *v.* Cavazos, 6 Wall. 355, 357, 18 L. Ed. 810; Germain *v.* Mason, 154 U. S. 587, 20 L. Ed. 689.

11. Signature.—Miller *v.* Texas, 153 U. S. 535, 38 L. Ed. 812, citing Ex parte Ralston, 119 U. S. 613, 30 L. Ed. 506, Sheppard *v.* Wilson, 5 How. 210, 12 L. Ed. 120, and distinguishing Bondurant *v.* Watson, 103 U. S. 281, 26 L. Ed. 447.

12. Issuance and service of writ of error.—Ex parte Ralston, 119 U. S. 613, 30 L. Ed. 506, citing Mussina *v.* Cavazos, 6 Wall. 355, 18 L. Ed. 810; Bondurant *v.* Watson, 103 U. S. 281, 26 L. Ed. 447.

13. From whence issued.—Buel *v.* Van Ness, 8 Wheat. 312, 5 L. Ed. 624.

jurisdiction in the case, the writ of error should be directed to such court; unless the record shall have been transmitted to an inferior tribunal.[14]

Where Record Is Transmitted to or Remains in Inferior Tribunal.—But if the highest court has, after judgment, sent its record and judgment in accordance with the law of the state to an inferior court for safe keeping, and no longer has them in its own possession, we may send our writ either to the highest court or to the inferior court. If the highest court can and will, in obedience to the requirement of the writ, procure a return of the record and judgment from the inferior court, and send them to us, no writ need go to the inferior court; but, if it fails to do this, we may ourselves send direct to the court having the record in its custody and under its control. So, too, if we know that the record is in the possession of the inferior court, and not in the highest court, we may send there without first calling upon the highest court; but if the law requires the highest court to retain its own records, and they are not in practice sent down to the inferior court, our writ can only go to the highest court. That court, being the only custodian of its own records, is alone authorized to certify them to us.[15] And in some of the states—as, for instance, New York and Massachusetts—the practice is for the highest court, after its judgment has been pronounced, to send the record and the judgment to the inferior court, where they thereafter re-

14. To what court the writ should be directed.—Downes *v.* Scott, 4 How. 502, 11 L. Ed. 1075; Atherton *v.* Fowler, 91 U. S. 143, 23 L. Ed. 265.

A writ of error from the supreme court of the United States to review the judgment of a state court must be issued to the highest court of the state in which a decision of the case could be had, even if that court be an inferior court of the state. Accordingly, where a circuit court of Virginia had jurisdiction to decide a case finally, the court of appeals of that state not having jurisdiction to review the decision, by reason of the amount in controversy being under $500, a writ of error from this court issued to the court of appeals was dismissed. If allowable at all, the writ should have been issued to the circuit court. Miller *v.* Joseph, 17 Wall. 655, 21 L. Ed. 741.

Under the 25th section of the judiciary act, the writ of error must be directed to the highest court of the state that can render a decision in the cause. The fact that the general assembly might set aside that judgment, would not make it proper to direct the writ of error to the general assembly, because they could not make a decision. Olney *v.* Arnold, 3 Dall. 308, 1 L. Ed. 614.

The writ of error should be "directed to the court which holds the proceedings as part of its own records, and exercises judicial power over them." Hunt *v.* Palas, 4 How. 589, 590, 11 L. Ed. 1115. If the highest court of the state retains the record, the writ should go there, as that court can best certify to us the proceedings upon which it has acted and given judgment. Atherton *v.* Fowler, 91 U. S. 143, 146, 23 L. Ed. 265, followed in Atherton *v.* Fowler, 154 U. S. 620, 23 L. Ed. 267.

Where a judgment of the corporation court of Alexandria county, Virginia, was affirmed by the supreme court of that state, and judgment given in the supreme court allowing the defendant in error to recover his damages and costs from the plaintiff in error, and such judgment is entered up in the corporation court, the writ of error under the 25th section of the judiciary act must be directed to the supreme court, and not to the corporation court. Underwood *v.* McVeigh, 131 U. S. appx. cxix, 21 L. Ed. 952.

15. Where record is transmitted to or remains in inferior tribunal.—Atherton *v.* Fowler, 91 U. S. 143, 148, 23 L. Ed. 265, citing Cohens *v.* Virginia, 6 Wheat. 264, 5 L. Ed. 257; Hunt *v.* Palas, 4 How. 589, 590, 11 L. Ed. 1115; Gelston *v.* Hoyt, 3 Wheat. 246, 4 L. Ed. 381; McGuire *v.* The Commonwealth, 3 Wall. 382, 17 L. Ed. 165; Webster *v.* Reid, 11 How. 437, 457, 13 L. Ed. 761; Gelston *v.* Hoyt, 3 Wheat. 286, 304, 4 L. Ed. 392.

Where according to the practice existing in the state, the record itself is remitted to the inferior court, and does not, nor does a copy of it remain in the supreme court, the writ of error is properly directed to the inferior court to bring the record here. Polleys *v.* Black River Co., 113 U. S. 81, 28 L. Ed. 938, citing Gelston *v.* Hoyt, 3 Wheat. 246, 4 L. Ed. 381; Atherton *v.* Fowler, 91 U. S. 143, 23 L. Ed. 265; McDonald *v.* Massachusetts, 180 U. S. 311, 45 L. Ed. 542; Rothschilds *v.* Knight, 184 U. S. 334, 46 L. Ed. 573.

Under the judiciary act of 1789, ch. 20, s. 25, giving appellate jurisdiction to the supreme court of the United States, from the final judgment or decree of the highest court of law or equity of a state, in certain cases, the writ of error may be directed to any court in which the record

main. If in such a case our writ should be sent to the highest court, that court might with truth return that it had no record of its proceedings, and, therefore, could not comply with our demand. Upon the receipt of such a return, we should be compelled to send another writ to the court having the record in its possession.[16] Where it appears from the form of the order of the highest court

and judgment on which it is to act may be found; and if the record has been remitted by the highest court, etc., to another court of the state, it may be brought by the writ of error from that court. Gelston *v.* Hoyt, 3 Wheat. 246, 4 L. Ed. 381, applied in Webster *v.* Reid, 11 How. 437, 457, 13 L. Ed. 761.

As the appellate jurisdiction of this court over the state courts is confined to a re-examination of the final judgment or decree in any suit in the highest court of a state in which the decision of a suit could be had, the writ of error sued out here should be sent only to such court; unless the latter, after pronouncing judgment, sends its record and judgment, in accordance with the laws and practice of the state, to the inferior court, where they thereafter remain. In such case, the writ may be sent either directly to the latter court, or to the highest court, in order that, through its instrumentality, the record may be obtained from the inferior court having it in custody or under control. Atherton *v.* Fowler, 91 U. S. 143, 23 L. Ed. 265.

A writ of error from this court is properly directed to the court in which the final judgment was rendered, and by whose process it must be executed, and in which the record remains, although such court may not be the highest court of the state, and although such highest court may have exercised a revisory jurisdiction over points in the case, and certified its decision to the court below. The omission in the record of these points and the action in the highest court upon them, make no ground for certiorari on account of diminution. McGuire *v.* The Commonwealth, 3 Wall. 382, 17 L. Ed. 165.

This case comes from the circuit court of Emmet County, Michigan. It was originally commenced in that court, where a decree was rendered dismissing the suit. On appeal to the supreme court of the state, the decree was reversed, and the circuit court directed to enter a decree in favor of the plaintiff for the relief prayed in the bill of complaint. The circuit court having complied with the mandate of the supreme court by entering that decree, the defendant sued out the writ of error from this court to review it. The writ was directed to the judge of the circuit court because the final decree was entered and the record of the suit remained there. Atherton *v.* Fowler, 91 U. S. 143, 23 L. Ed. 265; Gelston *v.* Hoyt, 3 Wheat. 246, 4 L. Ed. 381; Lee *v.* Johnson, 116 U. S. 48, 29 L. Ed. 570.

"A petition for a writ of error to the court of civil appeals having been presented to the supreme court of the state, and denied, the present writ of error from this court was properly addressed to the court of civil appeals, in which the record remained. Rev. Stat., § 709; Gregory *v.* McVeigh, 23 Wall. 294, 23 L. Ed. 156; Polleys *v.* Black River Co., 113 U. S. 81, 28 L. Ed. 938; Fisher *v.* Perkins, 122 U. S. 522, 30 L. Ed. 1192." Stanley *v.* Schwalby, 162 U. S. 255, 269, 40 L. Ed. 960.

Where a judgment was rendered by the supreme court for Iowa Territory and the record certified to this court by the supreme court of the state of Iowa, after her admission into the Union, and the subject matter is within the jurisdiction of this court, it will take jurisdiction over the case. "The subject matter being clearly within our jurisdiction, and having possession of the record, we see no objection to an examination of the case. This court held in Gelston *v.* Hoyt, 3 Wheat. 246, 4 L. Ed. 381, under the twenty-fifth section of the judiciary act of 1789, giving appellate jurisdiction to this court from the final judgment of the highest state court, 'the writ of error may be directed to any court in which the record and judgment on which it is to act may be found, and if the record has been remitted by the highest court and to another court of the state, it may be brought by writ of error from that court.' In principle, that case is analogous to the one under consideration. If the record contain the judgment duly certified, over which we can exercise jurisdiction, it is not essential that it should be certified by the court rendering the judgment." Webster *v.* Reid, 11 How. 437, 13 L. Ed. 761.

16. It has been so expressly decided in Gelston *v.* Hoyt, 3 Wheat. 246, 4 L. Ed. 381, and McGuire *v.* The Commonwealth, 3 Wall. 382, 17 L. Ed. 165; Atherton *v.* Fowler, 91 U. S. 143, 146, 23 L. Ed. 265.

When the supreme court of the state renders final judgment, and sends the judgment to a court below for execution, and with the judgment the record, a writ of error to review the judgment may be issued to the latter court. For example: Where the record was sent by the court of appeals of New York, to the supreme court of that state, and the judgment was entered in the latter court in conformity with the direction of the former, this became a final judgment, on which execution could issue only when entered, in the supreme court, to which the record

disposing of the case that the record remained in the lower court where judgment was ordered to be entered, the writ of error should run to the court where the judgment had to be rendered.[17] So, too, if we are in any way judicially informed, that, under the laws and practice of a state, the highest court is not the custodian of its own records, we may send to the highest court, and seek through its instrumentality to obtain the record we require from the inferior court having it in keeping, or we may call directly upon the inferior court itself. But if the highest court is the legal custodian of its own records, and actually retains them, we can only send there.[18]

Refusal of Leave to Appeal.—Where, by the laws of a state, an appeal can be taken from an inferior court of the state to the highest court of the same, only with leave of this latter or of a judge thereof, and that leave has been refused in any particular case, in the regular order of proceeding—the refusal not being the subject of appeal to this court—a writ of error, if there be in the case a "federal question," properly lies, under § 709 of the Revised Statutes, to the inferior court, and not to the highest one.[19]

Dismissal by Highest State Court for Want of Jurisdiction.—So, also, when the highest court of a state dismisses a suit brought up from the trial court for want of jurisdiction, the federal question, if there be one in it, was decided by the trial court, and the writ of error should be directed to that court.[20]

The writ of error need not state that it is directed to the highest court of law or equity in the state in which a decision in the suit could be had.[21]

The writ of error will be dismissed, when it is not properly directed.[22]

(7) *Return of Writ.*—**In General.**—By a rule of this court, the return of a copy of the record of the proper court, under the seal of that court, annexed to the writ of error, is a sufficient return of such writ.[23]

was returned, and where it remained. Green *v.* Van Buskirk, 3 Wall. 448, 18 L. Ed. 245.

17. Rothschild *v.* Knight, 184 U. S. 334, 46 L. Ed. 573; Wedding *v.* Meyler, 192 U. S. 573, 581, 48 L. Ed. 570.

18. Atherton *v.* Fowler, 91 U. S. 143, 147, 23 L. Ed. 265.

19. Gregory *v.* McVeigh, 23 Wall. 294, 23 L. Ed. 156.

20. Lane *v.* Wallace, 131 U. S. appx. ccxix, 26 L. Ed. 703.

Where an action upon a mortgage is brought in a state court, and in the course of the proceedings in that court, a petition for removal to a United States court was filed, and the state court denies this petition and renders a money judgment in favor of the plaintiffs, their claim under the mortgage being denied, and the defendants appeal to the state supreme court, which dismisses the appeal for want of jurisdiction; it was held, that the writ of error from this court should be directed to the inferior state court instead of the state supreme court. Lane *v.* Wallace, 131 U. S. appx. ccxix, 26 L. Ed. 703.

Where the supreme court of the state of Kansas has decided that it has no jurisdiction to review a decision of the Kansas City court of appeals involving a federal question, a writ of error from this court is properly directed to the Kansas City court of appeals. Missouri, etc., R. Co. *v.* Elliott, 184 U. S. 530, 46 L. Ed. 673.

Where the writ of error is dismissed by the state court solely and expressly because of a want of jurisdiction, and since the effect of the formal entry, adjudging that the court was without jurisdiction to pass upon the questions presented by the writ of error, cannot be different from what it would have been had the court not given expression to its views in a written opinion, the necessary result of the ruling that the court had not jurisdiction of the writ of error was to determine that the trial court was the final court where the questions presented by the writ could be decided; and, hence, the writ of error should have been directed to that court. Missouri, etc., R. Co. *v.* Elliott, 184 U. S. 530, 539, 46 L. Ed. 673; Western Union Tel. Co. *v.* Hughes, 203 U. S. 505, 507, 51 L. Ed. 294.

21. Buel *v.* Van Ness, 8 Wheat. 312, 5 L. Ed. 624.

22. Underwood *v.* McVeigh, 131 U. S. appx. cxix, 21 L. Ed. 952.

23. Return of writ.—Martin *v.* Hunter, 1 Wheat. 304, 4 L. Ed. 97.

This court adopted the following rule on this subject in 1797: "It is ordered by the court that the clerk of the court to which any writ of error shall be directed, may make the return of the same by transmitting a true copy of the record, and of all proceedings in the cause, under his hand, and the seal of the court." The power of the court to adopt this rule cannot be questioned; and it seems to have regulated the practice ever since its adoption. In some cases, the certificate

Compelling Return.—Where writ of error to state court had been served on the clerk of state court, and no return had been made, before any further proceeding is had, a rule was made upon the clerk to make the return at next term or show cause, and case was continued.[24]

(8) *Amendment of Writ.*—Under § 1005 of the Revised Statutes this court may amend a writ of error to a state court which bears the teste of the chief justice of the supreme court of a state, and is signed by the chief justice and clerk, and sealed with the seal of that court.[25] Where a writ of error from the United States supreme court to a state appellate court is signed by the clerk of the state court, instead of by the clerk of the United States supreme court or United States circuit court for the proper district, the defect is amendable under § 1005, Rev. Stat., U. S.[26]

(9) *The Citation*—aa. *Signature.*—The twenty-fifth section of the judiciary act of 1798 provides that the citation must be signed by the chief justice, or judge, of the court, or the presiding judge has been affixed to the record; but this court has decided, where the question has been raised, that such certificate is unnecessary. So far as the authentication of the record is concerned, it is impossible to make a distinction between a civil and a criminal case. What may be sufficient to authenticate the proceedings in a civil case, must be equally so in a criminal one. The verity of the record is of as much importance in the one case as in the other. Worcester *v.* Georgia, 6 Pet. 515, 8 L. Ed. 483, 503.

Is it necessary, in such a case, that the record should be certified by the judge who held the court? In the case of Martin *v.* Hunter's Lessee, which was a writ of error to the court of appeals of Virginia, it was objected that the return to the writ of error was defective, because the record was not so certified; but the court in that case said: "The forms of process, and the modes of proceeding in the exercise of jurisdiction, are, with few exceptions, left by the legislature to be regulated and changed, as this court may, in its discretion, deem expedient." By a rule of this court, "the return of a copy of a record, of the proper court, annexed to the writ of error, is declared to be a sufficient compliance with the mandate of the writ. The record in this case is duly certified by the clerk of the court of appeals, and annexed to the writ of error. The objection, therefore, which has been urged to the sufficiency of the return cannot prevail." (1 Wheat. 304.) Worcester *v.* Georgia, 6 Pet. 515, 8 L. Ed. 483, 502.

The forms of process, and the modes of proceeding in the exercise of jurisdiction, are, with few exceptions, left by the legislature, to be regulated and changed, as this court may, in its discretion, deem expedient. By a rule of this court, the return of a copy of a record of the proper court, under the seal of that court, annexed to the writ of error, is declared to be "a sufficient compliance with the mandate of the writ." Where the record is duly certified by the clerk of the court of appeals, and annexed to the writ of error, an objection, urged to the sufficiency of the return, cannot prevail. Martin *v.* Hunter, 1 Wheat. 304, 361, 4 L. Ed. 97.

A writ of error was issued to "the judges of the superior court for the county of Gwinnett in the state of Georgia," commanding them to send to the supreme court of the United States, the record and proceedings in the said superior court of the county of Gwinnett, between the state of Georgia, plaintiff, and Samuel A. Worcester, defendant, on an indictment in that court. The record of the court of Gwinnett was returned, certified by the clerk of the court, and was also authenticated by the seal of the court. It was returned with, and annexed to, a writ of error issued in regular form, the citation being signed by one of the associate justices of the supreme court, and served on the governor and attorney general of the state more than thirty days before the commencement of the term to which the writ of error was returnable. By the court: The judicial act, so far as it prescribes the mode of proceeding, appears to have been literally pursued. In February, 1797, a rule was made on this subject in the following words: "It is ordered by the court that the clerk of the court to which any writ of error shall be directed, may make return of the same by transmitting a true copy of the record, and of all proceedings in the same, under his hand and the seal of the court." This has been done. But the signature of the judge has not been added to that of the clerk. The law does not require it. The rule does not require it. Worcester *v.* Georgia, 6 Pet. 515, 8 L. Ed. 483.

24. United States *v.* Booth, 18 How. 476, 15 L. Ed. 464. See Ableman *v.* Booth, 21 How. 506, 512, 16 L. Ed. 169.

25. Amendment of writ.—Texas, etc., R. Co. *v.* Kirk, 111 U. S. 486, 28 L. Ed. 481, citing McDonogh *v.* Millaudon, 3 How. 693, 11 L. Ed. 787.

26. Miller *v.* Texas, 153 U. S. 535, 38 L. Ed. 812, citing Texas, etc., R. Co. *v.* Kirk, 111 U. S. 486, 28 L. Ed. 481.

or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the supreme court of the United States. If the citation is signed by a district judge, it is without authority of law, and the citation is, therefore, without effect.[27]

Section 999 of the Revised Statutes provides that the citation shall be signed by the chief justice judge or chancellor of the court rendering the judgment or passing the decree complained of, or by a justice of this court.[28]

bb. *Service.*—The only mode in which a state can be cited to appear is by serving the process on some one or more of its officers. But the citation must be directed to the party on the record, and served on him. And when an officer of the state is the party prosecuting the suit for the state, the citation must be served on him.[29] The "adverse party," within the meaning of the language of the act of 1789, ch. 20, which directs the "adverse party" to be cited on a writ of error or appeal, is the one which appealed in the suit, and who prosecuted or defended it, and in whose favor the judgment was rendered, which the plaintiff in the writ of error seeks to reverse.[30]

(10) *Appeal Bond.*—An application for leave to prosecute a writ of error to a state court, without giving security as required by § 1000 of the Revised Statutes, under an act of congress of July 20, 1892, 27 Stat. 252, must be denied. The ruling has uniformly been, and has been enforced in repeated instances, that that act has no application to proceedings in the supreme court of the United States.[31] But it need not appear, that the judge who granted the writ of error did, upon issuing the citation, take a bond, as required by the 22d section of the judiciary act. That provision is merely directory to the judge, and the presumption of law is, until the contrary appears, that every judge who signs a citation has obeyed the injunctions of the act.[32]

(11) *Limitations.*—**In General.**—No judgment or decree of a state court can be reviewed in this court unless the writ of error is brought within two years after the entry of the judgment.[33] Moreover, the act of March 3, 1891, c. 517,

27. Signature.—Palmer *v.* Donner, 7 Wall. 541, 19 L. Ed. 99.

Writs of error to the state courts can only issue when one of the questions mentioned in the 25th section of the judiciary act was decided by the court to which the writ is directed, and in order that there may be some security that such a question was decided in the case, the statute requires that the citation must be signed by the chief justice or judge, or chancellor of the court rendering or passing the judgment or decree complained of, or by a justice of the supreme court of the United States. Bartemeyer *v.* Iowa, 14 Wall. 26, 20 L. Ed. 792.

A district judge has no authority to sign a citation upon a writ of error to a state court. When the citation has been thus signed, the writ of error will be dismissed on motion. Palmer *v.* Donner, 7 Wall. 541, 19 L. Ed. 99.

28. Butler *v.* Gage, 138 U. S. 52, 55, 56, 34 L. Ed. 869.

29. Service.—Poydras *v.* Treasurer of Louisiana, 17 How. 1, 15 L. Ed. 93.

30. Poydras *v.* Treasurer of Louisiana, 17 How. 1, 15 L. Ed. 93.

Where a proceeding was instituted in Louisiana, in the name of the treasurer of the state, to recover a tax imposed upon property inherited by aliens, a citation served upon that officer was sufficient. He was the "adverse party," under the judiciary act. The tenth rule of this court, directing process to be served upon the chief executive magistrate and attorney general, applies to those cases only in which the state is a party on the record. When an officer of the state is the party prosecuting the suit for the state, the citation must be served on him. Poydras *v.* The Treasurer of Louisiana, 17 How. 1, 15 L. Ed. 93.

31. Appeal bond.—Gallaway *v.* Fort Worth Bank, 186 U. S. 177, 178, 46 L. Ed. 1111, approved in Bradford *v.* Southern R. Co., 195 U. S. 243, 247, 49 L. Ed. 178.

32. Martin *v.* Hunter, 1 Wheat. 304, 4 L. Ed. 97.

33. Limitations in general.—Rev. Stat., § 1008; Cummings *v.* Jones, 104 U. S. 419, 26 L. Ed. 824; Scarborough *v.* Pargoud, 108 U. S. 567, 27 L. Ed. 824.

Section 1008 of the Revised Statutes declares that "No judgment, decree, or order of a circuit or district court, in any civil action at law, or in equity, shall be reviewed by the supreme court, on writ of error or appeal, unless the writ of error is brought, or the appeal is taken within two years after the entry of such judgment, decree, or order." This rule is applicable to writs of error to the state courts in like manner as to circuit courts. Scarborough *v.* Pargoud, 108 U. S. 567,

26 Stat. at L. 826, did not operate to reduce the time in which writs of error could issue from the supreme court to the state courts.[34]

The statute of limitations begins to run from the time of the entry of the judgment in the state court. On that day the plaintiff has a right to his writ, and on that day the two years begins to run as described by § 1008 of the Revised Statutes.[35]

(12) *Parties to Proceeding*—aa. *In General.*—Any person who, in the state courts, has substantially made himself a party to the case, by asserting on the record his interest, and conducting the defense in the highest court of the state, may prosecute a writ of error in his own name in this court under the 25th section of the judiciary act.[36] However it may be in regard to the rights of parties on appeal in the state court, in order to be heard in this court on writ of error to a state court, the question must have been raised in the state court by the individual who seeks to have it reviewed here. A plaintiff in error in this court must show that he has himself raised the question in the state court which he argues here, and it will not aid him to show that someone else had raised it in the state court, while he failed himself to do so.[37]

bb. *Appealable Interest.*—The jurisdiction of the supreme court of the United States can only be invoked by a party having a personal interest in the litigation. It follows that a party cannot sue out a writ of error in behalf of third persons.[38] Moreover, the interest of an appellant in the supreme court of the United States should be a personal and not an official interest.[39]

The fact that a personal judgment for costs was rendered against a public official who has sought advise of the courts of his own state in his official capacity, will not give the supreme court of the United States jurisdiction of the cause on writ of error to the state court.[40] Besides, the fact that the various

27 L. Ed. 824; Polleys *v.* Black River Co., 113 U. S. 81, 82, 28 L. Ed. 938.

"This is a writ of error to the supreme court of Louisiana, brought more than two but less than five years after the judgment to be reviewed was rendered, and one of the questions raised on this motion is whether the limitation of two years prescribed by § 1008 of the Revised Statutes, for bringing writs of error to the circuit and district courts, applies to writs of error to state courts. We have no hesitation in saying it does." Cummings *v.* Jones, 104 U. S. 419, 26 L. Ed. 824, citing Brooks *v.* Norris, 11 How. 204, 13 L. Ed. 665.

34. Allen *v.* Southern, etc., R. Co., 173 U. S. 479, 43 L. Ed. 775, reaffirmed in Holt *v.* Indiana Mfg. Co., 176 U. S. 68, 44 L. Ed. 374.

35. Polleys *v.* Black River Co., 113 U. S. 81, 28 L. Ed. 938, citing Brooks *v.* Norris, 11 How. 204, 13 L. Ed. 665.

In the case of Brooks *v.* Norris, 11 How. 204, 13 L. Ed. 665, construing the 25th section of the judiciary act of 1789, it is said "that the writ of error is not brought, in the legal meaning of the term, until it is filed in the court which rendered the judgment. It is the filing of the writ that removes the record from the inferior to the appellate court, and the period of limitation prescribed by the act of congress must be calculated accordingly." This language is repeated in Mussina *v.* Cavazos, 6 Wall. 355, 18 L. Ed. 810, and in Scarborough *v.* Pargoud, 108 U. S. 567, 27 L. Ed. 824. Polleys *v.* Black River Co., 113 U. S. 81, 83, 28 L. Ed. 938.

36. Parties to proceeding in general.—Steamboat Burns, 9 Wall. 237, 19 L. Ed. 620.

37. Sulley *v.* American Nat. Bank, 178 U. S. 289, 297, 44 L. Ed. 1072.

38. Appealable interest.—Tyler *v.* Judges of Court of Registration, 179 U. S. 405, 45 L. Ed. 252; Clark *v.* Kansas City, 176 U. S. 114, 44 L. Ed. 392; Turpin *v.* Lemon, 187 U. S. 51, 47 L. Ed. 70; Lampasas *v.* Bell, 180 U. S. 276, 45 L. Ed. 527; Ludeling *v.* Chaffe, 143 U. S. 301, 36 L. Ed. 313; Giles *v.* Little, 134 U. S. 645, 33 L. Ed. 1062; Smith *v.* Indiana, 191 U. S. 138, 148, 48 L. Ed. 125.

39. Smith *v.* Indiana, 191 U. S. 138, 149, 48 L. Ed. 125.

A county auditor having sought the advice of the courts of his own state in his official capacity, in order to test the constitutionality of a law purely in the interest of third persons, viz, the taxpayers, is not entitled to a writ of error from the United States supreme court to review the judgment of the state court. Smith *v.* Indiana, 191 U. S. 138, 48 L. Ed. 125, citing and approving Caffrey *v.* Oklahoma, 177 U. S. 346, 44 L. Ed. 799.

40. Smith *v.* Indiana, 191 U. S. 138, 48 L. Ed. 125.

"It seems to be well settled that even if the fact that costs are awarded against a party, gives him an appealable interest, of which there appears to be considerable doubt, Travis *v.* Waters, 12 Johns. 500;

statutes fixing the jurisdiction of the circuit courts of the United States, and of this court, which from the original judiciary act of 1789 have, where the amount involved was made the test of jurisdiction, uniformly used the words "exclusive of costs," would indicate, so far as the federal courts are concerned, that a mere judgment for costs could not ordinarily be made the basis of an appeal to this court.[41]

(13) *Assignment of Errors.*[42]—**Necessity for.**—Objections not assigned in this court as error, in the assignments of error, or in the brief for plaintiff in error, will not be considered.[43] Where a writ of error is brought for a review of a judgment of a state court, but no assignment of errors is returned with the writ as required by § 997 of the Revised Statutes, this court will affirm the judgment under § 4 of Rule 21, 108 U. S. 585, for want of a due prosecution of the writ of error.[44]

Requisites and Sufficiency.—An assignment of error in the highest court of a state to the decision of an inferior state court, that the latter had decided a particular state statute "valid and constitutional," and a judgment entry by the latter court that the statute was not "in any respect repugnant to the constitution of the United States," is not specific enough to give jurisdiction to the supreme court of the United States under § 709 of the Revised Statutes; there being nothing else anywhere in the record to show to which provision of the constitution of the United States the statute was alleged to be repugnant.[45] However, where the record showed that the case was one of the assertion of a lien under a state statute for building a vessel at a town on what the court might perhaps judically notice was an estuary of the sea, and where the entry of judgment showed also that the court had adjudged "that the contract for building the vessel in question was not a maritime contract, and that the remedy given by the lien law of the state did not conflict with the constitution or laws of the United States," the court held, that the latter statement, in view of the whole record, was sufficient to give this court jurisdiction.[46] A ground of error assigned in the state court that "the charge of the court, the verdict of the jury, and the judgment below, are each against and in conflict with the constitution, and laws of the United States, and therefore erroneous," is too general and indefinite to come within the provisions of the act, or the decisions of this court.[47]

Reid *v.* Vanderheyden, 5 Cow. 719, 736, it does not give him an appealable interest in the judgment upon the merits, but limits him to the mere question of costs. Studebaker *v.* Markley, 7 Ind. App. 368; Hone *v.* Schaick, 7 Paige 221; Card *v.* Bird, 10 Paige 426; Cuyler *v.* Moreland, 6 Page 273;" Smith *v.* Indiana, 191 U. S. 138, 149, 48 L. Ed. 125.

If plaintiff in error objected to the judgment for costs, he might have moved to modify it in that particular. Not having done so, his appeal is presumptively from the judgment on the merits, American Ins. Co. *v.* Gibson, 104 Indiana 336, 342, and as his individual rights were not affected by such judgment, he is not entitled to an appeal. Smith *v.* Indiana, 191 U. S. 138, 149, 48 L. Ed. 125.

41. Smith *v.* Indiana, 191 U. S. 138, 149, 48 L. Ed. 125.

42. Assignment of errors.—For an example of what form an assignment of error should be in a writ of error to a state court, see Fletcher *v.* Rhode Island, 5 How. 540, 11 L. Ed. 272.

43. O'Neil *v.* Vermont, 144 U. S. 323, 36 L. Ed. 450.

44. Dugger *v.* Tayloe, 121 U. S. 286, 30 L. Ed. 946.

45. Edwards *v.* Elliott, 21 Wall. 532, 22 L. Ed. 487.

46. Edwards *v.* Elliott, 21 Wall. 532, 22 L. Ed. 487.

47. "This case cannot be distinguished from the case of Lawler *v.* Walker, 14 How. 149, 14 L. Ed. 364. In that case the state court certified that there was drawn in question the validity of statutes of the state of Ohio, etc., without saying what statutes. And in the opinion of this court dismissing the case for want of jurisdiction, they say: 'The statutes complained of in this case should have been stated; without that, the court cannot apply them to the subject matter of litigation to determine whether or not they violated the constitution of the United States.' So in the case before us, the clause in the constitution and the law of congress should have been specified by the plaintiffs in error in the state court, in order that this court might see what was the right claimed by them, and whether it was denied to them by the decision of the state court." Maxwell *v.* Newbold, 18 How. 511, 15 L. Ed. 506.

t. *The Record*—(1) *In General.*—This court cannot go out of the record to re-examine any question under a writ of error to a state court.[48] We are to try the case upon the duly certified record, legally made in the state court, and upon which its decision rests.[49] Neither the petition for a rehearing nor petition for writ of error in the state court after judgment, or assignments of error in this court, can supply deficiencies in the record of the state court, if any exist, in order to give this court jurisdiction to review a federal question from a state court.[50]

Exceptions to General Rule.—It is generally true, that a party claiming a right under an act of congress, must avail himself of some legal means to place on record that claim, and the facts on which it rests; otherwise, he cannot have the benefit of a re-examination of the judgment upon a writ of error. But this duty does not exist in a case in which he cannot perform it without surrendering some part of the right which the act secured to him, and in which the court, where the matter is depending, is expressly prohibited from taking any further proceeding.[51]

48. Edwards *v.* Elliott, 21 Wall. 532, 549, 22 L. Ed. 487.

The record in general.—Fisher *v.* Cockerell, 5 Pet. 248, 8 L. Ed. 114; Davis *v.* Packard, 7 Pet. 281, 8 L. Ed. 684; Inglee *v.* Coolidge, 2 Wheat. 363, 4 L. Ed. 261; New York State *v.* Barker, 179 U. S. 279, 45 L. Ed. 190, distinguishing Cummings *v.* National Bank, 101 U. S. 153, 162, 25 L. Ed. 903; Goodenough Horse Shoe Co. *v.* Rhode Island Horse Shoe Co., 154 U. S. 635, 24 L. Ed. 368; Walker *v.* Villavaso, 6 Wall. 124, 18 L. Ed. 853; Moore *v.* Mississippi, 21 Wall. 636, 639, 22 L. Ed. 653, approved in Otis *v.* Oregon Steamship Co., 116 U. S. 548, 550, 29 L. Ed. 719; Williams *v.* Norris, 12 Wheat. 117, 118, 6 L. Ed. 571; Davis *v.* Packard, 6 Pet. 48, 8 L. Ed. 315; Otis *v.* Bacon, 7 Cranch 596, 3 L. Ed. 451; Moore *v.* Mississippi, 21 Wall. 636, 22 L. Ed. 653.

The second section of the act of congress of February 5, 1867, amending the judiciary act of 1789, is to a great extent a transcript of the 25th section of the latter act. There are several alterations of phraseology which are not material. But at the close of the second section there is a substantial addition and omission. The omission is of these words in the 25th section of the original act, 1 Stat. at L. 85: "But no other error shall be regarded as a ground of reversal in any such case, as aforesaid, than such as appears on the face of the record, and immediately respects the before-mentioned questions of validity or construction of the said constitution, treaties, statutes, commissions, or authorities in dispute." Stewart *v.* Kahn, 11 Wall. 493, 502, 20 L. Ed. 176.

The 25th section of the act to establish the judiciary courts of the United States, which gives to this court the power of revising certain judgments of state courts, limits that power in these words "that no other error shall be assigned or regarded as a ground of reversal in any such case as aforesaid than such as appears on the face of the record." Fisher *v.* Cockerell, 5 Pet. 248, 8 L. Ed. 114; Harris *v.* Dennie, 3 Pet. 292, 7 L. Ed. 683; Craig *v.* Missouri, 4 Pet. 410, 7 L. Ed. 903; Owings *v.* Norwood, 5 Cranch 344, 3 L. Ed. 120; Miller *v.* Nicholls, 4 Wheat. 311, 312, 4 L. Ed. 578.

In the exercise of the appellate jurisdiction of the supreme court on the decisions of state courts, the supreme court is not at liberty to resort to forced inferences and conjectural reasonings, or possible or even probable suppositions of the points raised and actually decided by those courts. The court must see, plainly, that the decision was either directly made of some matter within the purview of the 25th section of the act of 1789, or that the decision could not have been such as it was, without necessarily involving such matter. It is to the record, and to the record alone, that the supreme court can resort to ascertain its appellate jurisdiction, in cases decided in the supreme or superior court of a state. Ocean Ins. Co. *v.* Polleys, 13 Pet. 157, 10 L. Ed. 105.

The preceedings on a motion to dismiss made in the state supreme court, form no part of the record. Davis *v.* Packard, 6 Pet. 41, 48, 8 L. Ed. 315.

49. Powell *v.* Brunswick County, 150 U. S. 433, 37 L. Ed. 1134; Harding *v.* Illinois, 196 U. S. 78, 49 L. Ed. 394, reaffirmed in Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171; Seale *v.* Georgia, 201 U. S. 642, 50 L. Ed. 902.

50. Simmerman *v.* Nebraska, 116 U. S. 54, 29 L. Ed. 535; Harding *v.* Illinois, 196 U. S. 78, 84, 49 L. Ed. 394, reaffirmed in Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171; Seale *v.* Georgia, 201 U. S. 642, 50 L. Ed. 902.

51. Kanouse *v.* Martin, 15 How. 198, 209, 14 L. Ed. 660.

For it is as true in this court as in the

(2) *Form and Contents of Record*—aa. *In General.*—Where in the transcript on a writ of error from the supreme court of the United States to the highest state court, there are no pleadings, no judgment other than an allegation in what is called a bill of exceptions of an adjudication in insolvency, and the recital in such bill of objections to the form of commencing the action, and certifying proceedings therein, the writ of error will be dismissed.[52]

bb. *Necessity for Setting Out Treaty, Act of Congress or Constitutional Provision.*—It is well settled in the supreme court of the United States that it must be made to appear that some provision of the federal, as distinguished from the state, constitution was relied upon, and that such provision be set forth.[53] It is not always necessary to refer to the precise words or to the particular section of the constitution, under which some right, title, privilege or immunity is claimed, it is sufficient if it appears affirmatively from the record that a right, title, privilege or immunity is specially set up or claimed under that instrument or under the authority of the United States.[54] A party relying on this court for reexamination and reversal of the decree or judgment of the highest state court, under the 25th section of the judiciary act of 1789, need not set forth specially the clause of the constitution of the United States on which he relies. If the pleadings make a case which necessarily comes within the provisions of the constitution, it is enough.[55] "It would be a new rule of pleading, and one altogether su-

superior court of New York that, upon a writ of error, this court looks only at the technical record, and affirms or reverses the judgment, according to what may appear thereon. (Inglee *v.* Coolidge, 2 Wheat. 363, 4 L. Ed. 261; Fisher *v.* Cockerell, 5 Pet. 248, 8 L. Ed. 114; Reed *v.* Marsh, 13 Pet. 153, 10 L. Ed. 103.) But this is only one of the rules of evidence for the exercise of its jurisdiction as a court of error; it prescribes what shall and what shall not be received as evidence of what was done in the court below; and when an act of congress cannot be executed without desregarding this general rule, it becomes the duty of this court to disregard it. The plaintiff in error, having a right to have the erroneous judgment reversed, must also have the right to have the only legal proceedings, which could be had consistently with the act of congress, examined to show that error. Kanouse *v.* Martin, 15 How. 198, 210, 14 L. Ed. 660.

When a record from the highest court of the state disclosed the fact that a person had been indicted on an indictment which contained certain counts charging him with selling lottery tickets, and certain others charging him with keeping a gaming table, both in violation of statute, and that he pleaded in bar to the whole indictment, a statute of earlier date which went to justify his issuing of the lottery tickets, but not to justify his keeping of a gaming table, and the plea, on demurrer, was held bad, and on his then pleading not guilty, he was found guilty, generally, and a proper judgment entered against him; this court held, there having been no bill of exceptions taken at the trial and no error specifically stated in the record—that it would not look out of the record—into the opinion of the court (made part of the transcript) or elsewhere—to see that the defendant had set up that the statute under which he was indicted and convicted violated the obligation, of a contract made by the prior one, which he had set up in bar to the whole indictment. The record showing that the plea had answered but part of the indictment, the judgment had a proper base for it, and no other matter being properly alleged for error it was rightly to be affirmed. Moore *v.* Mississippi, 21 Wall. 636, 22 L. Ed. 653.

52. Form and contents of record in general.—Clarke *v.* McDade, 165 U. S. 168, 41 L. Ed. 673.

53. Necessity for setting out treaty, act of congress or constitutional provision.—Porter *v.* Foley, 24 How. 415, 16 L. Ed. 740; Miller *v.* Cornwall R. Co., 168 U. S. 131, 42 L. Ed. 409; Dewey *v.* Des Moines, 173 U. S. 193, 43 L. Ed. 665; Keokuk, etc., Bridge Co. *v.* Illinois, 175 U. S. 626, 44 L. Ed. 299; Chapin *v.* Fye, 179 U. S. 127, 45 L. Ed. 119; New York, etc., R. Co. *v.* New York, 186 U. S. 269, 273, 46 L. Ed. 1158.

54. Oxley Stave Co. *v.* Butler County, 166 U. S. 648, 657, 41 L. Ed. 1149, explaining Maxwell *v.* Newbold, 18 How. 511, 15 L. Ed. 506; Hoyt *v.* Shelden, 1 Black 518, 17 L. Ed. 65, reaffirmed in Harkins *v.* Ashville, 180 U. S. 635, 45 L. Ed. 709; Baldwin *v.* County Commissioners, 168 U. S. 705, 42 L. Ed. 1213; Tompkins *v.* Cooper, 170 U. S. 703, 42 L. Ed. 1217; Mutual Life Ins. Co. *v.* Kirchoff, 169 U. S. 103, 42 L. Ed. 677; Chappell *v.* Stewart, 169 U. S. 733, 42 L. Ed. 1215; Fenwick Hall Co. *v.* Old Saybrook, 169 U. S. 734, 42 L. Ed. 1215.

55. Bridge Proprietors *v.* Hoboken, etc., Co., 1 Wall. 116, 17 L. Ed. 571.

perfluous, to require a party to set out specially the provision of the constitution of the United States, on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the constitution of the United States."[56] In the construction of the 25th section of the judicial act, passed 24th of September, 1789, this court has never required that the treaty, or act of congress, under which the party claims, who brings the final judgment of a state court into review before this court, should have been pleaded specially or spread upon the record. But it has always been deemed essential to the exercise of jurisdiction in such a case, that the record should show a complete title under the treaty or act of congress, and that the judgment of the court is in violation of that treaty or act.[57]

cc. *Orders in State Court Subsequent to Removal.*—No orders in the state court, after the removal of the record into this court (not made by way of amendment, but introducing new matter), can be brought into the record here. The cause must be heard and determined upon the record as it stood when removed.[58]

dd. *Petition for Rehearing.*—A petition for a rehearing in the state court is no part of the record.[59]

ee. *Petition for Writ of Error.*—It must be regarded as settled that a petition for a writ of error forms no part of the record on which it is to be ascertained whether the state court decided a federal question.[60]

56. Bridge Proprietors *v.* Hoboken Co., 1 Wall. 116, 142, 17 L. Ed. 571.

57. Hickie *v.* Starke, 1 Pet. 94, 7 L. Ed. 67; Crowell *v.* Randell, 10 Pet. 368, 395, 9 L. Ed. 458; McCullough *v.* Virginia, 172 U. S. 102, 118, 43 L. Ed. 382.

58. Orders in state court subsequent to removal.—Williams *v.* Norris, 12 Wheat. 117, 6 L. Ed. 571.

59. Petition for rehearing.—Grame *v.* Mutual Assur. Soc., 154 U. S. appx. 676, 26 L. Ed. 740; La Grange *v.* Chouteau, 4 Pet. 287, 7 L. Ed. 861.

A petition for a rehearing, filed in the court below after judgment, which has been refused, is no part of the record to be returned here with a writ of error for a review of the judgment. Steines *v.* Franklin County, 14 Wall. 15, 21, 20 L. Ed. 846; Grame *v.* Mutual Assur. Soc., 154 U. S. appx. 676, 26 L. Ed. 740; Harding *v.* Illinois, 196 U. S. 78, 84, 49 L. Ed. 394.

After the decision of the case in the supreme court of the state of Missouri, the plaintiff presented a petition for a rehearing, claiming his freedom under the provisions of the ordinance of congress of the 13th of July, 1787, for the government of the territory of the United States northwest of the River Ohio. The supreme court refused to grant the rehearing, and the plaintiff prosecuted a writ of error to this court under the twenty-fifth section of the judiciary act of 1789. Held, that as the petition for rehearing forms no part of the record, it cannot be noticed. The jurisdiction of this court depends on the matter disclosed in the bill of exceptions. LaGrange *v.* Chouteau, 4 Pet. 287, 7 L. Ed. 861.

In order for this court to review judgments of state courts on federal questions, it must appear unmistakably that the court either knew, or ought to have known, prior to judgment, that a federal question was involved in the decision to be made. And the fact that the federal question was suggested for the first time on a petition for rehearing, "is unimportant here, because our jurisdiction extends only to a review of the judgment as it stands in the record. We act on the case as made to the court below when the judgment was rendered, and cannot incorporate into the record any new matter which appears for the first time after the judgment, on a petition for rehearing. Such a petition is no part of the record on which the judgment rests." Susquehanna Boom Co. *v.* West Branch Boom Co., 110 U. S. 57, 28 L. Ed. 69, citing and approving Brown *v.* Colorado, 106 U. S. 95, 27 L. Ed. 132.

60. Petition for writ of error.—Manning *v.* French, 133 U. S. 186, 33 L. Ed. 582; Clark *v.* Pennsylvania, 128 U. S. 395, 32 L. Ed. 487; Warfield *v.* Chaffe, 91 U. S. 690, 23 L. Ed. 383; Butler *v.* Gage, 138 U. S. 52, 56, 34 L. Ed. 869; Leeper *v.* Texas, 139 U. S. 462, 467, 35 L. Ed. 225; French *v.* Taylor, 199 U. S. 274, 50 L. Ed. 189; Sayward *v.* Denny, 158 U. S. 180, 183, 39 L. Ed. 941, reaffirmed in Texas, etc., R. Co. *v.* Gay, 167 U. S. 745, 42 L. Ed. 1209; California Powder Works *v.* Davis, 151 U. S. 389, 393, 38 L. Ed. 206; Harding *v.* Illinois, 196 U. S. 78, 84, 49 L. Ed. 394.

The fact that, after the final judgment, and in the petition for a writ of error to this court, which seems to have been treated also as a petition for rehearing, a federal question was presented is not enough. It was so decided in Susque-

ff. *Arguments of Counsels.*—Nor do the arguments of counsel form part of the record upon which action is taken here, though the opinions of the state courts are now made such by rule.[61] The certification of the briefs by the clerk of the state supreme court, which are no part of the record, will not sufficiently raise a federal question to give this court jurisdiction to review the state court's decision.[62]

gg. *Opinion of the State Court*—aaa. *Under the 25th Section of the Judiciary Act.*—The 25th section of the judiciary act restricted this court, in reviewing on error the final judgment or decree of the highest court of a state, to the consideration of such errors as appeared on the face of the record. Therefore, the opinion of the state court could not be looked to in order to determine the errors committed, or whether such a question was involved as would give this court jurisdiction, because such opinion formed no part of the record.[63]

bbb. *Under Later Statutes.*—But in the second section of the act of February 5th, 1867, 14 Stat. at Large 385, amending the judiciary act of 1789, that clause, in the act of 1789, restricting this court to the consideration of such errors as

hanna Boom Co. *v.* West Branch Boom Co., 110 U. S. 57, 28 L. Ed. 69. As was said in that case: "We act on the case as made to the court below when the judgment was rendered, and cannot incorporate into the record any new matter which appears for the first time after the judgment, on a petition for rehearing. Such a petition is no part of the record on which the judgment rests." Simmerman *v.* Nebraska, 116 U. S. 54, 29 L. Ed. 535.

Where a petition for a writ of error from the supreme court of the United States to a state court and the assignment of error therein, set up federal questions, they form no part of the record on which to determine whether a federal question was decided by a state court. Corkran Oil Co. *v.* Arnaudet, 199 U. S. 182, 50 L. Ed. 143, citing Leeper *v.* Texas, 139 U. S. 462, 35 L. Ed. 225; Chapin *v.* Fye, 179 U. S. 127, 45 L. Ed. 119.

61. Arguments of counsel.—Gibson *v.* Chouteau, 8 Wall. 314, 19 L. Ed. 317; Parmelee *v.* Lawrence, 11 Wall. 36, 20 L. Ed. 48; Gross *v.* United States Mortgage Co., 108 U. S. 477, 484, 27 L. Ed. 795; United States *v.* Taylor, 147 U. S. 695, 700, 37 L. Ed. 335; Sayward *v.* Denny, 158 U. S. 180, 183, 39 L. Ed. 941, reaffirmed in Texas, etc., R. Co. *v.* Gay, 167 U. S. 745, 42 L. Ed. 1209.

It is necessary to the jurisdiction of this court, under the 25th section of the judiciary act, that the record show, either by express words or necessary legal intendment, that one of the questions mentioned in that act was before the state court, and was decided by it. The arguments of counsel cannot be looked to for this purpose. Gibson *v.* Chouteau, 8 Wall. 314, 19 L. Ed. 317.

62. Zadig *v.* Baldwin, 166 U. S. 485, 41 L. Ed. 1087; Harding *v.* Illinois, 196 U. S. 78, 49 L. Ed. 394, reaffirmed in Robinson *v.* Wingate, 198 U. S. 580, 49 L. Ed. 1171; Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171; Seale *v.* Georgia, 201 U. S. 642, 50 L. Ed. 902.

63. Under the 25th section of the judiciary act.—Williams *v.* Norris, 12 Wheat. 117, 6 L. Ed. 571; Rector *v.* Ashley, 6 Wall. 142, 143, 18 L. Ed. 733; Gibson *v.* Chouteau, 8 Wall. 314, 19 L. Ed. 317; Medberry *v.* Ohio, 24 How. 413, 16 L. Ed. 739; Davis *v.* Packard, 6 Pet. 41, 47, 8 L. Ed. 312; Cockcroft *v.* Vose, 14 Wall 5, 20 L. Ed. 875; Kenebec R. Co. *v.* Portland R. Co., 14 Wall. 23, 25, 20 L. Ed. 850.

The old rule, established by early cases, restricted our inquiries as to the existence and decision of the question "to the face of the record." Previous to the act of 1867, Rev. Stat., § 709, it was uniformly held, except as to the state of Louisiana, where a peculiar practice prevails, that we would not look into the opinions of the courts to ascertain what had been decided. Gibson *v.* Chouteau, 8 Wall. 317, 19 L. Ed. 317; Rector *v.* Ashley, 6 Wall. 142, 18 L. Ed. 733; Williams *v.* Norris. 12 Wheat. 117, 6 L. Ed. 571; Grand Gulf, etc., R. Co. *v.* Marshall, 12 How. 165, 13 L. Ed. 938; Cousin *v.* Labatut, 19 How. 202, 15 L. Ed. 601.

The opinion of the state court is not made a part of the record so that it might be examined on error from the United States courts, by a state statute requiring the opinion in writing to be filed among the papers in the cause. Williams *v.* Norris, 12 Wheat. 117, 6 L. Ed. 571; Rector *v.* Ashley, 6 Wall. 142, 143, 18 L. Ed. 733.

Where the record before the court, on a case from a state court, shows a declaration, pleas to it, issue on them, verdict on those issues and judgment on the verdict, without allusion to any demurrer, the court will not refer to opinions in books of printed reports of the state court to contradict the record and to show that there was a demurrer to the declaration, and that judgment overruling the demurrer was given. Edwards *v.* Elliott, 21 Wall. 532, 22 L. Ed. 487.

appeared on the face of the record, was omitted, and the court held, that the opinion of the state court, when properly certified or authenticated, might be examined to ascertain what was decided, in the case.[64] And it is the settled course of decision now that this court may examine opinions so delivered and recorded to ascertain the ground of the judgment of the state court.[65]

64. Under later statutes.—Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429; Gross *v.* United States Mortgage Co., 108 U. S. 477, 27 L. Ed. 795.

In Murdock *v.* Memphis, 20 Wall. 590, 633, 22 L. Ed. 429, it was said that in determining whether a federal question was actually raised and decided in the state court, "this court has been inclined to restrict its inquiries too much by this express limitation of the inquiry 'to the face of the record.' What was the record of a case was pretty well understood as a common-law phrase at the time that statute (act of 1789) was enacted. But the statutes of the state and new modes of proceedings in those courts have changed and confused the matter very much since that time." After observing that it was in reference to one of the necessities thus brought about that this court had long since determined to consider as part of the record the opinions delivered in such cases by the supreme court of Louisiana, it was said: "And though we have repeatedly decided that the opinions of other state courts cannot be looked into to ascertain what was decided, we see no reason why, since this restriction is removed, we should not so far examine those opinions, when properly authenticated, as may be useful in determining that question."

65. Kreiger *v.* Shelby R. Co., 125 U. S. 39, 44. 31 L. Ed. 675; Dibble *v.* Bellingham Bay Land Co., 163 U. S. 63, 69, 41 L. Ed. 72; Moore *v.* Mississippi, 21 Wall. 636, 638, 22 L. Ed. 653; Philadelphia Fire Ass'n *v.* New York, 119 U. S. 110, 116, 30 L. Ed. 342; Dale Tile Mfg. Co. *v.* Hyatt, 125 U. S. 46, 53, 31 L. Ed. 683; Columbia Water Power Co. *v.* Columbia Street R. Co., 172 U. S. 475, 43 L. Ed. 521; Wood Mowing, etc., Co. *v.* Skinner, 139 U. S. 293, 35 L. Ed. 193; Sayward *v.* Denny, 158 U. S. 180, 39 L. Ed. 941; Egan *v.* Hart, 165 U. S. 188, 41 L. Ed. 680; Castillo *v.* McConnico, 168 U. S. 674, 677, 42 L. Ed. 622; Board of Liquidation *v.* Louisiana, 179 U. S. 622, 637, 45 L. Ed. 347; San Jose Land, etc., Co. *v.* San Jose Ranch Co., 189 U. S. 177, 47 L. Ed. 765; Murdock *v.* Memphis, 20 Wall. 590, 633, 22 L. Ed. 429.

"It was formerly held that, even in writs of error to a state court, the opinion of the court below was not a part of the record (Williams *v.* Norris, 12 Wheat. 117, 119, 6 L. Ed. 571; Rector *v.* Ashley, 6 Wall. 142, 18 L. Ed. 733; Gibson *v.* Chouteau, 8 Wall. 314, 19 L. Ed. 317); but the inconvenience of this rule became so great that it was subsequently changed (Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429); and, finally, the eighth rule of this court was so modified, in 1873, as to require a copy of the opinion to be incorporated in the transcript." United States *v.* Taylor, 147 U. S. 695, 700, 37 L. Ed. 335.

In Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429, the subject was again under consideration, by reason of the omission from the act of 1867 of that provision in the 25th section of the act of 1789 restricting this court, when reviewing the final judgment or decree of the highest court of a state, to the consideration of such errors as appeared "on the face of the record." It was there said, that, in determining whether a federal question was raised and decided in a state court: "This court has been inclined to restrict its inquiries too much by this express limitation of the inquiry 'to the face of the record.'" "What was the record of a case," the court observed, speaking by Mr. Justice Miller, "was pretty well understood as a common-law phrase at the time that statute was enacted. But the statutes of the states, and new modes of proceedings in those courts, have changed and confused the matter very much since that time. It is in reference to one of the necessities thus brought about that this court long since determined to consider as part of the record the opinions delivered in such cases by the supreme court of Louisiana. Grand Gulf, etc., R. Co. *v.* Marshall, 12 How. 165, 13 L. Ed. 938; Cousin *v.* Labatut, 19 How. 202, 15 L. Ed. 601. And though we have repeatedly decided that the opinions of other state courts cannot be looked into to ascertain what was decided, we see no reason why, since this restriction is removed, we should not so far examine those opinions, when properly authenticated, as may be useful in determining that question. We have been in the habit of receiving the certificate of the court, signed by its chief justice or presiding judge, on that point, though not as conclusive, and these opinions are quite as satisfactory, and may more properly be treated as part of the record than such certificate." Gross *v.* United States Mortgage Co., 108 U. S. 477, 485, 27 L. Ed. 795.

Supreme court of Illinois.—"The subject was again considered in Gross *v.* United States Mortgage Co., 108 U. S. 477, 486, 27 L. Ed. 795, which came from the supreme court of Illinois. After referring to what was said in Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429, this court said: 'We cannot, therefore, doubt that in the existing state of the law it is

In the language of Mr. Justice Harlan, it has long been the practice of this court, in cases coming from a state court, to refer to its opinion made part of the record for the purpose of ascertaining whether any federal right, specially set up or claimed, had been denied to the plaintiff in error, or whether the judgment rested upon any ground of local law sufficient to dispose of the case without reference to any question of a federal character. And we have done this without stopping to inquire whether there was any statute of the state requiring the opinion of the court to be filed in the case as part of the record.[66]

Where a state statute requires the opinions of the supreme court to be spread upon the records of the court, this court, upon error to a state court, may examine such opinion in connection with other portions of the record, to ascertain whether any federal question was raised and decided.[67] In other words, when-

our duty to examine the opinion of the supreme court of Illinois, in connection with other portions of the record, for the purpose of ascertaining whether this writ of error properly raises any question determined by the state court adversely to a right, title, or immunity under the constitution or laws of the United States and especially set up and claimed by the party bringing the writ.' It is true that in that case the court stated that any difficulty upon the subject was removed by the statutes of Illinois regulating that subject; but the decision was not placed upon that ground." Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 484, 45 L. Ed. 280.

66. Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 484, 485, 45 L. Ed. 280.

67. Gross *v.* United States Mortgage Co., 108 U. S. 477, 27 L. Ed. 795.

"But if we look to the opinions, which, under the laws of Iowa, must be filed before a judgment is rendered, at which, when such is the law, may certainly be looked at to aid in construing doubtful expressions in a decree, it is shown unmistakably that the decision was put on that ground alone. Gross *v.* United States Mortgage Co., 108 U. S. 477, 486, 27 L. Ed. 795." Adams County *v.* Burlington, etc., R. Co., 112 U. S. 123, 129, 28 L. Ed. 678.

In California the opinion of the court forms part of the record, and therefore may be considered by this court upon a writ of error to the supreme court of that state. Martin *v.* Thompson, 120 U. S. 376, 30 L. Ed. 679.

In Illinois the provision of the Revised Statutes, 1874, p. 329, c. 37, § 16, directing that the justices of the supreme court of the state shall deliver and file written opinions, and that "such opinions shall also be spread at large upon the records of the court," is effective to permit an examination by the United States supreme court into the opinion of the state court brought up on error. Gross *v.* United States Mortgage Co., 108 U. S. 477, 27 L. Ed. 795.

"We cannot, therefore, doubt that in the existing state of the law it is our duty to examine the opinion of the supreme court of Illinois, in connection with other portions of the record, for the purpose of ascertaining whether this writ of error properly raises any question determined by the state court adversely to a right, title, or immunity, under the constitution or laws of the United States and specially set up and claimed by the party bringing the writ. Any difficulty existing upon this subject is removed by that provision of the Revised Statutes of Illinois which requires, not only that the justices of the supreme court of the state shall deliver and file written opinions in cases submitted to it, but that 'such opinions shall also be spread at large upon the records of the court.' Rev. Stat. Ill., 1874, p. 329, ch. 37, § 16. This statutory provision would seem to bring the case within the rule which permits an examination of the opinions of the supreme court of Louisiana to ascertain whether the case was determined upon any ground necessarily involving a federal question within the reviewing power of this court." Gross *v.* United States Mortgage Co., 108 U. S. 477, 486, 27 L. Ed. 795.

The statutes of Kentucky require written opinions to be delivered by the court of appeals in all cases, and to be recorded by its clerk. Code of Civil Procedure, § 765; Gen. Stat. c. 28, art. 2, § 10; c. 16, art. 1, § 1. By the settled course of decision under the existing judiciary acts of the United States, this court may examine opinions so delivered and recorded, to ascertain the ground of the judgment of the state court. Murdock *v.* Memphis, 20 Wall. 590, 633, 22 L. Ed. 429; McManus *v.* O'Sullivan, 91 U. S. 578, 23 L. Ed. 390; Gross *v.* United States Mortgage Co., 108 U. S. 477, 481, 487, 27 L. Ed. 795; Adams County *v.* Burlington, etc., R. Co., 112 U. S. 123, 129, 28 L. Ed. 678; Detroit City R. Co. *v.* Guthard, 114 U. S. 133, 137, 29 L. Ed. 118; Jacks *v.* Helena, 115 U. S. 288, 29 L. Ed. 392; Philadelphia Fire Ass'n *v.* New York, 119 U. S. 110, 30 L. Ed. 342. The decision in Fisher *v.* Cockerell, 5 Pet. 248, 255, 8 L. Ed. 114, cited by one of the defendants in error, in which, on a writ of error to the court of appeals of Kentucky, this court held that the opinion of that court could

ever a case comes from the highest court of a state for review, and by statute or settled practice in that state the opinion of the court is a part of the record, we are authorized to examine such opinion for the purpose of ascertaining the grounds of the judgment.[68]

ccc. *Review of Cases from Louisiana.*—It was uniformly held, even under the 25th section, that in cases coming to this court from the supreme court of Louisiana, the opinion of the court below, as set out in the record, may be referred to, if necessary, to determine whether the judgment is one we have authority to review.[69]

not be taken into consideration, was decided under the judiciary act of 1789, which contained a provision, omitted in the later acts, expressly requiring the error assigned as a ground of reversal to appear on the face of the record. Acts of September 25, 1789, c. 20, § 25, 1 Stat. 86; February 5, 1867, c. 28, § 2, 14 Stat. 386; Rev. Stat., § 709. Kreiger *v.* Shelby R. Co., 125 U. S. 39, 44, 31 L. Ed. 675.

68. New Orleans, etc., Co. *v.* Louisiana Sugar Refin. Co., 125 U. S. 18, 31 L. Ed. 607; Kreiger *v.* Shelby R. Co., 125 U. S. 39, 31 L. Ed. 675; Egan *v.* Hart, 165 U. S. 188, 41 L. Ed. 680; Thompson *v.* Maxwell Land Grant Co., 168 U. S. 451, 456, 42 L. Ed. 539, reaffirmed in Bent *v.* Miranda, 168 U. S. 471, 42 L. Ed. 547.

69. Review of cases from Louisiana.—Armstrong *v.* The Treasurer, 16 Pet. 281, 285, 10 L. Ed. 965; Almonester *v.* Kenton, 9 How. 1, 13 L. Ed. 21; Grand Gulf, etc., R. Co. *v.* Marshall, 12 How. 165, 13 L. Ed. 938; Cousin *v.* Labatut, 19 How. 202, 207, 15 L. Ed. 601; Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429; Crossley *v.* New Orleans, 108 U. S. 105, 27 L. Ed. 667; Weatherly *v.* Bowie, 131 U. S. appx. ccxv, 25 L. Ed. 606.

In Louisiana the opinion of the court is a part of the record, and in cases coming to the United States supreme court from Louisiana the opinion of the court below, as set out in the record, may be referred to, if necessary, to determine whether the judgment is one which the federal court has authority to review. This was so even under act of 1789, and a fortiori under the more liberal act of 1867. Crossley *v.* New Orleans, 108 U. S. 105, 27 L. Ed. 667; Grand Gulf, etc., R. Co. *v.* Marshall, 12 How. 165, 13 L. Ed. 938; Cousin *v.* Labatut, 19 How. 202, 15 L. Ed. 601; Armstrong *v.* The Treasurer, 16 Pet. 281, 10 L. Ed. 965; Almonester *v.* Kenton, 9 How. 1, 13 L. Ed. 21; Egan *v.* Hart, 165 U. S. 188, 41 L. Ed. 680.

According to the law and practice of Louisiana, the supreme court of that state, in cases brought before it by appeal from inferior courts, determines the matter in controversy, as presented by the record, both as to fact and law, without regard to the particular rulings of the courts below, and its opinion, showing the grounds of its judgment, constitutes part of the record to be reviewed in this court, upon writ of error, when the question for determination is whether the supreme court of the state decided a federal question, necessary to the decision of the case, without respect to the rulings of the inferior state court. Crescent City Live-Stock Co. *v.* Butchers' Union Slaughter-House Co., 120 U. S. 141, 30 L. Ed. 614, citing Parks *v.* Turner, 12 How. 39, 43, 13 L. Ed. 883; Cousin *v.* Labatut, 19 How. 202, 15 L. Ed. 601; Grand Gulf, etc., R. Co. *v.* Marshall, 12 How. 165, 13 L. Ed. 938; Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429; Crossley *v.* New Orleans, 108 U. S. 105, 27 L. Ed. 667; Caperton *v.* Bowyer, 14 Wall. 216, 20 L. Ed. 882.

"The grounds upon which the supreme court of Louisiana gave judgment for the defendants appear by its opinion, which, under the practice of that state, is strictly part of the record, and has always been so considered by this court on writs of error, as well under the judiciary act of 1789, which provided that "no other error shall be assigned or regarded as a ground of reversal than such as appear on the face of the record," as under the later acts, in which that provision is omitted. Acts of September 24, 1789, c. 20, § 25, 1 Stat. 86; February 5, 1867, c. 28, § 2, 14 Stat. 386; Rev. Stat. § 709; Almonester *v.* Kenton, 9 How. 1, 9, 13 L. Ed. 21; Grand Gulf, etc. R. *v.* Marshall, 12 How. 165, 13 L. Ed. 938; Cousin *v.* Labatut, 19 How. 202, 15 L. Ed. 601; Delmas *v.* Merchants' Ins. Co., 14 Well. 661, 663, 667, 20 L. Ed. 757; Crossley *v.* New Orleans, 108 U. S. 105, 27 L. Ed. 667; Crescent City Live-Stock Co. *v.* Butchers' Union Slaughter-House Co., 120 U. S. 141, 146, 30 L. Ed. 614." New Orleans, etc., Co. *v.* Louisiana Sugar Refin. Co., 125 U. S. 18, 27, 31 L. Ed. 607.

It is likewise settled that on error to the supreme court of Louisiana, the opinion of that court is to be treated as part of the record, and that it may be examined in order to ascertain the question presented, and this court may for the purpose, not of deciding the facts, but by way of throwing light on the findings, look into the entire record. Crossley *v.* New Orleans, 108 U. S. 105, 27 L. Ed. 667; Gross *v.* United States Mortgage Co., 108 U. S. 477, 27 L. Ed. 795; Egan *v.* Hart, 165 U. S. 188, 189, 41 L. Ed. 680.

hh. *Assignment of Errors.*—Where the record fails to show that a federal question was raised, the assignment of errors cannot be reviewed for that purpose. It makes no part of the record proper, to which alone we can resort to ascertain the subject matter of the litigation.[70] A petition for a writ of error from the supreme court to the state court and the assignments of error therein, form no part of the record on which it is to be ascertained whether the state court decided a federal question.[71]

ii. *Instructions.*—Where the charge of the court is not before us, nor is any exception taken to any part of it, the verdict and judgment must be held to have been rendered on the facts according to law.[72]

jj. *Certificate of Chief Judge of State Court.*—The certificate of the chief justice of the state court is not properly a part of the record.[73]

kk. *Certificate or Statement of Clerk or Judge.*—A writ of error, under the 25th section of the judiciary act, will not lie to a state court in a case in which the proceedings of the court which the writ of error seeks to revise, appear from a certificate by the clerk of the state court.[74] Upon a writ of error to a state court, a certificate of the clerk of the state court, that certain documents were read in evidence, and among them a patent for land under which the plaintiff in error claimed, issued by the governor of the state, cannot be considered a part of the record. Because the unauthorized certificate of the clerk that any document was read, or any evidence given to the jury, cannot make that document or that evidence a part of the record so as to bring it to the cognizance of this court.[75] The certificate of the clerk of the court, that a motion was made for a new trial, and reasons and certain papers filed, on which the motion was founded, which are on the files of the court, is not a part of the record; nor do the reasons on the files of the court become a part of the record, by such certificate.[76]

Report of Judge of State Court.—The report of the judge who tried the cause in the state court, which contains a statement of the facts, is not to be considered as a part of the record. It is not like a special verdict or a statement of facts agreed of record, upon which the court is to pronounce its judgment. The judgment is rendered upon a general verdict, and the report is mere matter in pais, to regulate the discretion of the court as to the propriety of granting relief, or sustaining a motion for a new trial.[77]

ll. *Supplemental Transcript.*—A supplemental transcript cannot be considered, when it does not appear how it came to be filed and no motion was made for leave to file it.[78]

70. Assignment of errors.—Medberry *v.* Ohio, 24 How. 413, 16 L. Ed. 739; Harding *v.* Illinois, 196 U. S. 78, 84, 49 L. Ed. 394; Corkran Oil Co. *v.* Arnaudet, 199 U. S. 182, 193, 50 L. Ed. 143; Leeper *v.* Texas, 139 U. S. 462, 35 L. Ed. 225; Chapin *v.* Fye, 179 U. S. 127, 45 L. Ed. 119.

71. French *v.* Taylor, 199 U. S. 274, 50 L. Ed. 189, affirmed in South Carolina *v.* Jennings, 204 U. S. 667, 668, 51 L. Ed. 671.

72. Instructions.—Hamburg, etc., Steamship Co. *v.* Lennan, 194 U. S. 628, 48 L. Ed. 1157; Hamburg-American Steamship Co. *v.* Grube, 196 U. S. 407, 413, 49 L. Ed. 529.

73. Certificate of chief judge of state court.—Home for Incurables *v.* New York City, 187 U. S. 155, 47 L. Ed. 117.

74. Certificate or statement of clerk or judge.—Reed *v.* Marsh, 13 Pet. 153, 10 L. Ed. 103, following Crowell *v.* Randell, 10 Pet. 368, 9 L. Ed. 458; Fisher *v.* Cockerell, 5 Pet. 248, 8 L. Ed. 114.

75. Fisher *v.* Crockerell, 5 Pet. 248, 8 L. Ed. 114, approved in Reed *v.* Marsh, 13 Pet. 153, 155, 10 L. Ed. 103.

76. Reed *v.* Marsh, 13 Pet. 153, 10 L. Ed. 103.

77. Inglee *v.* Coolidge, 2 Wheat. 363, 368, 4 L. Ed. 261; Suydan *v.* Williamson, 20 How. 427, 439, 15 L. Ed. 978; Pomeroy *v.* Bank of Indiana, 1 Wall. 592, 603, 17 L. Ed. 638.

78. Supplemental transcript.—On a writ of error from the supreme court of a state, a supplemental transcript was filed, after argument and decision of the case in the supreme court of the state, there was nothing to show how it came to be filed, no motion had been made to file it; no certiorari issued to bring it up; no order allowing it to be filed. Held, that it was a mere superfluity on the record and hence cannot be considered by the

(3) *Examination of Record.*—This court, upon a writ of error to a state court, receives the transcript of the record in the cause as it is certified here by that court, in answer to the precept of the writ of error allowed and issued to that end. When brought here it is open to examination only for the purpose of deciding whether it contains a federal question within our jurisdiction, and if so, whether there is error in the decision of that question by the supreme court of the state. Accordingly, the question whether on the death of the plaintiff in error after judgment the present plaintiff in error ought to have been substituted for the deceased plaintiff in the judgment to be reviewed, is a question of practice under the laws of the state, which the state court has exclusive right to determine. It is not open to any inquiry on our part here.[79]

(4) *Impeachment or Contradiction of Record.*—Upon a writ of error to review the decision of the lower court in a criminal case, the objection that the defendants were not actually present in the supreme court of the state at the time sentence was pronounced cannot be shown, when, on the face of the record, it shows that they were present. If this is not in accordance with the fact, the record must be corrected below and not here.[80]

(5) *Authentication of Record.*—On a writ of error to a state court, the record may be authenticated by the seal of the court and the certificate or signature of the clerk, without that of the judge.[81]

(6) *Certiorari.*—In a writ of error to a state court, if parts of the record below are omitted in the transcript, we may, by certiorari, have the omission supplied, "but we cannot here correct errors which actually exist in the record as it stands in the state court. For that purpose, application must be made there, and, if necessary, upon sufficient showing, this court may remand the case in order that the court may proceed."[82]

(7) *Amendment.*—We can only re-examine the final judgment in the suit, and for that purpose must look alone to the record of that judgment as it is sent to us.[83]

u. *Scope of Review*—(1) *In General.*—The language of the second section of the act of February 5th, 1867 (14 Stat. at Large 385), "to amend" the judiciary act of 1789, that "the judgment may be re-examined and reversed or affirmed on a writ of error * * * in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States," does not require the examination of any other than questions of federal law. The phrase above quoted has reference to the manner of issuing the writ, its return with the record of the case, its effect in removing the case to this court, and the general rules of practice which govern the progress of such cases to final judgments, and is not intended to prescribe the considerations which should govern this court in forming that judgment.[84] Upon a writ of error to a state

court. Telluride, etc., Co. *v.* Rio Grande, etc., R. Co., 175 U. S. 639, 44 L. Ed. 305, reaffirmed in Dakota, etc., R. Co. *v.* Crouch, 203 U. S. 582, 51 L. Ed. 327, following Goodenough Horse Shoe Co. *v.* Rhode Island Horse Shoe Co., 154 U. S., appx., 635, 24 L. Ed. 368.

79. Examination of record.—Renaud *v.* Abbott, 116 U. S. 277, 29 L. Ed. 629.

80. Impeachment or contradiction of record.—Spies *v.* Illinois, 123 U. S. 131, 31 L. Ed. 80.

81. Authentication of record.—Worcester *v.* Georgia, 6 Pet. 515, 8 L. Ed. 483, 492, citing Martin *v.* Hunter, 1 Wheat. 304, 4 L. Ed. 97; Buel *v.* Van Ness, 8 Wheat. 312, 5 L. Ed. 624; McCulloch *v.* Maryland, 4 Wheat. 316, 4 L. Ed. 579; Cohens *v.* Virginia, 6 Wheat. 264, 5 L. Ed. 257.

82. Certiorari.—Goodenough Horse Shoe Co. *v.* Rhode Island Horse Shoe Co., 154 U. S., appx., 635, 24 L. Ed. 368.

83. Amendment.—Goodenough Horse Shoe Co. *v.* Rhode Island Horse Shoe Co., 154 U. S., appx., 635, 636, 24 L. Ed. 368.

84. Scope of review in general.—Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429; Allen *v.* McVeigh, 107 U. S. 433, 27 L. Ed. 572; Hannibal, etc., R. Co. *v.* Missouri River Packet Co., 125 U. S. 260, 272, 31 L. Ed. 731; Baldwin *v.* Maryland, 179 U. S. 220, 45 L. Ed. 160; Traer *v.* Clews, 115 U. S. 528, 542, 29 L. Ed. 467; Southwestern R. Co. *v.* Wright, 116 U. S. 231, 236, 29 L. Ed. 626; Bonaparte *v.* Tax

court on the ground that a state statute violates the federal constitution, the authority of this court extends no farther than to ascertain whether the state statute violates the constitution of the United States; the question whether it violates the state constitution is not before this court.[85] The judgment of the

Court, 104 U. S. 592, 595, 26 L. Ed. 845; Wiggins Ferry Co. *v.* East St. Louis, 107 U. S. 365, 378, 27 L. Ed. 419. See opinion of Mr. Justice McKann, in Knights of Pythias *v.* Meyer, 198 U. S. 508, 519, 49 L. Ed. 1146.

The language of the second section of the act of Feb. 5th, 1867 (14 Stat. at Large 385), "to amend" the judiciary act of 1789, in making the jurisdiction of this court dependent on the decision of certain questions by the state court against the right set up under federal law or authority, conveys the strongest implication that these questions alone are to be considered when the case is brought here for revision. This view is confirmed by the course of decisions in this court for eighty years, by the policy of congress, as shown in numerous statutes, conferring the jurisdiction of this class of cases in courts of original jurisdiction, viz. the district and circuit courts, whether originally or by removal from state courts, when it intends the whole case to be tried, and by the manifest purpose which caused the passage of the law. Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429.

"It requires but slight examination of the reports of the decisions or familiarity with the practice of this court, to know that it does not examine into or decide all the errors, or matter assigned for error, of the most of the cases before them. Many of these are found to be immaterial, the case being reversed or affirmed on some important point which requires of itself a judgment without regard to other matters." Murdock *v.* Memphis, 20 Wall. 590, 623, 22 L. Ed. 429.

Congress did not intend, by omitting in this statute the restrictive clause at the close of the twenty-fifth section of the act of 1789 (limiting the supreme court to the consideration of federal questions in cases so removed) to enact affirmatively that the court should consider all other questions involved in the case that might be necessary to a final judgment or decree. Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429.

Where upon error to a state court, it appears that two defenses are interposed in the state court, either of which, if sustained, will bar the action, but the second involves a federal question, and the other does not, and the court in its decree sustains them both, and the finding is broad enough to maintain the decree even though the federal questions involved in the other defense was decided wrong, this court will affirm the decree, without considering that question or expressing any opinion upon it. Jenkins *v.* Lowenthal, 110 U. S. 222, 28 L. Ed. 129, citing Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429.

The defenses of the act of limitations and bona fide purchaser raised in the state court, come within the restriction found in the concluding part of the 25th section, which declares "'that no other error shall be assigned or regarded by this court as a ground of reversal, than such as immediately respects the before-mentioned questions of validity or construction of the constitution, treaties, statutes, commissions, or authorities, in dispute.' Mr. Justice Story comments on the foregoing restraining clause, in the case of Martin *v.* Hunter, 1 Wheat. 304, 358, 4 L. Ed. 97, which construction we need not repeat." Lytle *v.* Arkansas, 22 How. 193, 204, 16 L. Ed. 306.

Where the judgment of a state court upon the federal question was right, the judgment must be affirmed. "We can only look beyond the federal question when that has been decided erroneously, and then only to see whether there are any other matters or issues adjudged by the state court sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the federal question. Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429." McLaughlin *v.* Fowler, 154 U. S., appx., 663, 26 L. Ed. 176.

In all cases of a motion to dismiss the writ of error for want of jurisdiction, the court must necessarily examine the record to find the questions decided by the state court. But in many cases the question of jurisdiction is so involved with the other questions decided in the case, that this court cannot eliminate it without the examination of a voluminous record, and passing on the whole merits of the case. In such instances, the court will reserve the question of jurisdiction till the case is heard on the final argument on the merits. Semple *v.* Hager, 4 Wall. 431, 433, 18 L. Ed. 402.

If a federal question raised was not decided by the court below, this court has no jurisdiction. This court can only look beyond the federal question when that has been decided erroneously, and then only to see whether there are any other matters or issues adjudged by the state court sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the federal question. McLaughlin *v.* Fowler, 154 U. S., appx., 663, 26 L. Ed. 176, citing Murdock *v.* Memphis, 20 Wall. 590, 591, 22 L. Ed. 429.

85. Watson *v.* Mercer, 8 Pet. 88, 8 L. Ed. 876; Barbier *v.* Connolly, 113 U. S.

supreme court of the United States, in a case brought by writ of error to a court of a state, must be confined to the error alleged in the decision of the state court upon the construction of the act of congress before the state court.[86]

Review of Grounds of Decision.—It is also a rule that upon error to a state court, the question before this court is whether the judgment was correct; not the ground on which that judgment was given.[87]

Qualifications of General Rule.—But where, on error to the supreme court of a state, the record shows a decision of the state court on a federal question properly presented, and of which this court could take jurisdiction, and shows also the decision of a local question, the writ of error will not be dismissed on motion in advance of the hearing. The parties are entitled to be heard on the soundness of the decision below on the federal question, on the sufficiency of that question to control the judgment in the whole case, and on the sufficiency of any other point decided to affirm the judgment even if the federal question was erroneously decided.[88]

Distinguished from Direct Appeals to Circuit Court.—When a case properly is taken to the supreme court from the circuit court upon constitutional grounds, the whole case is open. But it is otherwise when a case comes from a state court.[89]

(2) *Irregularities and Mere Errors.*—Irregularities and mere errors in the proceedings can only be corrected in the state courts. Our authority does not extend beyond an examination of the power of the courts below to proceed at all.[90]

(3) *Discretionary Matters.*—**In General.**—There are errors also which may be sufficiently manifest of which the appellate court has no jurisdiction, as in regard to a motion for a new trial, or to quash an indictment, or for a continuance, or amendment of pleadings, or some other matter which, however important to the merits of the case, is within the exclusive discretion of the inferior court.[91]

27, 28 L. Ed. 923; Ashley *v.* Ryan, 153 U. S. 436, 440, 38 L. Ed. 773.

86. Pollard *v.* Kibbe, 14 Pet. 353, 10 L. Ed. 490; Matthews *v.* Zane, 7 Wheat. 164, 5 L. Ed. 425.

87. McClung *v.* Silliman, 6 Wheat. 598, 5 L. Ed. 340; Davis *v.* Packard, 6 Pet. 41, 48, 8 L. Ed. 312.

88. Railroad Co. *v.* Maryland, 20 Wall. 643, 22 L. Ed. 446, citing Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429.

89. Horner *v.* United States, 143 U. S. 570, 36 L. Ed. 266; German Savings Society *v.* Dormitzer, 192 U. S. 125, 128, 48 L. Ed. 373, citing Osborne *v.* Florida, 164 U. S. 650, 41 L. Ed. 586; McLaughlin *v.* Fowler, 154 U. S. appx., 663, 26 L. Ed. 176; Murdock *v.* Memphis, 20 Wall. 590, 22 L. L. Ed. 429.

90. Irregularities and mere errors.—Kennard *v.* Louisiana, 92 U. S. 480, 481, 23 L. Ed. 478.

91. Discretionary matters.—Murdock *v.* Memphis, 20 Wall. 590, 623, 22 L. Ed. 429.

"The supreme court of the state held that the refusal of the trial court to permit the defendant to amend his petition for removal was proper. Amendments of pleadings or other proceedings are as a rule matters of discretion with the trial court, and a writ of error will not lie to review its action in respect thereto. Walden *v.* Craig, 9 Wheat. 576, 6 L. Ed. 164; Chirac *v.* Reinicker, 11 Wheat. 280, 6 L. Ed. 474; United States *v.* Buford, 3 Pet. 12, 7 L. Ed. 585; Matheson *v.* Grant, 2 How. 263." Stevens *v.* Nichols, 157 U. S. 370, 39 L. Ed. 736.

The decision of the highest court of a state in granting or refusing to grant a motion for a rehearing in an equity suit is not re-examinable in this court under any writ of error which the court can issue to review the judgment or decree of a state court. Steines *v.* Franklin County, 14 Wall. 15, 20 L. Ed. 846.

When the ground relied on for the reversal by this court of a judgment of the highest court of a state is that the error complained of is so gross as to amount in law to a denial by the state of a trial by an impartial jury to one who is accused of crime, it must be made clearly to appear in order to obtain a reversal, that such is the fact, and that the case is not one which leaves something to the conscience or discretion of the court. Spies *v.* Illinois, 123 U. S. 131, 31 L. Ed. 80, following Reynolds *v.* United States, 98 U. S. 145, 25 L. Ed. 244.

It is for the state court to determine whether the discretionary power of the trial court in refusing a continuance or a motion for a new trial, has been so abused as to amount to error, and whether

Change of Venue.—The denial by a state court of an application for a change of venue on the ground of local prejudice, involves no federal question, especially as the granting of a change of venue in a criminal case rests largely in the discretion of the trial court.[92]

(4) *Questions of Fact*—aa. *In General.*—It is well settled that this court, in an action at law, at least, has no jurisdiction to review the decision of the highest court of a state upon a pure question of fact, although a federal question would or would not be presented according to the way in which the question of fact was decided.[93] On writ of error to a state court from the supreme court

its reconsideration, upon a motion for a new trial, or the refusal to continue, calls for revision. In short, the matter is for the state courts to decide, and the action presents no federal question. Davis *v.* Texas, 139 U. S. 651, 35 L. Ed. 300.

The action of a state court in refusing to allow an amendment to respondent's answer to a mandamus in which it was attempted to set up and claim certain rights, privileges and immunities under the federal constitution, does not raise a federal question which this court can examine, because it is in the discretion of the court to deny the motion to amend, when no reasons are assigned for its allowance, and to hold the parties to the issues made by the original petition and answer." Such action cannot be assigned for error, for there is nothing in the record justifying the conclusion that its discretion, in that regard, was exercised with the intent or so as to deprive the defendant either of any right or immunity to which he was entitled under the constitution or laws of the United States, or of the privilege of setting up or claiming in due time and in proper form any such right or immunity. Kipley *v.* Illinois, 170 U. S. 182, 42 L. Ed. 998, reaffirmed in Harkins *v.* Ashville, 180 U. S. 635, 45 L. Ed. 709; Ross *v.* King, 172 U. S. 641, 43 L. Ed. 1180; Jones *v.* Vane, 200 U. S. 614, 50 L. Ed. 621.

Injunctions.—Cases arise undoubtedly where a court of equity will enjoin a corporation not to proceed under an amendment to their charter passed by their assent, as where the effect would be to enable the corporation to violate their contracts with third persons, but no such question is here presented for the decision of this court, nor can it ever be under a writ of error to a state court. Questions of that kind are addressed very largely to the judicial discretion of the court and create the necessity for inquiry into the facts of the case and for an examination into all the surrounding circumstances. Beyond doubt such a question may be presented in the circuit court in the exercise of its jurisdiction, concurrent with the state courts, but it is clear that such a question can never be brought here for re-examination by a writ of error to a state court, as such a writ only removes into this court the questions, or some one of the questions, described in the twenty-fifth section of the judiciary act. Pennsylvania College Cases, 13 Wall. 190, 219, 20 L. Ed. 550.

92. Barrington *v.* Missouri, 205 U. S. 483, 51 L. Ed. 890.

93. Questions of fact in general.—Dower *v.* Richards, 151 U. S. 658, 668, 38 L. Ed. 305; Barton *v.* Geiler, 108 U. S. 161, 27 L. Ed. 687; Israel *v.* Arthur, 152 U. S. 355, 362, 38 L. Ed. 474; Egan *v.* Hart, 165 U. S. 188, 41 L. Ed. 680; Backus *v.* Fort Street Union Depot Co., 169 U. S. 557, 42 L. Ed. 853; Chapman, etc., Land Co. *v.* Bigelow, 206 U. S. 41, 51 L. Ed. 953; Telluride, etc., Co. *v.* Rio Grande, etc., R. Co., 175 U. S. 639, 44 L. Ed. 305; Republican River Bridge Co. *v.* Kansas Pac. R. Co., 92 U. S. 315, 23 L. Ed. 515; Noble *v.* Mitchell, 164 U. S. 367, 41 L. Ed. 472; Hedrick *v.* Atchison, etc., R. Co., 167 U. S. 673, 677, 42 L. Ed. 320; Turner *v.* New York,, 168 U. S. 90, 95, 42 L. Ed. 392; Chrisman *v.* Miller, 197 U. S. 313, 319, 49 L. Ed. 770; Clipper Min. Co. *v.* Eli Min., etc., Co., 194 U. S. 220, 48 L. Ed. 944; Kaufman *v.* Tredway, 195 U. S. 271, 49 L. Ed. 190; Smiley *v.* Kansas, 196 U. S. 447, 49 L. Ed. 546; Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 242, 41 L. Ed. 979; Gardner *v.* Bonestell, 180 U. S. 362, 45 L. Ed. 574, reaffirmed in Rose *v.* Kansas, 203 U. S. 580, 51 L. Ed. 326; Thomas *v.* Kansas, 205 U. S. 535, 536, 51 L. Ed. 919; Western Union Tel. Co. *v.* Call Pub. Co., 181 U. S. 92, 103, 45 L. Ed. 765; Hartwell *v.* Havighorst, 196 U. S. 635, 49 L. Ed. 629; Keokuk, etc., Bridge Co. *v.* Illinois, 175 U. S. 626, 44 L. Ed. 299; German Savings Society *v.* Dormitzer, 192 U. S. 125, 48 L. Ed. 373; In re Buchanan, 158 U. S. 31, 36, 39 L. Ed. 884; Stanley *v.* Schwalby, 162 U. S. 255, 278, 40 L. Ed. 960; Grand Rapids, etc., R. Co. *v.* Butler, 159 U. S. 87, 40 L. Ed. 85; Quimby *v.* Boyd, 128 U. S. 488, 32 L. Ed. 502; Dakota, etc., R. Co. *v.* Crouch, 203 U. S. 582, 51 L. Ed. 327; Minneapolis, etc., R. Co. *v.* Minnesota, 193 U. S. 53, 64, 48 L. Ed. 614; Kenney *v.* Effinger, 115 U. S. 577, 29 L. Ed. 498; Compare Murdock *v.* Memphis, 20 Wall. 590, 625, 22 L. Ed. 429.

"It is well settled that the findings of fact in the state courts are on a writ of error conclusive with us. Hedrick *v.* Atchison, etc., R. Co., 167 U. S. 673, 677, 42 L. Ed. 320, and cases cited therein; Bement *v.* Nat. Harrow Co., 186 U. S. 70, 46 L. Ed. 1058. In other words, we ap-

of the United States, whatever was a question of fact in the former court is a

ply the law to the facts settled in the state courts, and we do not search the record to see if there be not disclosed by the testimony some other matters not embraced in the findings which may affect the conclusion." Jenkins *v.* Neff, 186 U. S. 230, 235, 46 L. Ed. 1140.

The verdict of the jury settles all questions of fact. In Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 639, 42 L. Ed. 878, it is said: "Much was said at the bar about the finding of the jury being against the evidence. We cannot enter upon such an inquiry. The facts must be taken as found by the jury, and this court can only consider whether the statute as interpreted to the jury, was in violation of the federal constitution. Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 242, 246, 41 L. Ed. 979." Smiley *v.* Kansas, 196 U. S. 447, 49 L. Ed. 546, reaffirmed in Rose *v.* Kansas, 203 U. S. 580, 51 L. Ed. 326; Tomas *v.* Kansas, 205 U. S. 535, 536, 51 L. Ed. 919.

Illustrative cases.—In Lytle *v.* Arkansas, 22 How. 193, 16 L. Ed. 306, in which the supreme court of Arkansas had decided against a pre-emptive right claimed under the laws of the United States, Mr. Justice Catron said: "It is not material whether the invalidity of the title was decreed in the supreme court of Arkansas upon a question of fact or of law. The fact that the title was rejected in that court authorizes this court to re-examine the decree." Those observations must be taken as applied to the case before the court, in which the decision of the question of fact depended on the legal effect of acts of officers of the United States regarding that title; and that it was not intended to enlarge the scope of the appellate jurisdiction of this court is evident from the cases there cited. See, also, Magwire *v.* Tyler, 1 Black 195, 203, 17 L. Ed. 137.

A decision of the highest state court in an action against the collector of the port and a firm of warehousemen for a conspiracy in having certain cargoes of rags belonging to the plaintiffs condemned as unclean and infectious property, that the collector never ordered the rags to be disinfected, is a ruling upon a matter of fact, and hence not reviewable here. Bartlett *v.* Lockwood, 160 U. S. 357, 40 L. Ed. 455.

Validity of contract.—"The only federal question raised in the record is as to the validity of contracts A and B, with regard to the act of congress on the subject of trusts. Act of July 2, 1890, ch. 647, 26 Stat. 209. That is a question of law, plainly raised in the record, and we are not precluded from its consideration by any action of the state courts." Bement *v.* Nat. Harrow Co., 186 U. S. 70, 83, 46 L. Ed. 1058.

Confederate contracts.—A writ of error to a state court does not bring up for review a question of fact whether a contract was made with reference to Confederate notes. Kennedy *v.* Effinger, 115 U. S. 577, 29 L. Ed. 498.

License to real property.—Where the decision of the court below is that, as a matter of fact, there was no license to take minerals from certain land, this court has no jurisdiction; this was a finding by the court of a question of fact upon the submission of the whole case by the parties, rather than a judgment upon a question at law. Mining Co. *v.* Boggs, 3 Wall. 304, 17 L. Ed. 245.

Mines and mining.—This court cannot review the decision of a state court upon the question of fact whether the ledge, at the time when the town site patent took effect, was known to be valuable for mining purposes. Dower *v.* Richards, 151 U. S. 658, 38 L. Ed. 305.

Qualification of jurors.—A question in relation to the physical and mental condition of a juror and his competency to return a verdict, is a question of fact, and this court upon a writ of error to the highest court of a state, in an action at law cannot review its judgment upon such a question. Dower *v.* Richards, 151 U. S. 658, 664, 38 L. Ed. 305; In re Buchanan, 158 U. S. 31, 36, 39 L. Ed. 884.

Special benefits for improvements.—The amount of benefits resulting from an improvement where the assessment is made under the statute of a state which the supreme court of the United States has held to be constitutional, is a question of fact, and a hearing upon it being assumed, the decision of the board is final. And no constitutional question of a federal nature arises therefrom. Hibben *v.* Smith, 191 U. S. 310, 48 L. Ed. 195.

Percolating water on land.—Where the contention is that the state courts decided against the claim of plaintiffs in error to the rights of a riparian owner, and to the ownership of alleged percolating waters, as derived from patents of the United States as well as from Mexican grants, or under the treaty of Guadaloupe Hidalgo, it was held, that the question of the existence of percolating water is merely a question of fact. Hooker *v.* Los Angeles, 188 U. S. 314, 47 L. Ed. 487, citing San Francisco *v.* Scott, 111 U. S. 768, 28 L. Ed. 593; California Powder Works *v.* Davis, 151 U. S. 389, 38 L. Ed. 206.

Possession by defendant in replevin.—The decision of the state court in an action of replevin to recover logs cut upon public land, that the defendant was not in possession, involves no federal question, or any other question of law, but a mere inference of fact from the evidence, which this court is not authorized to review on

writ of error. Dower *v.* Richards, 151 U. S. 658, 38 L. Ed. 305; Egan *v.* Hart, 165 U. S. 188, 41 L. Ed. 680; Turner *v.* New York, 168 U. S. 90, 95, 42 L. Ed. 392.

Whether the dividing line between two states, which crosses a bridge running from one state to the other, was improperly located, is a question of fact, the finding of which by a state court is not reviewable. Keokuk, etc., Bridge Co. *v.* Illinois, 175 U. S. 626, 44 L. Ed. 299.

Assessment of bridge between states.—Whether a bridge dividing two states has been assessed at more than its value or not is question of fact, the finding of which by a state court is not reviewable here. Keokuk, etc., Bridge Co. *v.* Illinois, 175 U. S. 626, 44 L. Ed. 299.

In an action for the settlement of adverse claims to mineral lands, the question as to priority of location, is a question of fact, and not of law, and involves no federal question. Telluride, etc., Co. *v.* Rio Grande, etc., R. Co., 175 U. S. 639, 44 L. Ed. 305, following Eilers *v.* Boatman, 111 U. S. 356, 28 L. Ed. 454.

Revenue stamps—Value of land.—In Lewis *v.* Campau, 3 Wall. 106, 18 L. Ed. 211, a decision of the state court as to the value of land conveyed by deed, upon which depended the requisite amount of stamps under the revenue law of the United States, was held not to be reviewable, although, if the value of the land had been admitted, a federal question would have been presented. Hall *v.* Jordan, 15 Wall. 393, 21 L. Ed. 72.

Boundaries.—In Moreland *v.* Page, 20 How. 522, 15 L. Ed. 1009, this court dismissed a writ of error to review the judgment of a state court upon a question of the proper boundary between two tracts of land, although the owner of each claimed under a grant from the United States; and Mr. Justice Grier in delivering judgment said: "It is a question of fact, depending on monuments to be found on the ground, documents in the land office, or the opinion of experts or surveyors appointed by the court or the parties. If the accident to the controversy that both parties claim title under the United States should be considered as sufficient to bring it within our jurisdiction, then every controversy involving the title to such lands, whether it involve the inheritance, partition, devise or sale of it, may, with equal propriety, be subject to the examination of this court in all time to come."

In Almonester *v.* Kenton, 9 How. 1, 7, 13 L. Ed. 21, Mr. Justice Catron said: "Now that this court has no jurisdiction under the twenty-fifth section of the judiciary act of 1789, to re-examine the decision of a state court, which drew in question the mere fact of where a dividing line between two tracts of land was, is too plain for discussion. Had the decision of the supreme court of Louisiana stopped here, then certainly jurisdiction would be wanting." And this court assumed jurisdiction of that case solely because the state court had gone further, and had given a construction to an act of congress.

Right of possession.—In Mining Co. *v.* Boggs, 3 Wall. 304, 17 L. Ed. 245, a right of possession for the purpose of extracting gold from quartz rock was claimed "by a license inferred from the general policy of the state or of the United States, in relation to mines of gold and silver and the lands containing them;" and a writ of error to review a decision of the supreme court of California against the claim was dismissed by this court, speaking by Chief Justice Chase, for the following reasons: "We doubt whether such a claim, even if made in the pleadings, would be such an allegation as would give jurisdiction to this court. However that may be, there was no decision of the court against the validity of such a license. The decision was, that no such license existed; and this was a finding by the court of a question of fact upon the submission of the whole case by the parties, rather than a judgment upon a question of law."

Claim of title under federal government.—In Carpenter *v.* Williams, 9 Wall. 785, 19 L. Ed. 827, it was held, that this court had no jurisdiction where the decision of the state court turned upon the identity of the person to whom a recorder of land titles confirmed, or intended to confirm, a lot of ground; and Mr. Justice Miller, in delivering judgment, said: "It is a mistake to suppose that every suit for real estate, in which the parties claiming under the federal government are at issue as to which of them is entitled to the benefit of that title, necessarily raises a question of federal cognizance. If this were so, the title to all the vast domain, once vested in the United States, could be brought from the state courts to this tribunal."

In Republican River Bridge Co. *v.* Kansas Pac. R. Co., 92 U. S. 315, 23 L. Ed. 515, in an action at law concerning the title to real estate, in which each party claimed under a grant from congress, a district court of the state of Kansas, to which the case had been submitted without the intervention of a jury, made findings of fact, upon which it declared the law to be for the defendant; its judgment was affirmed by the supreme court of the state, and the plaintiff sued out a writ of error from this court. Mr. Justice Miller, in delivering the opinion, said: "The finding by the district court was received by the supreme court of the state as conclusive as to all facts in issue, and it is equally conclusive upon us. Where a right is set up under an act of congress in a state court, any matter of law found in the record, decided by the highest court

question of fact in the latter court.[94] The finding of facts made in the highest

of the state, bearing on the right so set up under the act of congress, can be re-examined here. In chancery cases, or in any other class of cases where all the evidence becomes part of the record in the highest court of the state, the same record being brought here, this court can review the decision of that court on both the law and the fact, so far as may be necessary to determine the validity of the right set up under the act of congress. But in cases where the facts are submitted to a jury, and are passed upon by the verdict, in a common-law action, this court has the same inability to review those facts in a case coming from a state court that it has in a case coming from a circuit court of the United States. This conclusiveness of the facts found extends to the finding by a state court to whom they have been submitted by waiving a jury, or to a referee, where they are so held by state laws, as well as to the verdict of a jury." Citing Mining Co. *v.* Boggs, 3 Wall. 304, 17 L. Ed. 245; and Crary *v.* Devlin, 154 U. S., appx., 619, 23 L. Ed. 510, as supporting this conclusion.

Validity of preferences under bankrupt act.—This court is concluded by the finding of fact by a state court upon an issue whether or not certain transactions were invalid under the bankrupt act, because it operated to give a preference to some creditors over others. Eau Claire Nat. Bank *v.* Jackman, 204 U. S. 522, 51 L. Ed. 596.

Fraudulency of title to land.—In California Powder Works *v.* Davis, 151 U. S. 389, 38 L. Ed. 206, in which each party to a suit to quiet title claimed under a patent from the United States confirming a Mexican grant, and the judgment of the supreme court of California rested on the proposition of fact that the grant under which the plaintiff in error deraigned title was simulated and fraudulent, this court dismissed the writ of error for want of jurisdiction.

Failure of proof.—In Crary *v.* Devlin, 154 U. S., appx., 619, 23 L. Ed. 510 (decided February 21, 1876), in an action to recover the price of alcohol sold, the defendants contended that the sale was unlawful because of a violation of the internal revenue laws of the United States. The court of appeals of New York gave judgment for the plaintiff, because no such violation was proved; and this court dismissed the writ of error, upon the authority of Mining Co. *v.* Boggs, 3 Wall. 304, 17 L. Ed. 245, Chief Justice Waite saying: "There could have been no decision of the court of appeals against the validity of any statute of the United States, because it was found that the facts upon which the defendants below relied to bring their case within the statute in question did not exist. The judgment did not deny the validity of the statute, but the existence of the facts necessary to bring the case within its operation."

Foreign corporations.—A decision by the highest state court in an action against a foreign insurance company to recover on a policy issued by it, that there was no adequate proof that the policy in controversy was issued by a foreign corporation, is a mere question of fact, and therefore is not subject to review here on a writ of error. Noble *v.* Mitchell, 164 U. S. 367, 41 L. Ed. 472, citing Dower *v.* Richards, 151 U. S. 658, 38 L. Ed. 305; In re Buchanan, 158 U. S. 31, 39 L. Ed. 884.

94. Eastern Building & Loan Ass'n *v.* Ebaugh, 185 U. S. 114, 46 L. Ed. 830.

Proof of foreign laws.—A finding of facts by a trial court of a state as to what the statutory law of another state is and what its application is under the decision of the courts of that state, is binding upon the supreme court of the United States on writ of error to the highest court of that state, which has held that such finding of facts are not subject to review but are conclusive upon it. Eastern Building & Loan Ass'n *v.* Ebaugh, 185 U. S. 114, 46 L. Ed. 830.

This court said, speaking by Chief Justice Waite, in Chicago, etc., R. Co. *v.* Wiggins Ferry Co., 119 U. S. 615, 30 L. Ed. 519, where, as in the case at bar, was invoked that provision of the constitution of the United States which requires the courts of one state to give full faith and credit to the public acts of another: "Whenever it becomes necessary under this requirement of the constitution for a court of one state, in order to give faith and credit to a public act of another state, to ascertain what effect it has in that state, the law of that state must be proved as a fact. No court of a state is charged with knowledge of the laws of another state; but such laws are in that court matters of fact, which, like other facts, must be proved before they can be acted upon. This court, and the other courts of the United States, when exercising their original jurisdiction, take notice, without proof, of the laws of the several states of the United States; but in this court, when acting under its appellate jurisdiction, whatever was matter of fact in the court whose judgment or decree is under review, is matter of fact here. This was expressly decided in Hanley *v.* Donoghue, 116 U. S. 1, 29 L. Ed. 535, in respect to the faith and credit to be given by the courts of one state to the judgments of the courts of another state, and it is equally applicable to the faith and credit due in one state to the public acts of another." Approved in Eastern Building & Loan Ass'n *v.* Ebaugh, 185 U. S. 114, 121, 46 L. Ed. 830.

court of a state is binding upon the supreme court of the United States, and will be the basis of decision there.[95]

And this for the reason, that the last clause of the seventh amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States. It applies equally to a case tried before a jury in a state court and brought here by writ of error from the highest court of the state.[96] To this may be added that congress has provided that the final judgment of the highest court of a state, in cases of which this court may take cognizance, shall be re-examined upon writ of error, a process of common-law origin, which removes nothing for re-examination but questions of law arising upon the record.[97]

Affirmance by Divided Court.—Where the highest court of a state affirms the judgment of the trial court, though by an equally divided court, and there is no statement of the facts by that court, its decision constitutes an affirmance of the findings of the trial court.[98]

bb. *Rulings on Questions of Evidence.*—**In General.**—This court cannot go behind the final judgment of the state court for the purpose of re-examining and weighing the evidence, and of determining whether, upon the facts, the jury erred in not returning a verdict in favor of the plaintiff in error for a larger sum, and this not only because of the seventh amendment of the constitution providing that "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law," but also because § 709 of the Revised Statutes provides that the final judgment of the highest court of a state may be re-examined in this court only upon a writ of error.[99] On error to a state court,

95. Adams *v.* Church, 193 U. S. 510, 48 L. Ed. 769, citing and approving Egan *v.* Hart, 165 U. S. 188, 41 L. Ed. 680; and Dower *v.* Richards, 151 U. S. 658, 38 L. Ed. 305.

96. Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 242, 243, 41 L. Ed. 979; The Justices *v.* Murray, 9 Wall. 274, 19 L. Ed. 658.

The ratio decidendi, the line of thought pervading and controlling the whole opinion in Parsons *v.* Bedford, 3 Pet. 433, 7 L. Ed. 732, was that the seventh amendment undoubtedly prohibited any court of the United States from re-examining facts once tried by a jury in a lower court of the United States, and that there was no reason why the prohibition should not equally apply to a case brought into a court of the United States from a state court. "In both instances," it was said, "the cases are to be disposed of by the same system of laws, and by the same judicial tribunal." Railroad Company *v.* Schurmeier, 9 Wall. 272, 277, 279, 19 L. Ed. 74. In Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 242, 244, 41 L. Ed. 979, the same course of reasoning was followed, and was applied to a case brought by writ of error from the highest court of a state to this court. Capital Traction Co. *v.* Hof, 174 U. S. 1, 12, 43 L. Ed. 873, opinion of Mr. Justice Gray.

The provision in the seventh amendment of the constitution of the United States, which declares that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law, applies to the facts tried by a jury in a cause in a state court. "It seems to us also that cases of federal cognizance, coming up from state courts, are not only within the words, but are also within the reason and policy of the amendment. They are cases involving questions arising under the constitution, the laws of the United States, and treaties, or under some other federal authority; and, therefore, are as completely within the exercise of the judicial power of the United States, as much so as if the cases had been originally brought in some inferior federal court. No other cases tried in the state courts can be brought under the appellate jurisdiction of this court or any inferior federal court, on which appellate jurisdiction may have been conferred." The Justices *v.* Murray, 9 Wall. 274, 19 L. Ed. 658.

97. Egan *v.* Hart, 165 U. S. 188, 41 L. Ed. 680; Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 246, 41 L. Ed. 979.

98. Minneapolis, etc., R. Co. *v.* Minnesota, 193 U. S. 53, 48 L. Ed. 614.

99. Rulings in questions of evidence.—Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 242, 41 L. Ed. 979.

The powers of the supreme court are limited in cases coming up from the state courts, under the twenty-fifth section of the judiciary act, to questions of law, where the final judgment or decree draws in question the validity of a treaty or

this court cannot re-examine the evidence, and when the facts are found below, we are concluded by such finding.[1] Upon a writ of error to a state court, this court has no right to review its decision upon the ground that the finding was against evidence or the weight of evidence.[2] This court, upon a writ of error to a state court, cannot enter upon an inquiry as to whether the finding of the jury is against the evidence. The facts must be taken as found by the jury, and this court can only consider whether the statute, as interpreted to the jury, is in violation of the federal constitution.[3] Where, according to the ruling of the highest state court, findings of fact by the trial court in the state, upon conflicting evidence are conclusive, and will not be reviewed by such court, that rule is equally binding on this court.[4]

Qualifications of General Rule.—While the mere rejection of a defend-

statute of the United States, etc., or where their construction is drawn in question, or an authority exercised under them; and as the admission of evidence to establish the mere fact of boundary in regard to the extent of grant cannot raise a question involving either the validity or construction of an act of congress, etc., this court has no jurisdiction to consider and revise the decision of a state court, however erroneous it may be in admitting evidence to establish the fact. But when evidence is admitted as competent for this purpose, and it is sought to give it effect for other purposes which do involve questions giving this court jurisdiction, then the decisions of state courts on the effect of such evidence may be fully considered here, and their judgments reversed or affirmed, in a similar manner as if a like question had arisen in a supreme court of error of a state, when reserving the proceedings of inferior courts of original jurisdiction—and on this principle we are compelled to act in the present suit, when dealing with the instruction given on behalf of the defendant. Mackay *v.* Dillon, 4 How. 421, 437, 447, 11 L. Ed. 1046, 1050.

When, indeed, the question decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of federal law, the decision may be reviewed by this court. It was accordingly said by Mr. Justice Catron: "The powers of the supreme court are limited in cases coming up from the state courts, under the twenty-fifth section of the judiciary act, to questions of law, where the final judgment or decree draws in question the validity of a treaty or statute of the United States, etc., or where their construction is drawn in question, or an authority exercised under them; and as the admission of evidence to establish the mere fact of boundary in regard to the extent of grant cannot raise a question involving either the validity or construction of an act of congress, etc., this court has no jurisdiction to consider and revise the decision of a state court, however erroneous it may be in admitting the evidence to establish the fact. But when evidence is admitted as competent for this purpose, and it is sought to give it effect for other purposes which do involve questions giving this court jurisdiction, then the decisions of state courts on the effect of such evidence may be fully considered here, and their judgments reversed or affirmed, in a similar manner as if a like question had arisen in a supreme court of error of a state, when reversing the proceedings of inferior courts of original jurisdiction." Mackay *v.* Dillon, 4 How. 421, 447, 11 L. Ed. 1046; Dower *v.* Richards, 151 U. S. 658, 667, 38 L. Ed. 305.

1. Dower *v.* Richards, 151 U. S. 658, 38 L. Ed. 305; Bartlett *v.* Lockwood, 160 U. S. 357, 40 L. Ed. 455; Stanley *v.* Schwalby, 162 U. S. 255, 278, 40 L. Ed. 960; Egan *v.* Hart, 165 U. S. 188, 189, 41 L. Ed. 680.

Where a writ of error is sued out from this court to review a decree of affirmance of the highest state court rejecting a petition filed by the plaintiffs in error in seeking to enjoin the erection of a dam on the ground that it would obstruct the navigation of the stream and therefore violate the laws of the United States, findings by the court that the said stream is nonnavigable, and the concurrent participation of the United States and the state in the building of the dam, are purely questions of fact and are therefore conclusive. Egan *v.* Hart, 165 U. S. 188, 41 L. Ed. 680, reaffirmed in Milburn Gin, etc., Co. *v.* German Bank, 173 U. S. 701, 43 L. Ed. 1185.

2. Egan *v.* Hart, 165 U. S. 188, 41 L. Ed. 680; Gardner *v.* Bonestell, 180 U. S. 362, 370, 45 L. Ed. 574; Bement *v.* Nat. Harrow Co., 186 U. S. 70, 83, 46 L. Ed. 1058; Jenkins *v.* Neff, 186 U. S. 230, 235, 46 L. Ed. 1140; Thayer *v.* Spratt, 189 U. S. 346, 353, 47 L. Ed. 845.

3. Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 42 L. Ed. 878, citing Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 41 L. Ed. 979.

4. Central Pac. R. Co. *v.* California, 162 U. S. 91, 40 L. Ed. 903, citing Republican River Bridge Co. *v.* Kansas Pac. R. Co., 92 U. S. 315, 23 L. Ed. 515; Dower *v.* Richards, 151 U. S. 658, 38 L. Ed. 305.

ant's offers of proof by a state court in a case involving the validity of a state statute, under the federal constitution, does not strictly present a federal question, the supreme court may properly regard the exclusion of evidence upon the ground of its incompetency or immateriality under the statute as showing what, in the opinion of the state court, is the scope and meaning of the statute.[5]

cc. *Findings of Fact by Referee.*—Whenever the judgment of the highest court of a state is brought here for the re-examination of some decision of a federal question, we must consider the question as it comes to us from that court. Upon writs of error to the courts of the United States, we cannot be called upon to decide a question, whether a finding of fact by a referee should be set aside because not sustained by the evidence, because the finding of the court below as to facts is conclusive upon us.[6]

dd. *Findings of Court.*—Where a jury is waived at the trial, and the court makes a finding of facts, the findings of fact by the trial court and by the supreme court of the state, are conclusive upon us.[7]

5. Jacobson *v.* Massachusetts, 197 U. S. 11, 24, 49 L. Ed. 643.

6. Findings of fact by referee.—Norris *v.* Jackson, 9 Wall. 125, 127, 19 L. Ed. 608; Insurance Co. *v.* Sea, 21 Wall. 158, 160, 22 L. Ed. 511; Melendy *v.* Rice, 94 U. S. 796, 797, 24 L. Ed. 143.

In Iowa a different practice prevails, and our rule has been so far, and only so far, relaxed as to permit the appellate court to set aside a judgment of an inferior court, because against the weight of the evidence, when there is no evidence whatever to support it, or when there is such an absence of evidence that it may be presumed to have been given through the influence of passion, prejudice, or favor. Rice *v.* Melendy, 41 Iowa 400; Wilson *v.* B. & M. R. Railroad Co., 33 Iowa 592; Starker *v.* Leese & Mahone, 33 Iowa 595; Pearson *v.* Minturn, 18 Iowa 37; Bellamy *v.* Doud, 11 Iowa 255. Melendy *v.* Rice, 94 U. S. 796, 798, 24 L. Ed. 143.

Where the judgment of the highest court of a state is here for re-examination, the federal question, which, it is claimed, arises in the record, will be considered here as it comes from that court. Where, therefore, the point there arising was whether the evidence in the record sustained a finding of fact upon which the judgment of an inferior court had been entered, and the appellate court was permitted by its rules to set aside the judgment as against the weight of evidence only where there was no evidence to support it, or such an absence of evidence that it might be presumed to have been given through the influence of prejudice, passion, or favor, this court will not, upon a question of preponderance of testimony alone, reverse the judgment of the latter court. So held, where the question below was, whether a party, when he purchased property, had reasonable cause to believe that his vendor was insolvent, and was making the sale in fraud of the bankrupt law. Melendy *v.* Rice, 94 U. S. 796, 24 L. Ed. 143.

The only federal question raised in the record was as to the validity of contracts A and B, with reference to the act of congress on the subject of trusts, act of July 2, 1890, ch. 647, 26 Stat. 209. It was held, that if facts not found by the referee are necessary for the purpose of connecting those contracts with others not found in such report, the supreme court of the United States cannot supply the omission to find those facts. Bement *v.* Nat. Harrow Co., 186 U. S. 70, 83, 46 L. Ed. 1058.

7. Findings of court.—Republican River Bridge Co. *v.* Kansas Pac. R. Co., 92 U. S. 315, 23 L. Ed. 515; Dower *v.* Richards, 151 U. S. 658, 672, 38 L. Ed. 305; Egan *v.* Hart, 165 U. S. 188, 41 L. Ed. 680; Hedrick *v.* Atchison, etc., R. Co., 167 U. S. 673, 677, 42 L. Ed. 320; Andrews *v.* Eastern Oregon Land Co., 203 U. S. 127, 51 L. Ed. 119; Thayer *v.* Spratt, 189 U. S. 346, 47 L. Ed. 845; Adams *v.* Church, 193 U. S. 510, 48 L. Ed. 769; Clipper Min. Co. *v.* Eli Min., etc., Co., 194 U. S. 220, 48 L. Ed. 944; Gulf, etc., R. Co. *v.* Texas, 204 U. S. 403, 411, 51 L. Ed. 541.

Where a case is tried without a jury and no special findings of fact are made, and the proceedings in the trial court have been approved by the supreme court of the state without any opinion, the supreme court of the United States will affirm the judgment, if there be evidence to sustain it, although there may be other testimony of a contradictory nature. Gleason *v.* White, 199 U. S. 54, 50 L. Ed. 87.

On writ of error from the supreme court of the United States to the supreme court of a state to review its judgment in proceedings to collect a special assessment to improve a street, "the question whether the benefit accruing to each particular piece of property assessed equalled the sum of the assessment placed thereon was foreclosed by the findings of fact of the trial court, to which court the case was submitted without the intervention of a jury." Lombard

ee. *Rule In Equity Proceedings.*—In an early decision by this court, it was said, that where a right is set up under an act of congress in a state court, any matter of law found in the record, decided by the highest court of the state, bearing on the right so set up under the act of congress, can be re-examined here. In chancery cases, or in any other class of cases where all the evidence becomes part of the record in the highest court of the state, the same record being brought here, this court can review the decision of that court on both the law and the fact, so far as may be necessary to determine the validity of the right so set up under the act of congress; but in cases where the facts are submitted to a jury, and are passed upon by the verdict, in a common-law action, this court has the same inability to review those facts in a case coming from a state court, that it has in a case coming from a circuit court of the United States. This conclusiveness of the facts found extends to the finding by a state court to whom they have been submitted by waiving a jury or to a referee, where they are so held by state laws, as well as to the verdict of a jury.[8] And, in a more recent case, the point was adverted to but not decided.[9] But the rule is now settled as follows: Not only the very nature of a writ of error, but also the rulings of this court from the beginning, make it clear that on error to a state court in a chancery case, as in a case at law, when the facts are found by the court below, this court is concluded by such finding.[10]

ff. *Rule Where Court Directs a Verdict.*—If the court below finds the facts, we are bound thereby, but if the court below did not find the facts, but instructs a verdict for the defendant, being of the opinion that upon no view of the evidence was there a case made which would have justified a verdict for the plaintiff, this raises a question of law, which is this: Was the evidence such as would have justified the jury, under any reasonable view thereof, to find for the plaintiff; in other words, was there sufficient evidence to warrant the submission of the case to the jury? This brings us to consider the evidence, in order to ascertain what inferences, one way or the other, might reasonably have been drawn by the jury therefrom.[11]

v. West Chicago, 181 U. S. 33, 40, 45 L. Ed. 731.

Although the supreme court of a state, without any evidence before it, sets aside the findings of fact made by the trial court, without making any special findings, such judgment will not be reversed by this court, where its statement of what was before it for consideration and its conclusions therefrom are sufficient to sustain the judgment. It is the highest court of a state and we may not ignore its recital of what it considered, especially where it appears that testimony was in fact taken, although the record fails to show how the facts were brought to its knowledge. "And when its conclusions are in harmony with the general rule of the effect to be given to a patent of the United States, we are not justified in setting aside the judgment upon any presumption of what might have been the testimony upon which the trial court made its findings." Andrews *v.* Eastern Oregon Land Co., 203 U. S. 127, 51 L. Ed. 119.

8. Rule in equity proceedings.—Merced Min. Co. *v.* Boggs, 3 Wall. 304, 18 L. Ed. 245; Republican River Bridge Co. *v.* Kansas Pac. R. Co., 92 U. S. 315, 316, 23 L. Ed. 515.

9. Quære, as to the extent of the power of this court upon a writ of error to the highest court of a state, in chancery cases, to review its judgment upon a question of fact? Grand Rapids, etc., R. Co. *v.* Butler, 159 U. S. 87, 40 L. Ed. 85.

10. Egan *v.* Hart, 165 U. S. 188, 189, 41 L. Ed. 680; Bement *v.* Nat. Harrow Co., 186 U. S. 70, 83, 46 L. Ed. 1058; Dower *v.* Richards, 151 U. S. 658, 666, 38 L. Ed. 305; Israel *v.* Arthur, 152 U. S. 355, 38 L. Ed. 474; Hedrick *v.* Atchison, etc., R. Co., 167 U. S. 673, 677, 42 L. Ed. 320; Weltmer *v.* Bishop, 191 U. S. 560, 561, 48 L. Ed. 302; Hamburg, etc., Steamship Co. *v.* Lennan, 194 U. S. 628, 48 L. Ed. 1157; Milburn Gin, etc., Co. *v.* German Bank, 173 U. S. 701, 43 L. Ed. 1185; Dennison *v.* Christian, 196 U. S. 637, 49 L. Ed. 630.

True it is that in Dower *v.* Richards, 151 U. S. 658, 38 L. Ed. 305, the court (referring to the dictum in Republican River Bridge Co. *v.* Kansas Pac. R. Co., 92 U. S. 315, 317, 23 L. Ed. 515), treated as open for further consideration the question whether in chancery cases the power existed in this court to review the decision of state courts on both the law and the fact. Egan *v.* Hart, 165 U. S. 188, 189, 41 L. Ed. 680.

11. Rule where court directs a verdict.—Rector *v.* City Deposit Bank Co., 200 U. S. 405, 412, 420, 50 L. Ed. 527.

(5) *Denial of Right by Municipal Ordinance.*—Where a writ of error is sued out from this court to a state court, our jurisdiction is limited to the question whether the plaintiff in error has been denied a right in violation of the constitution, laws, or treaties of the United States. But where the federal question is that the appellant has been denied some right under the constitution of the United States by the ordinances of a municipal corporation of the state, this court will put an independent construction upon such ordinance.[12]

(6) *Denial of Right to Remove Causes.*—Where this court holds that a case cannot be removed under § 641, Rev. Stat., from the state court into the circuit court, it will not pass upon the merits of any federal question which may arise in the case.[13]

v. *Affirmance, Reversal or Dismissal*—(1) *In General.*—Where it appears that this court has jurisdiction, it must examine the judgment so far as to enable it to decide whether this claim of right was correctly adjudicated by the state court. If it finds that it was rightly decided, the judgment must be affirmed. If it was erroneously decided, then the court must further inquire whether there is any other matter or issue adjudged by the state court sufficiently broad to maintain the judgment, notwithstanding the error in the decision of the federal question. If this be found to be the case, the judgment must be affirmed without examination into the soundness of the decision of such other matter or issue. But if it be found that the issue raised by the question of federal law must control the whole case, or that there has been no decision by the state court of any other matter which is sufficient of itself to maintain the judgment, then this court will reverse that judgment, and will either render such judgment here as the state court should have rendered, or will remand the case to that court for further proceedings, as the circumstances of the case may require.[14]

(2) *Affirmance*—aa. *In General.*—In a writ of error to a state court, where the federal questions involved in the case were correctly decided by the state supreme court, the settled rule of this court is that the judgment must be affirmed without determining the other questions not of a federal character.[15] In short, where upon a writ of error to a state court, this court can find no error in the record in respect of any question of a federal nature, the judgment will be affirmed.[16] If this court finds that the federal questions were properly decided as

12. Denial of right by municipal ordinance.—Yick Wo *v.* Hopkins, 118 U. S. 356, 30 L. Ed. 220.

13. Denial of right to remove causes.—Kentucky *v.* Powers, 201 U. S. 1, 50 L. Ed. 633.

14. Affirmance, reversal or dismissal.—Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429.

An important distinction exists in respect to writs of error issued under the 22d section of the judiciary act, from those issued under the 25th section of the same act, which it becomes necessary to notice in this connection. In order to maintain a writ of error to this court from a state court within the 25th section of that act, it must appear on the face of the record that some one, at least, of the questions stated in that section did arise in the state court, and that the question was decided in the state court, as required in the section; and if it does not so appear in the record, then this court has no jurisdiction of the case, and in that event the writ of error must be dismissed, as this court, under those circumstances, has no power either to reverse or affirm the judgment brought up for revision. But under the 22d section of the judiciary act, a different rule prevails. That section provides, in effect, that final judgments in a circuit court brought there by original process may be re-examined, and reversed or affirmed, in this court, upon a writ of error; and where the cause is brought into this court upon a writ of error issued under that section, and all the proceedings are regular, and no question is presented in the record for revision, it follows by the express words of the section, that the judgment of the court must be affirmed. Minor *v.* Tillotson, 1 How. 392, 11 L. Ed. 312; Stevens *v.* Gladding, 19 How. 64, 15 L. Ed. 569; Lathrop *v.* Judson, 19 How. 66, 15 L. Ed. 553; Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978.

15. Grounds of affirmance in general.—Myrick *v.* Thompson, 99 U. S. 291, 297, 25 L. Ed. 324, citing Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429.

16. Missouri, etc., R. Co. *v.* Haber, 169 U. S. 613, 42 L. Ed. 878; Laclede Gaslight Co. *v.* Murphy, 170 U. S. 78, 42 L. Ed. 955; Nutt *v.* Knut, 200 U. S. 12, 22, 50 L. Ed. 348; Swope *v.* Leffingwell, 105 U.

to one class of persons affected by the judgment, we must sustain that part of it, although we come to that conclusion for a different reason from that expressed by the state court, and one upon which that point is in conflict with its opinion but not with its judgment.[17] So, also, on a writ of error to a state court, where there is no dispute as to the law and both the trial court and the supreme court of the state have found the same way on a question of fact, the judgment will be affirmed.[18]

bb. *Want of Substantiality in Claim.*—Even if the formal raising of a federal question was alone considered on the motion to dismiss, and therefore the unsubstantial nature of the federal question for the purposes of the motion to dismiss were to be put out of view, the judgment below would have to be affirmed. This follows, since it is plain that as the substantiality of the claim of federal right is the matter upon which the merits depend, and that claim being without any substantial foundation, the motion to affirm would have to be granted.[19]

cc. *Moot Cases.*—Where the supreme court of the state to which a writ of error is directed under the 25th section of the judiciary act has not considered the question, as, for example, where the record satisfies the court that it is a moot case, made up to obtain the opinion of this court on a constitutional question without the existence of the facts necessary to raise that question, this court will not feel at liberty to go out of its usual course to decide it.[20] If the final ruling of a state court at the trial is based upon a state of facts which puts a statute which it is insisted is in conflict with the federal constitution, entirely out of the case, the supreme court of the United States is not called upon to consider any expression of opinion concerning the validity of the statute, for such expression is not necessary for the decision. Moot questions require no answer.[21]

dd. *Division of Opinion in State Court.*—Where the highest court of a state affirmed the judgment of the court below, in consequence of an equal division between the judges thereof, such judgment of affirmance is considered, when the

S. 3, 26 L. Ed. 939; Plant *v.* Stovall, 154 U. S. 584, 20 L. Ed. 538.

"Although no right, title, privilege or immunity was specially set up or claimed at the proper time and in the proper way, and no federal question was passed upon by the state courts or raised, except by the general averment in the petition for rehearing that the indictment was so defective that it, or the statute which authorized it, contravened the constitution, yet, as full argument was permitted at the bar, upon the assumption that the writ of error was providently issued, we will instead of dismissing the writ, affirm the judgment." Leeper *v.* Texas, 139 U. S. 462, 468, 35 L. Ed. 225.

Where upon a writ of error to a state court, this court concurs with the state court in the view that was taken, this court will not retain the case for further argument, but the judgment will be affirmed. Richardson *v.* Louisville, etc., R. Co., 169 U. S. 128, 42 L. Ed. 687, citing Chanute City *v.* Trader, 132 U. S. 210, 32 L. Ed. 345.

17. Bank of Commerce *v.* Tennessee, 163 U. S. 416, 41 L. Ed. 211.

18. Lammers *v.* Nissen, 154 U. S. 650, 25 L. Ed. 562.

19. Want of substantiality in claim.—Equitable Life Assurance Society *v.* Brown, 187 U. S. 308, 314, 47 L. Ed. 190, reaffirmed in Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171, following Chanute City *v.* Trader, 132 U. S. 210, 32 L. Ed. 345; Richardson *v.* Louisville, etc., R. Co., 169 U. S. 128, 42 L. Ed. 687; Blythe *v.* Hinckley, 180 U. S. 333, 338, 45 L. Ed. 557.

20. Moot cases.—Bartemeyer *v.* Iowa, 18 Wall. 129, 21 L. Ed. 929.

21. Missouri, etc., R. Co. *v.* Ferris, 179 U. S. 602, 45 L. Ed. 337.

The act of the Texas legislature of April 22, 1897, makes the statutory provision for ex parte depositions, to the effect that refusal to answer shall be deemed an admission, inapplicable to cases where either party to any suit is a corporation. The Texas court in the first instance expressed an opinion that the act was constitutional, yet its final ruling was based upon the fact that there was no such refusal as would entitle the defendant to have the interrogatories taken as confessed if the general statutory provision itself were applicable to the case. It was held, that no federal question remained for the consideration of the supreme court of the United States on writ of error to the state court. Missouri, etc., R. Co. *v.* Ferris, 179 U. S. 602, 45 L. Ed. 337.

case is brought here under the twenty-fifth section of the judiciary act, as an affirmance of the rulings of the court below.[22]

ee. *Uniting Motion to Affirm with Motion to Dismiss.*—Rule 6, § 5, of this court provides, "that there may be united with a motion to dismiss a writ of error to a state court a motion to affirm, on the ground that, although the record may show that this court has jurisdiction, it is manifest the writ was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument."[23] But if a party desires to obtain an affirmance under the operation of this rule, his motion must be to affirm as well as to dismiss,[24] and of this the plaintiff in error must have the requisite notice, so that he may resist if he chooses.[25]

22. Division of opinion in state court. —Lessieur *v.* Price, 12 How. 59, 13 L. Ed. 893.

23. Uniting motion to affirm with motion to dismiss.—Foree *v.* McVeigh, 131 U. S. appx. cxlii, 23 L. Ed. 1010; Foster *v.* Kansas, 112 U. S. 201, 206, 28 L. Ed. 629.

Where a federal question is presented by the record, but it is so frivolous as to make it manifest that the writ was taken for delay merely, the motion to dismiss for want of jurisdiction will be overruled, but the motion to affirm under Rule 6, as amended May 8, 1876, will be granted. Ruckman *v.* Bergholz, 131 U. S. appx. cxliii, 23 L. Ed. 1008.

A motion to affirm the judgment of a state court should be granted by the supreme court of the United States where the assignments of error are frivolous and the court convinced that the writ was taken only for delay. This is the ground for the dismissal in Chanute City *v.* Trader, 132 U. S. 210, 214, 32 L. Ed. 345; and Richardson *v.* Louisville, etc., R. Co., 169 U. S. 128, 132, 42 L. Ed. 687; Blythe *v.* Hinckley, 180 U. S. 333, 45 L. Ed. 557, reaffirmed in Dennison *v.* Christian, 196 U. S. 637, 49 L. Ed. 630.

In an action in a state court by a real estate broker to recover commissions on sales of land, the exclusion of evidence that he had not paid the tax or received the license required by the statutes of the United States, when properly excepted to, raises a federal question; but in this case the question was frivolous, and manifestly taken for delay. Ruckman *v.* Bergholz, 131 U. S. appx. cxliii, 23 L. Ed. 1008.

In a writ of error to a state court, although a federal question was presented by the record, yet if it is so frivolous as to make it manifest that the writ of error was taken for delay merely, the motion to dismiss for want of jurisdiction will be overruled, but the motion to affirm under Rule 6, as amended May 8, 1876, will be granted. Ruckman *v.* Bergholz, 131 U. S. appx. cxliii, 23 L. Ed. 1008, followed in Foree *v.* McVeigh, 131 U. S. appx. cxlii, 23 L. Ed. 1010.

"So far as we can discover from the record, the only federal question involved in this case was decided at the present term in Windsor *v.* McVeigh, 93 U. S. 274, 23 L. Ed. 914, and if there had been united with the motion to dismiss a motion to affirm, we should, as at present advised, have been inclined to enter a judgment of affirmance. The only motion made, however, is one to dismiss, and that is the only motion of which the plaintiff in error has had notice. He has never been called upon to meet a motion to affirm." Foree *v.* McVeigh, 131 U. S. appx. cxlii, 23 L. Ed. 1010.

Motions for allowance of writ of error. —"When, under § 5 of our Rule 6, a motion to affirm is united with a motion to dismiss for want of jurisdiction, the practice has been to grant the motion to affirm when 'the question on which our jurisdiction depends was so manifestly decided right, that the case ought not to be held for further argument.' Arrowsmith *v.* Harmoning, 118 U. S. 194, 195, 30 L. Ed. 243; Church *v.* Kelsey, 121 U. S. 282, 30 L. Ed. 960. The propriety of adopting a similar rule upon motions in open court for the allowance of a writ of error is apparent, for certainly we would not be justified as a court in sending out a writ to bring up for review a judgment of the highest court of a state, when it is apparent on the face of the record that our duty would be to grant a motion to affirm as soon as it was made in proper form." Spies *v.* Illinois, 123 U. S. 131, 164, 31 L. Ed. 80.

Amendment by motion to affirm.— Where it appears that the writ of error was sued out only for delay, or that the question on which the jurisdiction depends is so frivolous as not to need further argument, but no motion to affirm is united with the motion to dismiss, the further hearing of the motion to dismiss will be postponed, with leave to the defendant in error to amend by adding a motion to affirm because the question involved has been already decided and no further argument is necessary. Foree *v.* McVeigh, 131 U. S. appx. cxlii, 23 L. Ed. 1010.

24. Foree *v.* McVeigh, 131 U. S. appx. cxlii, 23 L. Ed. 1010.

25. Foree *v.* McVeigh, 131 U. S. appx. cxlii, 23 L. Ed. 1010.

Necessity for Color to Dismiss.—In order for the appellate court to affirm the judgment on motion, the record must show some color for the motion to dismiss.[26] There is sufficient color for a motion to dismiss the writ of error to

26. Abbott *v.* Tacoma Bank of Commerce, 175 U. S. 409, 44 L. Ed. 217; Texas, etc., R. Co. *v.* Southern Pac. Co., 137 U. S. 48, 34 L. Ed. 614; Douglas *v.* Wallace, 161 U. S. 346, 40 L. Ed. 727.

Where there is color for a motion to dismiss, on the ground that no federal question is involved—the case may properly be disposed of on a motion to affirm. St. Louis Min. Co. *v.* Montana Min. Co., 171 U. S. 654, 42 L. Ed. 320; Southern R. Co. *v.* Carson, 194 U. S. 136, 137, 48 L. Ed. 907.

There is color for a motion to dismiss a writ of error to a state court predicated upon a denial of the existence of a federal question so presented as to be available, where it does not appear that any such question was raised in the state court. Sugg *v.* Thornton, 132 U. S. 524, 32 L. Ed. 447.

Where a writ of error is sued out to the supreme court of Tennessee on the ground that the statute of that state providing that no more than two new trials shall be granted to any party in an action at law; or upon the trial by jury of an issue of fact in equity, is repugnant to the 14th amendment of the constitution, and a motion is made to dismiss the writ of error and with it is united a motion to affirm the judgment, it was held, that there was clearly color for the motion to dismiss, and ordinarily the case may be disposed of upon a motion to affirm. Louisville, etc., R. Co. *v.* Woodson, 134 U. S. 614, 33 L. Ed. 1032.

In East Tennessee, etc., R. Co. *v.* Frazier, 139 U. S. 288, 35 L. Ed. 196, the facts were that upon the pleadings no federal question was presented. Not only that, but in the assignment of error, which was made when the case was taken to the supreme court of the state, no reference was made to any federal question; and the unconstitutionality of the act was rested solely upon the supposed conflict with the state constitution. "When on October 26, 1889, the decree of the supreme court of the state was entered, affirming the ruling of the chancellor as to the liability of the property, the points decided were specifically stated in it, and in them no reference is made to any federal question. Two days thereafter an entry appears on the records of that court, stating that upon application of counsel for the railway company, the decree is modified so as to show that upon the argument of the case the question of the invalidity of the act of 1877, by reason of the inhibition of the federal constitution, was presented by counsel, and that the decision of the court was adverse to such contention. Upon these facts, we think there was color for the motion to dismiss. The pleadings in the trial court, the assignment of error, the opinion of the supreme court and the original decree of that court, contain no reference to any federal question. The invalidity of the act of 1877, in all these proceedings, is placed upon a supposed conflict with the state constitution. Obviously that was the substantial matter litigated. The fact that two days after the decision the presentation of a federal question was recognized by the supreme court, is not to be taken as a declaration that the federal question was a principal one—one which it had theretofore ignored—but rather implies that it was a subordinate and incidental matter, which though noticed by counsel was not made the stress of the argument or the burden of the complaint."

In an action in a state court to recover damages for a libel, alleged to have been contained in the pleadings of defendants in error, the trial court dismissed the action, and the judgment was affirmed by the highest state court, and from thence brought here by writ of error. A motion was made to dismiss the action or affirm the judgment of the lower court. Held, that there being color for the motion of dismissal, the motion to affirm should be considered, and as the judgment of the court of last resort in the state did not deprive plaintiff of any right, privilege or immunity secured to him by the constitution or laws of the United States, it should be affirmed. Abbott *v.* Tacoma Bank of Commerce, 175 U. S. 409, 44 L. Ed. 217.

Denial of right under national bank act.—Where a writ of error is sued out to this court to review the judgment of a state court deciding as to whether under the statutes of the United States in respect to national banks, it is within its power to become the agent of the defendant in error to sell certain notes to a third person; and not within the power of its cashier, to conduct any transaction to bind the bank by such contract of agency, and the defendant in error moves to dismiss the writ of error, or, if that motion is not sustained, that the judgment be affirmed, a contention that the judgment of the state court rests on two grounds, one of which, broad enough in itself to sustain the judgment, involves no federal question, is so justified as to give color to the motion, so that this court has authority to pass on the motion to affirm. First Nat. Bank *v.* Anderson, 172 U. S. 573, 43 L. Ed. 558.

Removal of cases.—The action of a circuit court in remanding a cause after its removal on the first application is not

a state court on the ground that a receiver appointed by a federal court has been sued without previous leave of such court in contravention of the federal statute, to enable us to dispose of the motion to affirm.[27]

Rule Qualified.—Even where the motion to dismiss is denied, and where such motion should be treated as without color, considering alone the formal making of such question, yet notwithstanding the provisions of subdivision 5 of rule 6, the power to consider and sustain a motion to affirm obtains where the assignments of error on the merits are obviously and unquestionably frivolous, or when it is patent that the writ of error has been prosecuted for mere delay, or where it is evident on the face of the record that the question on the merits is not open to possible contention because it has previously been so specifically and adversely ruled on by the court as to absolutely foreclose further contention on the subject.[28] Where there was a motion to dismiss a writ of error to a state court for want of jurisdiction, to which was united a motion to affirm, although this court may be in doubt whether under our rules there is sufficient color for the motion to dismiss, to justify the court in considering a motion to affirm, yet where the supreme court of the state does not seem to have expressly passed upon the federal question, although it is clearly in the record, we may consider that there was color for making the motion to dismiss.[29]

ff. *Damages Awarded for Frivolous Appeal.*—Where it appears that the writ of error could have been prosecuted only for delay, the judgment will be affirmed with ten per cent. damages.[30]

(3) *Reversal*—aa. *In General.*—Where the judgment of the state court may be sustained on error, on any ground within the exclusive cognizance of that court, this court will not reverse such judgment merely because some point which can be examined here, was erroneously ruled.[31] The fact that a state statute enacted subsequently to the rendition of the judgment under review, had the effect of taking away the power of the state to enforce such judgment, will not

open to revision on writ of error from this court to a state court. Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 40 L. Ed. 536. And if the state court did not err in denying the second application, the motion to affirm must be sustained, as the effect of the remanding order gives color for the motion to dismiss. Whitcomb *v.* Smithson, 175 U. S. 635, 637, 44 L. Ed. 303.

Constitutionality of statutes compelling removal of grade crossings.—Where a writ of error is sued out to review a decision of a state court sustaining the constitutionality of laws compelling the removal of grade crossings on railroads, and a motion to dismiss the writ of error for want of jurisdiction is made, and with it is united a motion to affirm on the ground that although the record may show that this court has jurisdiction, it is manifest "that the writ or appeal was taken for delay only, or that the question on which the jurisdiction depends is so frivolous as not to need further argument," this court held, that as that jurisdiction rests on so narrow a foundation, because of the repeated decisions holding it to be within the exercise of the police power of the state to abolish grade crossings, that there was sufficient color for the motion to dismiss to justify the disposal of the case on motion to affirm. New York, etc., R. Co. *v.* Bristol, 151 U. S. 556, 38 L. Ed. 269, followed in Connecticut *v.* Woodruff, 153 U. S. 689, 38 L. Ed. 869. See Wheeler *v.* New York, etc., Co., 178 U. S. 321, 324, 44 L. Ed. 1085.

27. McNulta *v.* Lochridge, 141 U. S. 327, 35 L. Ed. 796.

28. Chanute City *v.* Trader, 132 U. S. 210, 32 L. Ed. 345; Richardson *v.* Louisville, etc., R. Co., 169 U. S. 128, 42 L. Ed. 687; Blythe *v.* Hinckley, 180 U. S. 333, 338, 45 L. Ed. 557; Equitable Life Assurance Society *v.* Brown, 187 U. S. 308, 311, 47 L. Ed. 190, reaffirmed in Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171.

29. Bell's Gap R. Co. *v.* Pennsylvania, 134 U. S. 232, 33 L. Ed. 892.

30. Damages awarded for frivolous appeal.—"The court refused to dismiss, for want of jurisdiction, a case brought here as within the 25th section of the judiciary act, when they could see a federal question raised under it, though raised somewhat obscurely; and though they had "a very clear conviction" that the decision of the state court was correct, so clear indeed that as it finally turned out (see infra, next case) they affirmed it with 10 per cent. damages, because any writ of error could have been prosecuted only for delay." Pennywit *v.* Eaton, 15 Wall. 380, 21 L. Ed. 72.

31. In general.—Erwin *v.* Lowry, 7 How. 172, 12 L. Ed. 655.

give this court jurisdiction to reverse the judgment of the highest court of a state independently of the federal questions involved, or in other words without passing on the federal question. "It is our duty to decide the federal question upon which the writ of error was prosecuted, and leave open the purely local question, which has arisen since the decision by the lower court."[32]

bb. *Harmless Error.*—It has been the uniform doctrine of this court that, where it appears that the judgment of the state court must be affirmed on other grounds disclosed in the record, it will not be reversed for an erroneous ruling of the state court on a federal question not necessary to the decision of the cause.[33] In other words, where the case is brought here by a writ of error to a state court for re-examination, the court is not inclined to reverse the judgment unless there is some substantial error to the prejudice of the complaining party, and especially not where it appears that the error has become immaterial and that the same party will be entitled to judgment if a new trial is granted.[34]

(4) *Dismissal*—aa. *Grounds for Dismissal*—aaa. *Want of Jurisdiction.*—Where the record in the court below does not show that any federal question was presented by the pleadings, or decided by the state court, the writ will be dismissed for want of jurisdiction.[35] But a motion to dismiss a writ of error to a state court from the supreme court of the United States, for lack of jurisdiction, must be denied where a federal question is duly raised, although the claim may not be well founded.[36]

bbb. *When State Court Proceeds on Non-Federal Grounds.*—When we find it unnecessary to decide any federal question, and when the state court has based its decision on a local or state question, our logical course is to dismiss the writ of error.[37]

32. Campbell *v.* California, 200 U. S. 87, 50 L. Ed. 382.

33. Harmless error.—Murdock *v.* Memphis, 20 Wall. 590, 634, 22 L. Ed. 429; Jenkins *v.* Loewenthal, 110 U. S. 222, 28 L. Ed. 129; Erwin *v.* Lowry, 7 How. 172, 12 L. Ed. 655; Gibson *v.* Chouteau, 8 Wall. 314, 19 L. Ed. 317; Crescent City Live-Stock Co. *v.* Butchers' Union Slaughter-House Co., 120 U. S. 141, 156, 30 L. Ed. 614.

34. Pugh *v.* McCormick, 14 Wall. 361, 374, 20 L. Ed. 789.

Where on a writ of error to the highest court of the state, it appears that the only question in the case was whether as a matter of fact, when the plaintiff in error purchased from the United States lot No. so and so, Dakota land district, there was in front and outside of the meandered line of the lot any land that could be cultivated or that bore trees of value or grass sufficient for grazing purposes, and the district court of a county in the state found that there was such land and this finding was affirmed by the supreme court of the state on appeal, and there was no dispute between the parties as to the law, this court will not disturb the judgment of the state court unless the error is clear. The court said: "No less stringent rule should be applied in cases of this kind than that which formerly governed in admiralty appeals, when two courts had found in the same way, on a question of fact." Lammers *v.* Nissen, 154 U. S. 650, 25 L. Ed. 562.

35. Want of jurisdiction.—Warfield *v.* Chaffe, 91 U. S. 690, 23 L. Ed. 383; Allen *v.* Tarlton, 154 U. S. 596, 21 L. Ed. 955.

Where the record does not show that a federal question was presented to the supreme court of the state for determination, or that it was decided, or that its decision was in any manner necessary to the judgment as rendered, a motion to dismiss the cause for want of jurisdiction will be granted. Bergner *v.* Palethorp, 131 U. S. appx. ccviii.

The court reiterates the proposition that unless it can be seen from the record that a state court decided the question relied on to give this court jurisdiction, the writ of error will be dismissed. Cockroft *v.* Vose, 14 Wall. 5, 20 L. Ed. 875.

Where the record shows that no question under the 25th section of the judiciary act was passed upon by the state court, no ground appears of jurisdiction in this court over the judgment, and the writ of error must be dismissed for want of jurisdiction. Davidson *v.* Starcher, 154 U. S., appx., 566, 19 L. Ed. 52.

36. Blythe *v.* Hinckley, 180 U. S. 333, 45 L. Ed. 557, reaffirmed in Dennison *v.* Christian, 196 U. S. 637, 49 L. Ed. 630.

37. When state court proceeds on non-federal grounds.—St. Louis, etc., R. Co. *v.* Merriam, 156 U. S. 478, 39 L. Ed. 502; Hamblin *v.* Western Land Co., 147 U. S. 531, 37 L. Ed. 267; Castillo *v.* McConnico, 168 U. S. 674, 42 L. Ed. 622; White *v.* Leovy, 174 U. S. 91, 96, 43 L. Ed. 907; Remington Paper Co. *v.* Watson, 173 U. S. 443, 451, 452, 43 L. Ed. 762, reaffirmed in Delahanty *v.* Pitkin, 199 U.

ccc. *Frivolous Appeals.*—Where the question is not of the validity but of the existence of an authority, and we are satisfied that there was and could have been no decision by the state court against any authority of the United States, the writ of error will be dismissed as frivolous.[38] If the federal questions involved are frivolous and undeserving of notice, the appeal may be dismissed.[39] A writ of error to a state court will be dismissed where there is nothing to sustain it except a contention of a federal right for which there is no color. As, for example, where a husband has appeared and been heard in a proceeding for alimony, there is no color for a contention that he is deprived of his property without due process of law.[40] Although the brief of counsel alleges that certain federal questions were duly raised and so disposed of as to sustain the jurisdiction of this court, yet if these questions were wholly without merit or were no longer open by reason of our previous decisions, the writ of error will be dismissed.[41]

ddd. *Want of Substantiality in Claim.*—Although in considering a motion to dismiss, it be found that a question adequate, abstractly considered, to confer jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly fore-

S. 602, 50 L. Ed. 328; Archer *v.* Baltimore Building & Loan Ass'n, 179 U. S. 679, 45 L. Ed. 383; Winter *v.* Montgomery, 156 U. S. 385, 39 L. Ed. 460; Eustis *v.* Bolles, 150 U. S. 361, 37 L. Ed. 1111.

In Remington Paper Co. *v.* Watson, 173 U. S. 443, 43 L. Ed. 762, we had occasion to repeat and affirm the rule announced in Eustis *v.* Bolles, 150 U. S. 361, 370, 37 L. Ed. 1111, "that when we find it unnecessary to decide any federal question, and when the state court has based its decision on a local or state question, our logical course is to dismiss the writ of error." White *v.* Leovy, 174 U. S. 91, 96, 43 L. Ed. 907.

"Having reached the conclusion that we are not called upon to determine any federal question, nor to consider whether the state court was right or wrong in its decision of the other question in the case, it only remains to inquire whether that conclusion requires us to affirm the judgment of the court below, or to dismiss the writ of error. An examination of our records will show that, in similar cases, this court has sometimes affirmed the judgment of the court below, and sometimes has dismissed the writ of error. This discrepancy may have originated in a difference of views as to the precise scope of the questions presented. However that may be, we think that, when we find it unnecessary to decide any federal question, and when the state court has based its decision on a local or state question, our logical course is to dismiss the writ of error. This was the judgment pronounced in Klinger *v.* Missouri, 13 Wall. 257, 20 L. Ed. 635; New Orleans, etc., Co. *v.* Louisiana Sugar Refin. Co., 125 U. S. 18, 31 L. Ed. 607; Kreiger *v.* Shelby R. Co., 125 U. S. 39, 31 L. Ed. 675; De Saussure *v.* Gaillard, 127 U. S. 216, 32 L. Ed. 125; Hale *v.* Akers, 132 U. S. 554, 33 L. Ed. 442; Hopkins *v.* McLure, 133 U. S. 380, 33 L. Ed. 660; Johnson *v.* Risk, 137 U. S. 300, 307, 34 L. Ed. 683." Eustis *v.* Bolles, 150 U. S. 361, 370, 37 L. Ed. 1111.

"In such cases as this it has sometimes been the practice of this court to affirm the judgment and sometimes to dismiss the writ. 'An examination of our records will show that in some cases this court has affirmed the judgment of the court below and sometimes has dismissed the writ of error. This discrepancy may have originated in a difference of views as to the precise scope of the question presented. However that may be, we think that when we find it unnecessary to decide any federal question, and that when the state court has based its decision on a local or state question, our logical course is to dismiss the writ.'" Eustis *v.* Bolles, 150 U. S. 361, 37 L. Ed. 1111. Accordingly the judgment in the case last cited was one of dismissal. The same judgment was given in the two cases in Rutland R. Co. *v.* Central Vermont R. Co., 159 U. S. 360, 40 L. Ed. 284; and Gillis *v.* Stinchfield, 159 U. S. 658, and also in the very latest case on the subject, that of the Seneca Nation of Indians *v.* Christy, 162 U. S. 283, 40 L. Ed. 970. Bacon *v.* Texas, 163 U. S. 207, 228, 41 L. Ed. 132.

38. Frivolous appeals.—Millingar *v.* Hartupee, 6 Wall. 258, 18 L. Ed. 829; New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 86, 87, 35 L. Ed. 946; Hamblin *v.* Western Land Co., 147 U. S. 531, 37 L. Ed. 267; Walsh *v.* Columbus, etc., R. Co., 176 U. S. 469, 476, 44 L. Ed. 548, reaffirmed in Gates *v.* Commissioners, 183 U. S. 693, 46 L. Ed. 393.

39. Mobile Transportation Co. *v.* Mobile, 187 U. S. 479, 47 L. Ed. 266.

40. Lynde *v.* Lynde, 181 U. S. 183, 45 L. Ed. 810, reaffirmed in Jones *v.* Vane, 200 U. S. 614, 50 L. Ed. 621.

41. Barrington *v.* Missouri, 205 U. S. 483, 51 L. Ed. 890.

closed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail.[42] In other words, where the federal question asserted to be contained in a record is manifestly lacking all color of merit or is no longer open by reason of previous decisions, the writ of error must be dismissed.[43] But the power, however, to dismiss because of the want of substantiality in the claim upon which the assertion of jurisdiction is predicated, does not apply to cases where the subject matter of the controversy is per se and inherently federal.[44]

eee. *Moot Cases.*—The duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and without any fault of the defendant, an event occurs which renders it impossible for this court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. The reasons are quite as strong, to say the least, for applying the rule to a writ of error to a state court, on which the jurisdiction of this court is limited to federal questions only, as to a writ of error to a circuit court of the United States, on which the jurisdiction of this court extends to the whole case.[45] A writ of error will not lie

42. Want of substantiality in claim.—New Orleans Waterworks Co. *v.* Louisiana, 185 U. S. 336, 345, 46 L. Ed. 936; Equitable Life Assurance Society *v.* Brown, 187 U. S. 308, 311, 47 L. Ed. 190, reaffirmed in Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171.

Although a federal question is raised below in a formal manner, yet if that question, when examined with reference to the averments of fact upon which it is made to depend, is one which has been so explicitly decided by this court as to foreclose further argument on the subject, this will cause the federal question relied upon to be devoid of any substantial foundation or merit. Equitable Life Assurance Society *v.* Brown, 187 U. S. 308, 47 L. Ed. 190, reaffirmed in Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171, citing New Orleans Waterworks Co. *v.* Louisiana, 185 U. S. 336, 46 L. Ed. 936.

43. Swafford *v.* Templeton, 185 U. S. 487, 493, 46 L. Ed. 1005; Wabash R. Co. *v.* Flannigan, 192 U. S. 29, 38, 48 L. Ed. 328; reaffirmed in Iron Bridge Co. *v.* Brennan, 194 U. S. 630, 48 L. Ed. 1158; Watkins *v.* American Nat. Bank, 199 U. S. 599, 50 L. Ed. 327; Delahanty *v.* Pitkin, 199 U. S. 602, 50 L. Ed. 427; Barrington *v.* Missouri, 205 U. S. 483, 484, 51 L. Ed. 890.

Denial of full faith and credit.—Where the supreme court of one state has entered a judgment directing a lower court of that state to render a judgment for plaintiff, the fact that such lower court refuses to offset against the amount of the judgment directed, the sum of a judgment recovered in attachment suit in another state subsequently to the decision of the supreme court of the former state, will not give the federal court jurisdiction on the ground of denial of the full faith and credit to which judgments are entitled by virtue of § 1, art. 4, of the constitution of the United States, when nowhere in the proceeding had in the courts of the latter state were rights set up specifically based on the foreign judgment, claiming for that judgment an effect which if denied it would have impaired its force and effect, or claiming any right to the relief demanded upon the effect due to the foreign judgment. Wabash R. Co. *v.* Flannigan, 192 U. S. 29, 37, 48 L. Ed. 328, reaffirmed in Iron Bridge Co. *v.* Brennan, 194 U. S. 630, 48 L. Ed. 1158; Watkins *v.* American Nat. Bank, 199 U. S. 599, 50 L. Ed. 327; Delahanty *v.* Pitkin, 199 U. S. 602, 50 L. Ed. 328.

44. Swafford *v.* Templeton, 185 U. S. 487, 493, 46 L. Ed. 1005; Equitable Life Assurance Society *v.* Brown, 187 U. S. 308, 311, 47 L. Ed. 190, reaffirmed in Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171.

45. Moot cases.—Mills *v.* Green, 159 U. S. 651, 653, 40 L. Ed. 293; Kimball *v.* Kimball, 174 U. S. 158, 162, 43 L. Ed. 932, reaffirmed in Cedar Rapids Water Co. *v.* Cedar Rapids, 199 U. S. 600, 50 L. Ed. 327.

The rule was applied to a writ of error to the court of errors and appeals of the state of New Jersey in Little *v.* Bowers, 134 U. S. 547, 33 L. Ed. 1016. See Kimball *v.* Kimball, 174 U. S. 158, 162, 43 L. Ed. 932, reaffirmed in Cedar Rapids Water Co. *v.* Cedar Rapids, 199 U. S. 600, 50 L. Ed. 327.

The refusal on the part of an insurance commissioner to grant authority to plaintiff to transact the business of insurance under a new permit after the expiration of an old permit, does not raise a federal

from this court to a state court under § 25 of the judiciary act, where the record does not aver any facts which show that an actual question has arisen. A presentation of a possible, but not actual question, one which may hereafter arise, but which has not arisen as yet, is not sufficient.[46] Where a municipal tax is questioned on the ground that the tax impairs the obligation of the contract, and is also an attempt to take property without due process of law, if there is no law of the state authorizing the imposition of the tax, there is no federal question involved which will give the supreme court jurisdiction.[47]

This court of its own motion must determine whether the enactment of a statute subsequent to the decision by the state court, so obviously has the effect of relieving the plaintiff in error from the burden imposed by the judgment below, as to cause the federal question to become merely a moot one.[48]

bb. *Operation and Effect of Decree.*—Where two writs of error are taken from the highest state court to the supreme court of the United States, the first of which incorrectly describes the judgment of the state court while the second correctly describes it, the former may be dismissed without prejudice to the proceeding in the latter.[49]

cc. *Hearing and Determination of Motion.*—The merits of the controversy cannot be revised in this tribunal upon a motion to dismiss the writ of error for want of jurisdiction. We can inquire only whether the record shows that the constitution, or a treaty, or a law of the United States, has been violated by the decision of the state court.[50] Whether a state has or has not impaired the ob-

question, where, since the writ of error was filed the permit has ceased to have any effect, and therefore an event has occurred which renders it impossible for this court to grant any effectual relief in favor of the plaintiff in error. In such case, this court will dismiss the writ of error. Security Life Ins. Co. *v.* Prewitt, 200 U. S. 446, 50 L. Ed. 545; Travellers' Ins. Co. *v.* Prewitt, 200 U. S. 450, 50 L. Ed. 549, citing Mills *v.* Green, 159 U. S. 651, 40 L. Ed. 293; Tennessee *v.* Condon, 189 U. S. 64, 47 L. Ed. 709; Jones *v.* Montague, 194 U. S. 147, 48 L. Ed. 913.

46. Downham *v.* Alexander Council, 10 Wall. 173, 19 L. Ed. 829.

What the courts of the state may decide as to jurors we do not wish to anticipate, and plaintiff in error cannot complain until he is made to suffer. Lloyd *v.* Dollison, 194 U. S. 445, 450, 48 L. Ed. 1062.

The fact that a state has enacted a new inheritance tax law, after a judgment of the highest state court, sustaining the previous inheritance tax law, as against the claim that it denied the equal protection of the laws, as guaranteed by the United States constitution, does not convert the above federal question into a moot question, hence the decision will be reviewed by this court unless it is plain that the new inheritance law relieved the plaintiffs in error from their previous obligations under the earlier law. Campbell *v.* California, 200 U. S. 87, 50 L. Ed. 382.

47. Savannah, etc., R. Co. *v.* Savannah, 198 U. S. 392, 396, 49 L. Ed. 1097, citing Barney *v.* New York City, 193 U. S. 430, 48 L. Ed. 737.

48. Campbell *v.* California, 200 U. S. 87, 50 L. Ed. 382.

49. Operation and effect of decree.—Northern Pac. R. Co. *v.* Ely, 197 U. S. 1, 49 L. Ed. 639, citing Wheeler *v.* Harris, 13 Wall. 51, 20 L. Ed. 531; Silsby *v.* Foote, 20 How. 290, 15 L. Ed. 822; Northern Pac. R. Co. *v.* Hasse, 197 U. S. 9, 49 L. Ed. 642.

50. Hearing and determination of motion.—New Orleans *v.* De Armas, 9 Pet. 224, 234, 9 L. Ed. 109.

A lot of ground situated in the city of New Orleans, which was occupied, under an incomplete title, for some time by permission of the Spanish government, granted before the acquisition of Louisiana by the United States, was confirmed to the claimants, under the laws of the United States, and a patent was issued for the same on the 17th of February, 1821. The city of New Orleans claiming this lot as being part of a quay dedicated to the use of the city in the original plan of the town, and therefore not grantable by the King of Spain, enlarged the levee in front of New Orleans so as to include it. The patentees from the United States brought a suit in the district court of the state of Louisiana for the lot, which pronounced judgment in their favor, and that judgment was affirmed by the supreme court of the state. The judgment was removed to this court, under the twenty-fifth section of the judicial act. A motion was made to dismiss the writ of error for want of jurisdiction. By the court: The merits of this controversy cannot be revised in this tribunal. The only inquiry here is, whether the record shows that the constitution, or a treaty, or a law of the United States has been violated by the decision of that court. New Orleans *v.* De Armas, 9 Pet. 224, 9 L. Ed. 109.

ligation of a contract is not a question which can be properly passed upon, on a motion to dismiss, so long as the complainant claims in his bill that it has that effect, and such claim is apparently made in good faith, and is not a frivolous one.[51]

(5) *Hearing and Determination.*—Upon a writ of error from a state court, where the federal question upon which the jurisdiction depends is also the identical question upon which the merits depend, and is, in fact, without merit, and there is a motion to affirm as well as a motion to dismiss, the supreme court will cause its decree to respond to the question which arises first in order for decision and dismiss the writ of error.[52]

w. *Effect of Transfer of Cause*—(1) *In General.*—A writ of error issued under the twenty-fifth section of the judiciary act is in the nature of a commission by which the judges of one court are authorized to examine a record upon which a judgment or decree was given in another court, and on such examination to reverse or affirm that judgment or decree. When regular in form, and duly served, the writ of error operates upon the record of the court to which it is addressed in the case described in the writ, and it has the effect to remove that record into the court granting the writ of error and to submit it to re-examination, and the twenty-third section of the judiciary act provides to the effect that where all the conditions prescribed in that section concur in the case the jurisdiction of the court where the record remained when the writ of error was sued out and served shall be suspended until the cause is determined by or remanded from the appellate tribunal.[53]

(2) *Supersedeas.*—**In General.**—Under the act of 1867 providing for the examination by this court of final judgments or decrees in the highest state court, it was held, that the effect of the writ and of the regulations governing it is that when accompanied by proper bond, given and approved within the prescribed time, it operates as a supersedeas to further proceedings in the inferior court. The phrase "in the same manner and under the same regulations, and the writ shall have the same effect" in the act of 1867 providing that a final judgment or decree in any suit in the highest court of a state in which a decision in the suit can be had, may be re-examined and reversed or affirmed in the supreme court of the United States upon a writ of error, is one eminently appropriate to the expression of the idea that these cases, though coming from state instead of fed-

51. New Orleans *v.* New Orleans Waterworks Co., 142 U. S. 86, 88, 35 L. Ed. 946; City R. Co. *v.* Citizens' Street R. Co., 166 U. S. 557, 564, 41 L. Ed. 1114.

52. Hearing and determination.—Equitable Life Assurance Society *v.* Brown, 187 U. S. 308, 47 L. Ed. 190, reaffirmed in Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171.

"This being the case, it is obvious that, on this record, either the motion to dismiss must be allowed or the motion to affirm granted, and that the allowance of the one or the granting of the other as a practical question will have the like effect, to finally dispose of this controversy. The question then is, to which of the motions should the decree which we are to render respond? As there is a case governed by the principles controlling writs of error to state courts, it follows that the federal question upon which the jurisdiction depends is also the identical question upon which the merits depend, and therefore the unsubstantiality of the federal question for the purpose of the motion to dismiss and its unsubstantiality for the purpose of the motion to affirm are one and the same thing, that is, the two questions are therefore absolutely coterminous. Hence, in reason, the denial of one of the motions necessarily involves the denial of the other, and hence also one of the motions cannot be allowed except upon a ground which also would justify the allowance of the other. Under this state of the case (there being of course no inherently federal question, Swafford *v.* Templeton, 185 U. S. 487, 493, 46 L. Ed. 1005), we think the better practice is to cause our decree to respond to the question which arises first in order for decision, that is, the motion to dismiss, and therefore the writ of error is dismissed." Equitable Life Assurance Society *v.* Brown, 187 U. S. 308, 315, 47 L. Ed. 190, reaffirmed in Chicago, etc., R. Co. *v.* Newell, 198 U. S. 579, 49 L. Ed. 1171.

53. In general.—Cohens *v.* Virginia, 6 Wheat. 264, 410, 5 L. Ed. 257; Suydam *v.* Williamson, 20 How 427, 437, 15 L. Ed. 978; Barton *v.* Forsyth, 5 Wall. 190, 18 L. Ed. 545; Slaughter-House Cases, 10 Wall. 273, 19 L. Ed. 915.

eral tribunals, shall be conducted in their progress through the court, in the matter of the general course of procedure, by the same rules of practice that prevail in cases brought under writs of error to the courts of the United States. "The word manner also much more appropriately expresses the general mode of proceeding with the case, after the writ has been allowed, the means by which the exigency of the writ is enforced, as by rule on the clerk, or mandamus to the court, and the progress of the case in the appellate court; as filing the record, docketing the case, time of hearing, order of the argument, and such other matters as are merely incident to final decision by the court."[54]

Service of Writ of Error.—Writs of error issued under the twenty-fifth section of the judiciary act have the same effect as if the judgments or decrees were rendered in a circuit court, and they operate as a supersedeas and stay execution only where the writ of error is served by a copy thereof being lodged for the adverse party in the clerk's office where the record remains, within ten days, Sundays exclusive, from the date of the judgment or decree.[55] Exceptional cases arise where the judgment or decree given on appeal in the highest court of a state is required by the law of the state to be returned to the subordinate court for execution, and in such cases it is held, that the writ of error from this court may operate as a supersedeas, if granted and served at any time within ten days from the return entry of the proceedings in the court from which the record was removed, but in all other cases the writ of error must be issued and served within ten days from the date of the judgment or decree, in order that it may operate as a supersedeas and stay execution.[56]

(3) *Execution on Judgment of State Court.*—The provision of § 1007 of the Revised Statutes, to the effect that, in cases where a writ of error may be a supersedeas, executions shall not issue until the expiration of ten days, does not apply to judgments in the highest court of a state.[57]

(4) *Effect on Injunction Proceedings.*—A writ of error to a state court cannot have any greater effect than if the judgment or decree had been rendered or passed in a circuit court, and it is quite certain that neither an injunction nor a decree dissolving an injunction passed in a circuit court is reversed or nullified by an appeal or writ of error before the cause is heard in this court.[58]

54. Supersedeas.—Murdock *v.* Memphis, 20 Wall. 590, 624, 22 L. Ed. 429.

55. Slaughter-House Cases, 10 Wall. 273, 290, 19 L. Ed. 915.

56. McGuire *v.* The Commonwealth, 3 Wall. 382, 386, 17 L. Ed. 165; Gelston *v.* Hoyt, 3 Wheat. 246, 4 L. Ed. 381; Green *v.* Van Buskirk, 3 Wall. 448, 450, 18 L. Ed. 245; Slaughter-House Cases, 10 Wall. 273, 291, 19 L. Ed. 915.

57. Execution on judgment of state court.—Foster *v.* Kansas, 112 U. S. 201, 204, 28 L. Ed. 629; Doyle *v.* Wisconsin, 94 U. S. 50, 24 L. Ed. 64.

Section 1007 of the Revised Statutes, which, as amended by the act of Feb. 18, 1875 (18 Stat., part 3, p. 316), provides that, where a writ of error may operate as a supersedeas, execution shall not issue until the expiration of ten days after the rendition of the judgment, has reference only to the judgments of the courts of the United States. "It was not the intention of congress, under the act of 1789, to interfere at all with the practice of the state courts as to executions upon their judgments, until a supersedeas was actually perfected, and that the same effect must be given to the corresponding sections of the revision." Doyle *v.* Wisconsin, 94 U. S. 50, 52, 24 L. Ed. 64, citing Board of Commissioners *v.* Gorman, 19 Wall. 661, 664, 22 L. Ed. 226.

58. Effect on injunction proceedings.—Slaughter-House Cases, 10 Wall. 273, 297, 19 L. Ed. 915.

Injunctions to state courts.—There is no appellate relation between a subordinate state court and the supreme court of the United States, and where no such relation is established by law, the prohibition of that section (the fifth section of the act of the second of March, 1793)—"nor shall a writ of injunction be granted to stay proceedings in any court of a state"—applies to the supreme court as well as to the circuit court. 1 Stat. at Large 335. Slaughter-House Cases, 10 Wall. 273, 298, 19 L. Ed. 915.

Where injunctions had been granted in the district court of the state of Louisiana, and suspensive appeals had been taken to the supreme court of the state, where the decrees granting the injunctions had been affirmed, and a writ of error under the 25th section of the judiciary act sued out to that judgment of affirmance, the writ of error and bond,

x. *Presumptions on Appeal.*—**In General.**—As state tribunals are presumed to do their duty, their decisions will not be disturbed by the United States supreme court on appeal or writ of error under the 25th section of the judiciary act unless very manifestly improper or erroneous. Therefore, where the plaintiff in error asserts that such right or title has been improperly overruled by the state court, the burden devolves on him to show it.[59] This court will not presume that the court below decided erroneously in order to defeat their own jurisdiction, in the case of a writ of error to this court under the 25th section of the judiciary act.[59a] Where a case has been decided in an inferior court of a state on a single point which would give this court jurisdiction, it will not be presumed here that the supreme court of the state decided it on some other ground not found in the record or suggested in the latter court.[60]

That Public Officers Perform Their Duties.—The supreme court of the United States will not and ought not to presume a violation of duty by public officials in the absence of allegations and proofs to that effect.[61]

y. *Mandate*—(1) *Remand for Further Proceedings.*—This court may, at their discretion, remand the cause to the state court from which it was removed by the writ.[62]

though filed within ten days of the affirmance, did not authorize this court to enjoin or supersede the action of the district court in giving effect to the said injunctions subsequent to the issuing of the writ of error. The supersedeas of the act operated alone upon the supreme court of the state to which the writ of error is directed under the said 25th section. The appeals from the district to the supreme court of the state operated as a stay of execution, and suspended all jurisdiction to proceed further until the cause was remanded. But when the supreme court rendered its final judgment and perpetuated the injunction, whatever conditions were annexed to the appeal were abrogated, as the appeal was then fully executed. Slaughter-House Cases, 10 Wall. 273, 19 L. Ed. 915.

59. Presumptions on appeal.—Doe *v.* Eslava, 9 How. 421, 13 L. Ed. 200, citing Garnett *v.* Jenkins, 8 Pet. 75, 8 L. Ed. 871; Carroll *v.* Peake, 1 Pet. 18, 23, 7 L. Ed. 34; Bagnell *v.* Broderick, 13 Pet. 436, 447, 10 L. Ed. 235; United States *v.* Arredonda, 6 Pet. 691, 727, 8 L. Ed. 547; Strother *v.* Lucas, 12 Pet. 410, 435, 9 L. Ed. 1137.

59a. Tyler *v.* Magwire, 17 Wall. 253, 280, 21 L. Ed. 576, citing Neilson *v.* Lagow, 12 How. 98, 110, 13 L. Ed. 909; Magwire *v.* Tyler, 1 Black 195, 199, 17 L. Ed. 137.

We cannot assume error in the decision of the state court. We accept it, as we are bound to do, as a correct exposition of the law of the state—common, statutory and constitutional. Howard *v.* Kentucky, 200 U. S. 164, 173, 50 L. Ed. 421.

60. Keith *v.* Clark, 97 U. S. 454, 24 L. Ed. 1071.

61. New York State *v.* Barker, 179 U. S. 279, 45 L. Ed. 190, distinguishing Cummings *v.* National Bank, 101 U. S. 153, 25 L. Ed. 903.

The supreme court of the United States cannot, with reference to the action of the public and sworn officials of New York city, assume without evidence that they have violated the laws of their state, when the highest court of the state itself refuses, in the absence of evidence, to assume any such violation. New York State *v.* Barker, 179 U. S. 279, 45 L. Ed. 190.

62. Remand for further proceedings.—Rev. Stat., § 709.

Power to re-examine, in a certain class of cases, final judgments and decrees in the highest court of law or equity of a state, and to reverse or affirm same upon a writ of error, was conferred upon the supreme court by the twenty-fifth section of the judiciary act, and the same section provides that the writ of error shall have the same effect as if the judgment or decree had been rendered or passed in the circuit court, and that the proceeding upon the reversal shall also be the same, except that the supreme court, instead of remanding the cause for a final decision, may, at their discretion, if the cause shall have been once before remanded, proceed to a final decision of the same, and award execution. 1 Stat. at L. 86. Where the reversal is in favor of the original plaintiff, and the damages to be assessed or matters to be decreed are uncertain, the supreme court will remand the cause for a final decision, unless the same shall have been once before remanded, in which case the court may, at their discretion, proceed to a final decision of the cause. Execution in that event may be awarded here, but the court, in all other appellate cases, will send a special mandate to the subordinate court for all further necessary proceedings. Such were the directions of the judiciary act, but the congress, on the 5th of February, 1867, amended that section in several particulars, and provided that the writ of error, in such a case, shall have the same effect as if the judgment or decree had been rendered or passed in a federal court, and that the proceeding upon the reversal shall also be

(2) *Rendering and Ordering Final Judgment.*—By § 25 of the judiciary act, this court was given power on writs of error to the state courts to re-examine, reverse or affirm their final judgments "in the same manner and under the same regulations, and the writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a circuit court, and the proceeding upon the reversal shall also be the same, except that the supreme court, instead of remanding the cause for a final decision, * * * may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution."[63] The re-enactment of the provisions as to writs of error to the highest court of a state, contained in § 709 of the Revised Statutes, manifests the purpose to continue in force the power in such cases to render the judgment required by the ends of justice. The language of the statute is that on such writs the judgment of the state court "may be re-examined and reversed or affirmed in the supreme court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States." "The supreme court may reverse, modify or affirm the judgment or decree of such state court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."[64] Under the power thus conferred, it has never been questioned that this court possessed authority upon reversal for error of a final judgment to award a new trial.[65] But the rule is equally well settled, that where the cause has once before been remanded and the state court declines or refuses to carry into effect the mandate of the supreme court, the court will proceed to a final decision of the same and award execution to the prevailing party.[66]

the same, except that the supreme court may, at their discretion, proceed to a final decision of the same and award execution or remand the same to the inferior court. 14 Stat. at L. 387. Tyler *v.* Magwire, 17 Wall. 253, 272, 21 L. Ed. 576.

An action to recover the title and possession of land against officers of the United States setting up title in the United States, and defendant by the district attorney of the United States, was dismissed by the highest court of the state as against the United States; but judgment was rendered against the officers, upon the ground that they could not avail themselves of the statute of limitations. This court, on writ of error, reversed that judgment, and remanded the case for further proceedings. The highest court of the state thereupon held that the United States were a party to the action, and decided, upon evidence insufficient in law, that the United States had no valid title, because they took with notice of a prior conveyance; and gave judgment against the officers for title and possession, and against the United States for costs. This court, upon a second writ of error, reverses the judgment, and remands the case with instructions to dismiss the action against the United States, and to enter judgment for the individual defendants, with costs. Stanley *v.* Schwalby, 162 U. S. 255, 40 L. Ed. 960, cited in Chicago, etc., R. Co. *v.* Illinois, 200 U. S. 561, 601, 50 L. Ed. 596.

63. Rendering and ordering final judgment.—Ballew *v.* United States, 160 U. S. 187, 199, 40 L. Ed. 388.

64. Ballew *v.* United States, 160 U. S. 187, 200, 40 L. Ed. 388.

65. Ballew *v.* United States, 160 U. S. 187, 199, 40 L. Ed. 388.

66. Tyler *v.* Magwire, 17 Wall. 253, 290, 21 L. Ed. 576; citing Martin *v.* Hunter, 1 Wheat. 304, 354, 4 L. Ed. 97; Gibbons *v.* Ogden, 9 Wheat. 186, 239, 6 L. Ed. 68; Williams *v.* Bruffy, 96 U. S. 176, 193, 24 L. Ed. 716.

In Magwire *v.* Tyler, 17 Wall. 253, 21 L. Ed. 576, this court, at December term, 1869, adjudged that a decree in equity of the supreme court of Missouri be reversed, and the case remanded with directions to enter a decree affirming the decree of an inferior court of the state; but, upon motion of counsel, modified its judgment so as to remand the cause for further proceedings in conformity to the opinion of this court, and declared this to "be more in accordance with the usual practice of the court in such cases." Maguire *v.* Tyler, 8 Wall. 650, 658, 662, 19 L. Ed. 320. The supreme court of Missouri, after receiving the mandate of this court, entered a decree dismissing the suit because there was an adequate remedy at law; and thereupon this court, at December term, 1872, upon a second writ of error, entered judgment here, reversing that decree, with costs, and ordering a writ of possession to issue from this court; and, speaking by Mr. Justice Clifford, after referring to the difference between the provisions of the acts of 1789 and 1867, said: "Much discussion of those provisions is unnecessary, as it is clear that the court, under either, possesses

(3) *Direction of Mandate.*—Upon a writ of error to a state court under the 25th section of the judiciary act, where the judgment of the highest court of the

the power to remand the cause or to proceed to a final decision. Judging from the proceedings of the state court under the former mandate, and the reasons assigned by the court for their judicial action in the case, it seems to be quite clear that it would be useless to remand the cause a second time, as the court has virtually decided that they cannot, in their view of the law, carry into effect the directions of this court as given in the mandate. Such being the fact, the duty of this court is plain, and not without an established precedent. The precedent referred to was Martin *v.* Hunter, 1 Wheat. 304, 4 L. Ed. 97." Approved in Stanley *v.* Schwalby, 162 U. S. 255, 280, 40 L. Ed. 960.

Under the judiciary act, as well as under that of the 5th of February, 1867, amendatory of it, on a second writ of error to a state court, this court "may proceed to a final judgment and award execution." Tyler *v.* Maguire, 17 Wall. 253, 21 L. Ed. 576; Martin *v.* Hunter, 1 Wheat. 304, 354, 4 L. Ed. 97.

The supreme court of the state of Missouri, on appeal, dismissed a petition which sought to have the title to lands held by the defendant, under a patent from the United States, divested, and vested in the complainant. From this decree of dismissal, a writ of error brought up the case under the twenty-fifth section of the judiciary act, the complainant claiming the land under a former patent from the United States. This court determined that the legal title to the premises was in the complainant under the second patent, reversed the decree, and remanded the cause "for further proceedings in conformity to the opinion of the court." Maguire *v.* Tyler, 8 Wall. 668, 672, 19 L. Ed. 420. The opinion given, declared also that on the merits (which were gone into, and in which utterance was given as to every point which it was necessary to decide in order to dispose of the case on them), the case was with the plaintiff or complainant. On the presentation of the mandate to the supreme court of the state, they directed it to be filed, and entered up an order reversing their former decree, and the cause again coming up to be disposed of, the court decided that the legal title to the premises was vested by the second patent in the complainant, as declared by this court, and that on such a title under the laws and practice of the state there was a plain and adequate remedy at law, and that equity had no jurisdiction of the case made by the petition, and, therefore, decreed dismissing the petition. To this decree the complainant sued out a second writ of error, under the twenty-fifth section. Held, that the legal sufficiency of the ground maintained by the supreme court of the state for its decree, to wit, that by the laws and practice of the state the complainant's remedy on a legal title was at law, and not in equity, is a question within the jurisdiction of this court, and revisable under the twenty-fifth section on a second writ of error. Tyler *v.* Maguire, 17 Wall. 253, 21 L. Ed. 576.

Under the judiciary act of September 24, 1789, ch. 20, § 25, a final judgment or decree in the highest court of a state in which a decision could be had might "be re-examined and reversed or affirmed" in this court upon a writ of error, "in the same manner and under the same regulations, and the writ shall have the same effect, as if the judgment or decree complained of had been rendered or passed in a circuit court; and the proceeding upon the reversal shall also be the same, except that the supreme court, instead of remanding the cause for a final decision as before provided, may, at their discretion, if the cause shall have been once remanded before, proceed to a final decision of the same, and award execution." 1 Stat. 86. The qualification, "if the cause shall have been once remanded before," restricted only the power to proceed to a final decision and award execution in this court, and did not restrict the power of this court to reverse or affirm the judgment of the state court, as justice might require. Accordingly, in the leading case upon the subject of the appellate jurisdiction of this court from the courts of a state, this court, upon the first writ of error to the court of appeals of Virginia, not only reversed the judgment of that court, but affirmed the judgment of the inferior court of the state, which had been reversed by the court of appeals, and issued its mandate to the court of appeals accordingly; and, upon that court declining to obey the mandate, this court, upon a second writ of error, rendered judgment in the same terms as before. Fairfax *v.* Hunter, 7 Cranch 603, 628, 3 L. Ed. 453; Martin *v.* Hunter, 1 Wheat. 304, 323, 362, 4 L. Ed. 97; Stanley *v.* Schwalby, 162 U. S. 255, 279, 40 L. Ed. 960.

The act of February 15, 1867, ch. 28, § 2, revising the subject, omitted the qualification "if the cause shall have been once remanded before," and put the last clause of the section in this form, "and the proceeding upon the reversal shall also be the same, except that the supreme court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to an inferior court." 14 Stat. 386. The sections of the acts of 1789 and 1867 are printed side by side in 17 Wall. 681, 682. Stanley *v.* Schwalby, 162 U. S. 255, 280, 40 L. Ed. 960.

Section 2 of the act of 1867 was sub-

state is reversed, and that of the lower court affirmed, the mandate must go to the latter court.[67]

(4) *Compliance with Mandate.*—This court will not take action to cause the judgment of a state court to be reversed as upon a noncompliance with the mandate of this court, where it does not appear that the petitioner has ever applied to the highest court of the state to carry the mandate of this court into effect.[68] The state court, in complying with the mandate of this court, which does not prescribe in terms the judgment which should be rendered by the state court, cannot be compelled to violate its rule not to reverse any judgment for error of fact not apparent on the face of the record.[69]

(5) *Recalling Mandate.*—Where, upon a petition for a rehearing of a cause, previously decided by this court on a writ of error to the state court, we have failed to exercise our appropriate jurisdiction in refusing to decide a certain question, it is our duty, upon the question now being brought to our attention, to recall the mandate in examining the question. "If we find the federal questions properly decided as to one class of persons affected by the judgment, we must sustain that part of it, although we come to that conclusion for a different reason from that expressed by the state court, and one which upon that point is in conflict with its opinion but not with its judgment."[70]

8. Over Military Courts and Tribunals[71].—**In General.**—Military tribunals are not courts with jurisdiction in law or equity within the meaning of those terms as used in the 3d article of the constitution.[72]

stantially re-enacted in Rev. Stat., § 709. By the act of February 18, 1875, ch. 80, entitled "An act to correct errors and to supply omissions in the Revised Statutes of the United States," § 709 of the Revised Statutes was amended by striking out this provision: "and the proceeding upon the reversal shall be the same, except that the supreme court may, at their discretion, proceed to a final decision of the case, and award execution, or remand the same to the court from which it was so removed." 18 Stat. 318; Rev Stat. (2d Ed.), p. 133. The repeal of this provision may not have revived that provision of the act of 1789 which had been superseded by the act of 1867. Rev. Stat., § 12. But it did not affect the general power, conferred by § 709 of the Revised Statutes, as by all former acts, by which the judgment of the state court may be "re-examined and reversed or affirmed" by this court, and in the exercise of which this court, in Fairfax *v.* Hunter, 7 Cranch 603, 3 L. Ed. 453, and Martin *v.* Hunter, 1 Wheat. 304, 362, 4 L. Ed. 97, above cited, ordered the proper judgment to be entered in the state court. Stanley *v.* Schwalby, 162 U. S. 255, 281, 40 L. Ed. 960.

67. Direction of mandate.—Where the highest court of a state refuses to obey the mandate of this court for any reason, this court will direct that the mandate be recalled, and that final judgment be entered here, and for this purpose may direct this mandate either to an appellate or an inferior state court. Williams *v.* Bruffy, 102 U. S. 248, 26 L. Ed. 135; Martin *v.* Hunter, 1 Wheat. 304, 4 L. Ed. 97; Clerke *v.* Harwood, 3 Dall. 342.

68. Compliance with mandate.—In re Royall, 125 U. S. 696, 32 L. Ed. 855.

The supreme court of the United States reversed a decree of the supreme court of Illinois affirming the action of the superior court in granting an injunction against the prosecution of a suit in a circuit court of the United States; and remanded the cause for further proceedings. In pursuance of the mandate, the supreme court of Illinois reversed and set aside the injunction decree of the superior court, and directed a dismissal of the bill. It was contended that the supreme court of Illinois went further and beyond the mandate, in directing the superior court to dismiss the bill and a writ of error was sued out asking the supreme court of the United States to supervise and reverse the action of the supreme court of Illinois in that respect. It was held, that the action of the supreme court of Illinois does not involve a federal question which the supreme court of the United States has jurisdiction to review, for the dismissal of the bill if it affected any federal rights at all was not a decision against the parties invoking them. Lake Street Elevated R. Co. *v.* Farmers' Loan & Trust Co., 182 U. S. 417, 45 L. Ed. 1161.

69. Davis *v.* Packard, 8 Pet. 312, 8 L. Ed. 957.

70. Recalling mandate.—Bank of Commerce *v.* Tennessee, 163 U. S. 416, 421, 41 L. Ed. 211, distinguishing Murdock *v.* Memphis, 20 Wall. 590, 22 L. Ed. 429.

71. Over military courts and tribunals.—See the titles ARMY AND NAVY; MILITARY LAW.

72. In re Vidal, 179 U. S. 126, 45 L. Ed. 118.

Naval Court-Martial.—Neither the supreme court of the District of Columbia nor this court has any appellate jurisdiction over the naval court-martial, nor over offenses which such a court has power to try. Neither of these courts is authorized to interfere with it in the performance of its duty, by way of a writ of prohibition or any order of that nature.[73]

By Certiorari.—The supreme court of the United States is not empowered by § 716 of the Revised Statutes to review the proceedings of military tribunals by certiorari.[74] Nor has the supreme court of the United States power to review by certiorari the proceedings of a military commission ordered by a general officer of the United States army, commanding a military department. "The appellate powers of the supreme court, as granted by the constitution, are limited and regulated by the acts of congress, and must be exercised subject to the exceptions and regulations made by congress."[75]

9. Over Supreme Court of Philippine Islands—a. *In General.*—Section 10 of the Philippine Act of July 1, 1902, 32 Stat. c. 1369, pp. 691, 695, provides: "That the supreme court of the United States shall have jurisdiction to review, revise, reverse, modify, or affirm the final judgments and decrees of the supreme court of the Philippine Islands in all actions, cases, causes, and proceedings now pending therein or hereafter determined thereby in which the constitution or any statute, treaty, title, right, or privilege of the United States is involved, or in causes in which the value in controversy exceeds twenty-five thousand dollars, or in which the title or possession of real estate exceeding in value the sum of twenty-five thousand dollars, to be ascertained by the oath of either party or of other competent witnesses, is involved or brought in question; and such final judgments or decrees may and can be reviewed, revised, reversed, modified, or affirmed by said supreme court of the United States on appeal or writ of error by the party aggrieved, in the same manner, under the same regulations, and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts of the United States."[76]

b. *Amount in Controversy.*—Under § 10 of the Philippine Islands act of 1902

73. Wales *v.* Whitley, 114 U. S. 564, 570, 29 L. Ed. 277; United States *v.* Fletcher, 148 U. S. 84, 92, 37 L. Ed. 378, citing Dynes *v.* Hoover, 20 How. 65, 15 L. Ed. 838; Smith *v.* Whitney, 116 U. S. 167, 29 L. Ed. 601; Keyes *v.* United States, 109 U. S. 336, 28 L. Ed. 954.

74. In re Vidal, 179 U. S. 126, 45 L. Ed. 118.

The question of the issue of the writ of certiorari in the exercise of inherent general power cannot arise in respect to military tribunals. In re Vidal, 179 U. S. 126, 45 L. Ed. 118.

By the act of congress of April 12, 1900, 31 Stat. 77, ch. 191, taking effect by its terms on the 1st of May, the military tribunal established for the department of Porto Rico was discontinued, and a United States district court established as its successor, authorized to take possession of its records and to take jurisdiction of all cases and proceedings pending therein. It was held, that the supreme court of the United States has no jurisdiction to review proceedings, had in the said military tribunal. In re Vidal, 179 U. S. 126, 45 L. Ed. 118.

75. Durousseau *v.* United States, 6 Cranch 307, 314, 3 L. Ed. 232; Barry *v.* Mercein, 5 How. 103, 119, 12 L. Ed. 70; United States *v.* Curry, 6 How. 106, 113, 12 L. Ed. 363; Forsythe *v.* United States, 9 How. 571, 13 L. Ed. 262; Ex parte Vallandigham, 1 Wall. 243, 17 L. Ed. 589.

It is not "within the letter or spirit of the grants of appellate jurisdiction to the supreme court. It is not in law or equity within the meaning of those terms as used in the 3d article of the constitution. Nor is a military commission a court within the meaning of the 14th section of the judiciary act of 1789. That act is denominated to be one to establish the judicial courts of the United States, and the 14th section declares that all the before mentioned courts of the United States shall have power to issue writs of scire facias, habeas corpus, and all other writs not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, agreeably to the principles and usages of law. The words in the section, 'the before mentioned' courts, can only have preference to such courts as were established in the preceding part of the act, and excludes the idea that a court of military commission can be one of them." Ex parte Vallandigham, 1 Wall. 243, 17 L. Ed. 589.

76. In general.—Fisher *v.* Baker, 203 U. S. 174, 181, 51 L. Ed. 142.

allowing appeals in all cases where the amount in controversy exceeds $25,000, this court has no power to create an exception not made in the statute, since that would be judicial legislation.[77] For the purposes of the jurisdiction of this court over the supreme court of the Philippine Islands in a suit for divorce, "it makes no difference whether the amount claimed be termed alimony or the wife's share of the community property. It is sufficient that she claimed to be entitled to an amount exceeding twenty-five thousand dollars."[78]

c. *Remedies for Transferring Cause.*—Judgments of the supreme court of the Philippine Islands, rendered in an action at law, can be reviewed here only by writ of error. This, in the absence of modification, by statute, is the rule in respect to all courts whose records are brought here for review.[79]

Habeas Corpus Proceedings.—Under that part of § 10 of the Philippine Island act of July 1, 1902, 32 Stat., c. 1369, pp. 691, 695, providing that final judgments or decrees of the supreme court of the Philippine Islands may and can be reviewed, revised, reversed, modified or affirmed by the supreme court of the United States on appeal or writ of error by the party aggrieved, in the same manner and under the same regulations and by the same procedure, as far as applicable, as the final judgments and decrees of the circuit courts of the United States, final orders of the supreme court of the Philippine Islands in habeas corpus can only be reviewed by appeal and not by writ of error, because a proceeding in habeas corpus is a civil and not a criminal proceeding, and final orders of the circuit courts or district courts of the United States in habeas corpus can only be reviewed by appeal and not by writ of error.[80]

d. *Re-Examination of Facts.*—The territorial practice act of April 7, 1874, 18 Stat. 27, by virtue of which the jurisdiction of this court on appeal from the supreme court of a territory does not extend to a re-examination of the facts, but is limited to determining whether the findings of fact support the judgment and to reviewing errors in the admission or rejection of testimony on exceptions duly taken, has no application to appeals from the Philippine Islands.[81] The Philippine Code of Procedure (Public Laws of Philippine Commission, Acts, 1900, 1901) prescribes in chapter 22 the practice of the supreme court in reviewing the judgments of courts of first instance. It confines the review to questions of law, with certain exceptions, one of which is as follows: "If the excepting party filed a motion in the court of first instance for a new trial, upon the ground that the findings of fact were plainly and manifestly against the weight of evidence, and the judge overrules said motion, and due exception was taken to his overruling the same, the supreme court may review the evidence and make such findings upon the facts and render such final judgment as justice and equity require. But, if the supreme court shall be of the opinion that the exception is frivolous and not made in good faith, it may impose double or treble additional costs upon the excepting party, and may order them to be paid by counsel prosecuting the bill of exceptions, if in its opinion justice so requires."[82] An appeal to this court from a judgment of the supreme court of the Philippine Islands in a proceeding for divorce calls for a re-examination of the grounds upon which the petition for a separation of the conjugal property and alimony pendente lite was denied.[83] Decisions of the supreme court of the Philippine Islands, where the amount exceeds $25,000, are reviewable on appeal or writ of error, under § 10 of the act of July 1, 1902, 32 Stat. 691, in the same manner as judgments of the circuit courts of the United States, and such appeals extend to an examination of the facts as well

77. Amount in controversy.—De La Rama *v.* De La Rama, 201 U. S. 303, 50 L. Ed. 765.

78. De La Rama *v.* De La Rama, 201 U. S. 303, 311, 50 L. Ed. 765.

79. Remedies for transferring cause.—Behn *v.* Campbell, 205 U. S. 403, 407, 51 L. Ed. 857.

80. Fisher *v.* Baker, 103 U. S. 174, 51 L. Ed. 142.

81. Re-examination of facts.—De La Rama *v.* De La Rama, 201 U. S. 303, 50 L. Ed. 765.

92. Behn *v.* Campbell, 205 U. S. 403, 408, 51 L. Ed. 857.

83. De La Rama *v.* De La Rama, 201 U. S. 303, 50 L. Ed. 765.

as the law, and in a case where alimony or separation of conjugal property has been awarded by the decree of divorce to an amount exceeding $25,000, and jurisdiction of the appeal is taken by this court on account of the amount involved, it may pass upon the sufficiency of the testimony authorizing or refusing the decree, if necessary to determine whether the decree was right in that respect.[84] But the rule that upon a writ of error only questions of law apparent on the record can be considered, and that there can be no inquiry whether there was error in dealing with questions of fact, applies equally to appeals from the supreme court of the Philippine Islands.[85] Whether the supreme court of the Philippine Islands erred in setting aside the conclusions of the lower court, plainly and manifestly against the weight of evidence, is not a question of law which may be brought here by a writ of error.[86]

e. *Appeals by the Government in Criminal Cases.*—The government no longer has a right of appeal in criminal cases in the Philippine Islands.[87]

f. *Assignment of Errors.*—It is provided in the act giving this court jurisdiction to review the judgments of the supreme court of the Philippine Islands that they may be reviewed here "in the same manner, under the same regulations, and by the same procedure as far as applicable, as the final judgments and decrees of the circuit court of the United States." In such cases alleged errors, not stated in the assignment of errors filed with the petition for the writ, have sometimes been considered. The limits of this practice is accurately stated in the thirty-fifth rule of this court. There it is said that if errors are not assigned with the petition for the writ they will be disregarded, except that the court, in its option, may notice a plain error not thus assigned.[88]

g. *Reversal.*—The judgment of the court of first instance of the Philippine Islands, finding that the wife in a divorce proceeding had not committed the offense charged in the bill, should not be reversed by the supreme court of the Philippine Islands unless the findings of that court were plainly and manifestly against the weight of evidence.[89]

10. OVER COURT OF PRIVATE LAND CLAIMS—a. *Right of Appeal.*—Congress has power to confer upon this court jurisdiction to entertain appeals from decisions of the court of private land claims.[90] And an appeal lies to this court from a decree of the district court for California, in a proceeding under the act of 14th of June, 1860 (12 Stat. at Large 33), commonly called the survey law.[91]

84. De La Rama *v.* De La Rama, 201 U. S. 303, 50 L. Ed. 765, citing Beyer *v.* LeFevre, 186 U. S. 114, 119, 46 L. Ed. 1080.

85. De La Rama case distinguished.—It was held in De La Rama *v.* De La Rama, 201 U. S. 303, 50 L. Ed. 765, that upon an appeal this court will consider whether a reversal by the supreme court of the findings of the court of first instance was justified on the ground that the findings below were plainly and manifestly against the weight of evidence, and upon being satisfied that the action of the supreme court was not warranted on that ground would reverse it. But this case was one of appeal, and the vital distinction between an appeal and a writ of error has already been shown. The principle acted upon in that case is not applicable to writs of error. Behn *v.* Campbell, 205 U. S. 403, 409, 51 L. Ed. 587.

86. Behn *v.* Campbell, 205 U. S. 403, 51 L. Ed. 857, distinguishing De La Rama *v.* De La Rama, 201 U. S. 303, 50 L. Ed. 765.

87. Appeals by the government in criminal cases.—Kepner *v.* United States, 195 U. S. 100, 49 L. Ed. 114, followed in Dorr *v.* United States, 195 U. S. 138, 49 L. Ed. 128; Mendezona *v.* United States, 195 U. S. 158, 49 L. Ed. 136, citing United States *v.* Sanges, 144 U. S. 310, 36 L. Ed. 445.

Military order, No. 58, as amended by act of the Philippine commissioner, No. 194, in so far as it undertakes to permit an appeal by the government after acquittal, is repealed by the act of congress of July, 1902, provided immunity from second jeopardy for the same criminal offense. Kepner *v.* United States, 195 U. S. 100, 49 L. Ed. 114; Dorr *v.* United States, 195 U. S. 138, 49 L. Ed. 128; Mendezona *v.* United States, 195 U. S. 158, 49 L. Ed. 136.

88. Assignment of errors.—Behn *v.* Campbell, 205 U. S. 403, 409, 51 L. Ed. 587.

89. Reversal.—De La Rama *v.* De La Rama, 201 U. S. 303, 50 L. Ed. 765.

90. Right of appeal.—United States *v.* Coe, 155 U. S. 76, 84, 39 L. Ed. 76.

91. The Fossat Case, 2 Wall. 649, 17 L. Ed. 739.

A proceeding in the district or circuit

But appeals on frivolous grounds, from decrees in cases of California surveys, in the name of the United States, acting for intervenors, under the act of June 14, 1860, were discouraged as being liable to abuse; since on the one hand, the party wronged by the appeal gets no costs from the government; while, on the other, the government is made to pay the expenses of a suit promoted under its name by persons who may be litigious intervenors merely.[92]

There can no longer be an appeal to the supreme court of the United States from an order of the district court of the United States sustaining a demurrer to and dismissing a petition for the enforcement of a decree confirming a claim, under the act of congress to ascertain and settle private land claims in the state of California, passed March 3, 1851, because even if the court of appeals act does not apply to the case, the appellate jurisdiction of this court was clearly taken away by § 3 of the act of 1864, and transferred to the circuit court of the United States for California, except as to appeals which had already been taken. And if there had been no reservation of pending cases, even such cases would have fallen within the law.[93]

b. *The Remedy for Reviewing.*—Causes in the court of private land claims are, in effect, equity causes and brought to this court by appeal, and, as observed by Chief Justice Ellsworth, in Wiscart *v.* D'Auchy, 3 Dall. 321, 1 L. Ed. 619, "an appeal is a process of civil-law origin, and removes a cause entirely; subjecting the fact, as well as the law, to a review and retrial; but a writ of error is a process of common-law origin and it removes nothing for re-examination but the law."[94]

c. *Questions Reviewable*—(1) *In General.*—The jurisdiction of the board of commissioners for the settlement of private land claims in California, and of the courts of the United States on appeal, extends not only to the adjudication of questions relating to the genuineness and authenticity of the grant, and others of a similiar character, but also all questions relating to its location and boundaries; and does not terminate until the issue of a patent conformably to the decree.[95] Likewise, an appeal will lie from an order of the district court setting aside and annulling surveys of land claims arising by virtue of a right or title derived from the Spanish or American government.[96] But the decrees of the district court on California land surveys under the acts of congress are final, not only as to the

court of the United States under the act of March 3d, 1851, 9 Stat. at Large, 631, for the ascertainment and settlement of private land claims in the state of California, is in the nature of a proceeding in equity. A decree of the circuit court in one of these cases transferred to it is therefore subject to appeal to the supreme court of the United States under the amendatory judicial act of March 3d, 1803, 2 Stat. at Large 244. "By the 22d section of the judiciary act, in connection with the act of March 3, 1803, all judgments and decrees in civil actions, and in suits in equity in a circuit court brought there by original process, or removed there from courts of the several states, or removed there by appeal from a district court, may be re-examined and reversed or affirmed in the supreme court. It is said that the present case was not brought into the circuit by an appeal from the district court, and hence is not within the provision. The case, as we have seen, comes into the circuit under the 4th section of the act of 1864, not by appeal, but by an order of the district court transferring it to the circuit." United States *v.* Circuit Judges, 3 Wall. 673, 17 L. Ed. 111.

The action of congress under the act of Dec. 22, 1858, 11 Stat. 374, confirming title to private land claims of the Pueblo Indians, is not subject to judicial review in this or any other forum; the right is not given by act of congress. United States *v.* Conway, 175 U. S. 60, 44 L. Ed. 72; Tameling *v.* United States Freehold, etc., Co., 93 U. S. 644, 662, 23 L. Ed. 998. See, also, Maxwell Land Grant Case, 121 U. S. 325, 30 L. Ed. 949.

92. United States *v.* Billing, 2 Wall. 444, 17 L. Ed. 848.

93. Gwin *v.* United States, 184 U. S. 669, 46 L. Ed. 741, reaffirmed in Gore *v.* United States, 199 U. S. 604, 50 L. Ed. 329.

94. The remedy for reviewing.—United States *v.* Coe, 155 U. S. 76, 83, 39 L. Ed. 76.

95. Questions reviewable in general.—United States *v.* Fossatt, 21 How. 445, 16 L. Ed. 186.

96. Higueras *v.* United States, 5 Wall. 827, 18 L. Ed. 469.

questions of title, but as to the boundaries which it specifies; and the remedy, if erroneous, is by appeal.[97]

(2) *Necessity for Finality of Decision.*—This court might have reviewed the decrees of the district court under this act, which were not final decrees under the judiciary act of 1789.[98]

(3) *Discretionary Matters.*—Where, under the statute of June 14, 1860, relating to surveys of Mexican grants in California, notice has been given to all parties having or claiming to have any interest in the survey and location of the claim, to appear by a day designated, and intervene for the protection of their interest, and upon the day designated certain parties appeared, and the default of all other parties was entered; the opening of such default with respect to any party subsequently applying for leave to appear and intervene, is a matter resting in the discretion of the district court, and its action on the subject is not open to revision on appeal.[99]

(4) *Questions of Fact.*—The supreme court of the United States will not review and reverse the decision of the court of private land claims as to the sufficiency of the evidence of possession under a Spanish grant, where the evidence is such that different inferences might be drawn therefrom.[1]

d. *Transfer of Cause*—(1) *In General.*—The 12th section of the act of August 31st, 1852, provides that, in every case in which the board of land commissioners in California shall render a final decision, it shall be their duty to have two certified transcripts of their proceedings and decisions, and of the papers and evidence on which the same were founded, made out, one of which transcripts shall be filed with the clerk, shall ipso facto operate as an appeal for the party against whom the decision shall be rendered; and if such decision shall be against the private claimant, it shall be his duty to file a notice with the clerk of the court, within six months thereafter, of his intention to prosecute the appeal; and if the decision shall be against the United States, it shall be the duty of the attorney general of the United States, within six months after receiving the said transcript, to cause to be filed with the clerk aforesaid a notice that the appeal will be prosecuted by the United States; and on the failure of either party to file such notice with the clerk, the appeal shall be regarded as dismissed.[2]

(2) *What Law Governs.*—Appeals from the district courts of California, un-

97. United States *v.* Billings, 2 Wall. 444, 17 L. Ed. 848, following United States *v.* Halleck, 1 Wall. 439, 17 L. Ed. 664; The Fossat Case, 2 Wall. 649, 17 L. Ed. 739.

98. Necessity for finality of decision.—After the authenticity of a grant of land in California is ascertained in this court, and a reference has been made to the district court, to determine the external bounds of the grant, in order that the final confirmation may be made, another appeal cannot be claimed until the whole of the directions of this court are complied with, and that decree made. "In the exercise of the jurisdiction conferred by this act (Act of 1824) and acts of a similar character, this court has habitually revised decrees of the district court, which were not final decrees under the judiciary act of 1789." United States *v.* Fossatt, 21 How. 446, 16 L. Ed. 186.

99. Discretionary matters.—United States *v.* Estudillo, 1 Wall. 710, 17 L. Ed. 702.

1. Questions of fact.—United States *v.* Pendell, 185 U. S. 189, 46 L. Ed. 866.

A decree was entered by the court of private land claims confirming title of the original grantees to a tract of land from whom the petitioners derived their title. For the purpose of proving a grant a correct copy of the original record showing the proceedings taken before a civil judge of the canton under the provisions of the law of the republic of Mexico, May 23, 1837, to perpetuate evidence of the title was introduced in evidence. On an appeal to the supreme court of the United States, it was held that in the absence of any sufficient attack upon the record or of any evidence on the part of the government going to disprove or discredit the averments contained therein, it formed enough of a basis for the finding of the court below that there was a grant made as stated in its findings, and that such grant and the record thereof in the archives had been destroyed under the circumstances mentioned. United States *v.* Pendell, 185 U. S. 189, 46 L. Ed. 866.

2. Transfer of cause in general.—De Yturbide *v.* United States, 22 How. 290, 16 L. Ed. 342, 343.

der the act of March 3d, 1851—which, while giving an appeal from them to this court, makes no provision concerning returns here, and none concerning citations, and which does not impose any limitation of time within which the appeal may be allowed—are subject to the general regulations of the judiciary acts of 1789 and 1803, as construed by this court. Hence, the allowance of the appeal, together with a copy of the record and the citation, when a citation is required, must be returned to the next term of this court after the appeal is allowed.[3]

(3) *Allowance of Appeal.*—An associate justice of the court of private land claims may allow an appeal to this court.[4]

(4) *Parties to the Appeal.*—The United States government may appeal from a decision of the court of private land claims in favor of a petitioner, and even though the government have no interest in the result of the litigation. Upon such appeal, the government is at liberty to show that the petitioner is not entitled to a confirmation of his claim.[5] The 9th section of the act of congress of 1824, making it the duty of the district attorney in every case of claim to land in Missouri, under that act, where the decision is against the United States, and the claim exceeds 1,000 acres, to report the case to the attorney general, who, if he shall think the decision erroneous, shall direct an appeal to be taken, does not prevent the United States from appealing when a claim is for less than 1,000 acres.[6]

Controversy between Individuals.—When the government does not claim land in California as public land, this court will not entertain jurisdiction of an appeal by the United States from a district court there under the act of March 3d, 1851, for the settlement of private land claims; it has no jurisdiction under that act—nor has the district court—when the controversy is between individuals wholly.[7] In an appeal by the United States from a decree of one of those courts, where the proceeding below was to have a land title confirmed under this act of March 3, 1851, an assertion by the counsel of the United States that the controversy is between individuals wholly, and that the United States have no interest in the case, is sufficient to satisfy the court of that fact so far as respects the United States itself. But it is not sufficient, the record itself not showing the fact, to satisfy the court as respects the opposing party. Hence, although if this court have no jurisdiction because the controversy is between private individuals wholly, the court below had none either, yet where the fact of such individual interest in the suit rests wholly on the admission of the United States here, and the opposing party is not represented here by counsel, this court will not reverse the decree below, but will only dismiss the case.[8]

(5) *Notice of Intention to Appeal.*—The 12th section of the act of 31st of August, 1852, providing for an appeal from the board of land commissioners in California to the district court, directs that notice of an intention to appeal shall be filed within six months; and on failure to file such notice, the appeal shall be regarded as dismissed. This language is mandatory on the court, and admits of no discretion. In case of such failure, the appeal must be dismissed.[9]

3. What law governs.—Castro *v.* United States, 3 Wall. 46, 18 L. Ed. 163.

4. Allowance of appeal.—United States *v.* Pena, 175 U. S. 500, 44 L. Ed. 251.

"A final contention is that the allowance of appeal was not made by the presiding judge but by one of the associate justices of that court. But the provisions of § 9 is that appeals shall be taken in the same manner and upon the same conditions as appeals from the judgments of a circuit court of the United States, and by § 999 of the Revised Statutes any judge of such court has the power to act. The rule is different in cases coming from a state court. Havnor *v.* New York, 170 U. S. 408, 42 L. Ed. 1087." United States *v.* Pena, 175 U. S. 500, 502, 44 L. Ed. 251.

5. Parties to the appeal.—United States *v.* Conway, 175 U. S. 60, 44 L. Ed. 72.

6. United States *v.* Porche, 12 How. 426, 13 L. Ed. 1051.

7. United States *v.* Morillo, 1 Wall. 706, 17 L. Ed. 626.

8. United States *v.* Morillo, 1 Wall. 706, 17 L. Ed. 626.

9. Notice of intention to appeal.—Yturbide *v.* United States, 22 How. 290, 16 L. Ed. 342.

In United States *v.* Ritchie, 17 How. 524, 15 L. Ed. 236, it was objected that the 12th section of the act of 1852 providing

(6) *Limitations of Appeal.*—Section 9 of the act creating the court of private land claims, act of March 3, 1891, c. 539, 26 Stat. 854, 858, while giving to either party the right of appeal within six months from the date of the decision, also provides that on the rendition of a judgment confirming any claim it shall be the duty of the attorney of the United States to notify the attorney general in writing of the judgment, giving a clear statement of the case and the points decided —a statement to be verified by the certificate of the presiding judge of the court; and also that if the attorney general shall not receive such statement within sixty days next after the rendition of a judgment, the right of appeal on the part of the United States shall continue to exist until six months next after the receipt of the statement.[10]

e. *Exceptions and Objections.*—In appeals from orders of the district court, with respect to surveys of land claims arising by virtue of a right or title derived from the Spanish or Mexican government, the questions for decision here are those only which are presented in the exceptions.[11] Accordingly, when certain testimonials of title, under a Spanish grant, have been admitted without exception, before the commissioners of the United States for the adjustment of claims to lands in Florida, and before the superior court in Middle Florida, without objection as to the mode and form of their proof; the supreme court, on an appeal, will not interfere with the question as to the sufficiency of the proof, or the au-

for an appeal from a final decision of a board of commissioners to sell private land claims in California, makes no provision for notice to the party in whose favor the decision had been rendered by the commissioners, of the appeal to the district court. The court said: "He has notice of the appeal, as the filing of the transcript by the board, according to the act, has that effect; and then ordinary diligence will enable the party to be heard on the appeal. Besides, the court has the power, doubtless, to regulate the time of the hearing, and provide for reasonable notice by its rules, so as to prevent surprise."

10. Limitations of appeal.—United States *v.* Pena, 175 U. S. 500, 501, 44 L. Ed. 251.

Sufficient reason for the delay of the United States attorney in failing to give notice to the attorney general of a judgment confirming a private land claim, thereby extending the time for an appeal by the United States is shown by the allowance of an appeal by a justice whose attention was called to it, thereby approving the action of the attorney. United States *v.* Pena, 175 U. S. 500, 44 L. Ed. 251.

Under § 9 of the act creating the court of private land claims, act of March 3, 1891, c. 539, 26 Stat. 854, 858, it is provided that either party may appeal within six months from the date of the decision, and that on the rendition of a judgment conferring any claim it should be the duty of the attorney of the United States to notify the attorney general in writing of the judgment, giving a clear statement of the case and the points decided; and also if the attorney general shall not receive such statement within sixty days next after the rendition of a judgment, the right of appeal on the part of the United States should continue to exist until six months next after the receipt of the statement. Held, where the decree was entered on December 1st, 1896, but no such statement was sent to the attorney general until March 9th, 1898, or received by him until March 25th, 1898, that the leave for an appeal on the part of the United States had not expired. United States *v.* Pena, 175 U. S. 500, 44 L. Ed. 251.

Act for adjustment of land claims in Louisiana.—The 9th section of the act of 26th of May, 1824, relative to the action of the attorney general in cases of appeal, is only directory, and its nonobservance does not vitiate an appeal, provided it be taken by the district attorney and sanctioned in this court by the attorney general. "The ninth section of said act has this provision: 'That it shall be the duty of the district attorney of the United States for the district in which the suits authorized by this act shall be instituted, in every case where the decision is against the United States, and the claim exceeds one thousand acres, to make out and transmit to the attorney general of the United States a statement containing the facts of the case, and the points of law on which the same was decided; and if the attorney general shall be of opinion that the decision of the district court was erroneous, it shall be his duty to direct an appeal to be made to the supreme court of the United States, and to appear and prosecute the said appeal in that court; and it shall be the further duty of the district attorney to observe the instructions given to him by the attorney general in that respect." United States *v.* Curry, 6 How. 106, 12 L. Ed. 363.

11. Exceptions and objections.—Higueras *v.* United States, 5 Wall. 827, 18 L. Ed. 469.

thenticity of the acts relating to the title, which had been admitted by the authorities in Florida, which was the tribunal to judge of the evidence.[12]

f. *Effect of Appeal.*—It is provided in the ninth section of the act of March 3, 1891, c. 539, 26 Stat. 854, establishing the court of Private Land Claims, that, upon any appeal from such court, "the supreme court shall retry the cause, as well the issues of fact as of law, and may cause testimony to be taken in addition to that given in the court below, and may amend the record of the proceedings below as truth and justice may require; and on such retrial and hearing every question shall be open."[13] An appeal from a decree of the district court to the supreme court, in California land cases, suspends the operation and effect of the decree only when, by a judgment of the supreme court, the claim of the confirmee in the premises in controversy may be defeated.[14]

g. *Who May Allege Error.*—The general rule that parties who have not appealed are not entitled to be heard in this court, except in support of the decree in the court below, applies equally to appeals taken in these proceedings.[15]

h. *Dismissal of Appeal.*—**What Constitutes.**—The act of August 31st, 1852, relating to appeals from the board of Land Commissioners to ascertain and settle private land claims in California, created under the act of March 3d, 1851, provides that the filing of a transcript of the decision and proceedings of the board with the clerk of the district court shall operate ipso facto as an appeal on behalf of the party against whom the decision was rendered, and that the attorney general shall, within six months after receiving a certified transcript of such decree and proceedings, when the decision is against the United States, cause notice to be filed with the clerk that the appeal will be prosecuted, and on failure to give such notice that "the appeal shall be regarded as dismissed." Under this act, when the attorney general gave notice that he would not prosecute the appeal, such appeal was for all legal purposes in fact dismissed, and the decree of the board took effect precisely as if no appeal had ever been taken; and an order or decree of the district court giving leave to the claimant to proceed upon the decree of the board as upon a final decree was a proper disposition of the case.[16]

Vacating Dismissal.—An appeal of a case originating below under the statute of June 14, 1860, relating to surveys of Mexican grants in California, and in which the appellants appear on the record as the United States, simply (no intervenors being named), remains within the control of the attorney general; and a dismissal of the case under the 20th rule of this court is not subject to be vacated on the application of parties whose names do not actually appear in the record as having an interest in the case, even although it is obvious that below there were some private owners contesting the case under cover of the government name, and that some such were represented by the same counsel who now profess to represent them here.[17]

12. United States *v.* Delespine, 15 Pet. 319, 10 L. Ed. 753, citing United States *v.* Clarke, 8 Pet. 436, 454, 8 L. Ed. 1001.

13. Effect of appeal.—United States *v.* Chaves, 159 U. S. 452, 455, 40 L. Ed. 215.

14. Grisar *v.* McDowell, 6 Wall. 363, 18 L. Ed. 863.

15. Who may allege error.—If no appeal is taken to this court by the United States from a decree of the district court of California, in a proceeding under the act of June 14, 1860 (12 Statutes at Large 33), commonly called the survey law, they may appear in this court as appellees, but cannot demand a reversal or change of the decree. The Fossat Case, 2 Wall. 649, 17 L. Ed. 739.

Where parties are permitted by the district court, under the act of June 14, 1860, relating to surveys of Mexican grants in California to appear and contest the survey and location, the order of the court permitting such appearance and contest should be set forth in the record. Only those persons, who, by such order, are made parties contestant, will be heard on appeal. United States *v.* Estudillo, 1 Wall. 710, 17 L. Ed. 702; Miller, Swayne and Davis, JJ., dissenting; Taney, C. J., and Grier, J., absent.

16. Dismissal of appeal.—Beard *v.* Federy, 3 Wall. 478, 18 L. Ed. 88.

17. United States *v.* Estudillo, 1 Wall. 710, 17 L. Ed. 702, Swayne and Davis, JJ., dissenting; Taney, C. J., and Grier, J., absent.

11. Over Supreme Court of Porto Rico and the United States District Court—a. *In General.*—The 35th section of the Porto Rico act is in these words: "That writs of error and appeals from the final decisions of the supreme court of Porto Rico and the district court of the United States shall be allowed and may be taken to the supreme court of the United States in the same manner and under the same regulations and in the same cases as from the supreme courts of the territories of the United States; and such writs of error and appeal shall be allowed in all cases where the constitution of the United States, or a treaty thereof, or an act of congress, is brought in question and the right claimed thereunder is denied; and the supreme and district courts of Porto Rico and the respective judges thereof may grant writs of habeas corpus in all cases in which the same are grantable by the judges of the district and circuit courts of the United States. All such proceedings in the supreme court of the United States shall be conducted in the English language."[18]

Effect of Circuit Court of Appeals Act.—In a lengthy opinion by Mr. Justice Harlan, in which all the statutes bearing on the question were reviewed and discussed, it was held, that writs of error and appeals may be prosecuted to this court from the district court of the United States for Porto Rico in the same manner, under the same regulations and in the same cases as from the supreme court of the territories of the United States. And, this, so far as the final judgments of the district courts of the United States for Porto Rico are concerned, is not affected by anything in the circuit court of appeals act of 1891. "If congress had intended that the judgments of the United States court for Porto Rico should, in any class of cases, be re-examined in some circuit court of appeals of the United States, it would have so declared by appropriate words. It did not so declare."[19]

Appellate Jurisdiction of Court of Appeals.—The Porto Rico act of 1900 does not refer to the circuit court of appeals act of 1891, nor contain any provision looking to the assignment of Porto Rico to one of the established circuits. This tends to show that it was the intention of the act of 1900 to establish a direct connection between this court and the United States court for Porto Rico in respect to every case which, if determined by the supreme court of a territory of the United States, could have been brought here under the statutes in force when the act of 1891 was passed. In our opinion, congress did not intend that any connection should exist between the United States court for Porto Rico and any circuit court of appeals established under the act of 1891.[20] Unless the case is one in which the judgment can be reviewed, then such judgment is final and not subject to review; for no case determined in the United States court for Porto Rico can be carried to a circuit court of appeals. Congress did not intend that any connection should exist between the United States court for Porto Rico and any circuit court of appeals established under the act of 1891.[21]

18. Over supreme court of Porto Rico and the United States district court—31 Stat. 77, 85, c. 191; Serralles *v.* Esbri, 200 U. S. 103, 50 L. Ed. 391; Royal Ins. Co. *v.* Martin, 192 U. S. 149, 159, 48 L. Ed. 385, reaffirmed in Rosales Cueli *v.* Rodriguez, 198 U. S. 581, 49 L. Ed. 1172; Garrozi *v.* Dastas, 204 U. S. 64, 51 L. Ed. 369; Rodriguez *v.* United States, 198 U. S. 156, 49 L. Ed. 994; Crowley *v.* United States, 194 U. S. 461, 48 L. Ed. 1075.

19. Royal Ins. Co. *v.* Martin, 192 U. S. 149, 48 L. Ed. 385; Rosales Cueli *v.* Rodroguez, 198 U. S. 581, 49 L. Ed. 1172; Garrozi *v.* Dastas, 204 U. S. 64, 51 L. Ed. 369.

This court has jurisdiction to review a decision of the district court of the United States for Porto Rico under the 35th section of the act of congress of April 12th, 1900, c. 191, where the matter in dispute exceeds the sum of $5,000, and the final judgment in a like case in the supreme court of one of the territories of the United States could have been reviewed here. Hijo *v.* United States, 194 U. S. 315, 48 L. Ed. 994; Royal Ins. Co. *v.* Martin, 192 U. S. 149, 48 L. Ed. 385.

20. Royal Ins. Co. *v.* Martin, 192 U. S. 149, 160, 48 L. Ed. 385, reaffirmed in Rosales Cueli *v.* Rodriguez, 198 U. S. 581, 49 L. Ed. 1172; Garrozi *v.* Dastas, 204 U. S. 64, 51 L. Ed. 369.

21. Amado *v.* United States, 195 U. S. 172, 176, 49 L. Ed. 145; Royal Ins. Co. *v.* Martin, 192 U. S. 149, 160, 48 L. Ed. 385.

Section 15 of Court of Appeals Act.—The territories of the United States, referred to in the 15th section of the act of 1891, are those which it was contemplated would be assigned to some circuit, and they do not embrace Porto Rico; and the words in the act of 1900, "in the same manner and under the same regulations and in the same cases as from the supreme court of a territory of the United States," refer not to the act of 1891 but to those general statutes authorizing this court to review the final judgment of the supreme court of a territory of the United States in every case, without regard to the sum or value in dispute, where the constitution of the United States or a treaty thereof or an act of congress is brought in question and the right claimed thereunder is denied, and in every other case where the sum or value in dispute exceeds $5000, exclusive of costs.[22] These views as to the scope and effect of the Porto Rico act of 1900 are not at all affected by the provisions in the acts relating to the re-examination of the final judgments of the highest court of the Indian Territory, Hawaii and Alaska.[23] Those acts had exclusive reference to the particular territories named—each, upon its face, showing that the final judgments of the courts of those territories, at least in certain cases, should be reviewable, primarily, in a designated circuit court of appeals of the United States. No such provisions are found in the act of 1900, and this court has not assumed to assign Porto Rico to any circuit of the United States.[24]

b. *Jurisdiction as Dependent on Amount in Controversy.*—By the act of April 12, 1900 (31 Stat. L. 85, ch. 191), the general rule governing the right of this court to review by writs of error or appeal final decisions of the district court of the United States for Porto Rico, was made as to amount to conform to that obtaining as to the territories of the United States, viz. five thousand dollars.[25] The supreme court of the United States has no jurisdiction to review a judgment of the district court of Porto Rico for $5,000 and costs, although it carries interest, for it is the amount of the judgment that furnishes the test of jurisdiction.[26] Where the case does not involve the requisite jurisdictional amount, it follows that the right of review does not exist unless the case is within the provision of the statute conferring jurisdiction to review in this court "in all cases where * * * an act of congress is brought in question and the right claimed therein is denied."[27]

c. *Jurisdiction as Dependent on Claim of Federal Right.*—**In General.**—This court has jurisdiction to review the judgment of the supreme court of Porto Rico under § 35 of the Foraker act (April 12th, 1900), where a right is claimed under a statute of the United States and denied.[28] But the Porto Rican laws in force at the time of the adoption of the act of congress of April 12, 1900, com-

22. Royal Ins. Co. *v.* Martin, 192 U. S. 149, 160, 48 L. Ed. 385, reaffirmed in Rosales Cueli *v.* Rodriguez, 198 U. S. 581, 49 L. Ed. 1172; Garrozi *v.* Dastas, 204 U. S. 64, 51 L. Ed. 369.

23. Indian Territory, 26 Stat. 826, c. 517, § 13; Hawaii, 31 Stat. 141, 158, c. 339, § 86; Alaska, 31 Stat. 321, 245, c. 786.

24. Royal Ins. Co. *v.* Martin, 192 U. S. 149, 160, 48 L. Ed. 385, reaffirmed in Rosales Cueli *v.* Rodriguez, 198 U. S. 581, 49 L. Ed. 1172; Garrozi *v.* Dastas, 204 U. S. 64, 51 L. Ed. 369.

25. Jurisdiction as dependent on amount in controversy.—American R. Co. *v.* Castro, 204 U. S. 453, 454, 51 L. Ed. 564.

26. Ortega *v.* Lara, 202 U. S. 339, 50 L. Ed. 1055; Dones *v.* Urrutia, 202 U. S. 614, 50 L. Ed. 1172.

27. American R. Co. *v.* Castro, 204 U. S. 453, 454, 51 L. Ed. 564.

28. Jurisdiction as dependent on claim of federal right.—A right is claimed and denied under a statute of the United States within the meaning of the Foraker act of April 12th, 1900, giving the court jurisdiction to review the judgment of the supreme court of Porto Rico, where a judgment of the supreme court of Porto Rico requires an indebtedness to be paid in American money at the rate of one dollar for each peso of indebtedness, as against the claim of appellant who asserts his right under § 11 of the act of congress of April 12th, 1900, under which the rate of liquidation is sixty cents of American money to each peso of indebtedness, and the claim of appellant being denied on the ground that there was a clear contract to pay as demanded by the appellee, and that the act of congress had no application to the case. Serralles *v.* Esbri, 200 U. S. 103, 50 L. Ed. 391.

monly known as the "Foraker Act" did not thereby become, by adoption, laws of the United States, so that a denial of the right or claim under them by the district court of Porto Rico, would give the supreme court of the United States jurisdiction to review the judgment upon the ground that a federal question was involved.[29] Under the act of April 12, 1900, 31 Stat. L. 85, ch. 191, governing the right of this court to review by writs of error or appeal final decisions of the district court of the United States for Porto Rico, which gives a right of review regardless of amount "in all cases where an act of congress is brought in question and the right claimed therein is denied," it is held, that the mere assertion of a federal right, and its denial, did not justify our assuming jurisdiction where it indubitably appears that the federal right asserted is frivolous, that is, without color of merit.[30]

When Is the Act "Brought in Question."—Under the act of congress of April 12, 1900, 31 Stat. L. 85, ch. 191, giving this court a right to review by writs of error or appeal final decisions of the district court of the United States for Porto Rico, without regard to the amount, in all cases where an act of congress is brought in question and the right claimed therein is denied; "It has been settled that where, in the course of litigation pending in the court just referred to, a party asserts a right under an act of congress, the act 'is brought in question,' and when the right so claimed is denied the case can be brought here."[31]

Criminal Cases.—The words, "brought in question," in the act of April 12, 1900, do not mean that the accused, in order to bring the final judgment here, must have disputed the validity of the acts of congress which were alleged to have been violated to their prejudice. It was quite sufficient that they should assert rights under those acts and that the rights so claimed were denied to them.[32] A prosecution in the United States district court of Porto Rico for violation of § 3082 of the Revised Statutes providing punishment for importing dutiable articles without paying duty, is not reviewable by the supreme court of the United States.[33] An objection that an indictment does not set forth "an offense under the statutes of the United States," amounts to nothing more than a plea of not guilty, or a general demurrer, and is not an assertion of any particular right under the constitution, treaty or act of congress, so as to give the United States supreme court jurisdiction to review a judgment of the United States district court of Porto Rico.[34]

A right is claimed and denied under a statute of the United States, in order to give this court jurisdiction to review the decision of a district court under the § 35 of the Foraker act of April 12, 1900, where the prisoner claimed in the United States court of Porto Rico that the qualifications of the grand jurors presenting an indictment against him should have been ascertained under the local act of January 21, 1901, and the district court decides adversely to his contention.[35] Under the act of April 12, 1900 (31 Stat. at L. 85, ch. 191), providing that writs of error and appeal may be prosecuted from the final decisions of the district court of the United States for the district of Porto Rico in all cases where an act of congress is brought in question and the right claimed thereunder is denied, it was held that the supreme court of the United States can review on

29. Ortega *v.* Lara, 202 U. S. 339, 50 L. Ed. 1055; Dones *v.* Urrutia, 202 U. S. 614, 50 L. Ed. 1172.

30. American R. Co. *v.* Castro, 204 U. S. 453, 51 L. Ed. 564.

31. Crowley *v.* United States, 194 U. S. 461, 48 L. Ed. 1075; American R. Co. *v.* Castro, 204 U. S. 453, 455, 51 L. Ed. 564; Serralles *v.* Esbri, 200 U. S. 103, 50 L. Ed. 391; Rodriguez *v.* United States, 198 U. S. 156, 49 L. Ed. 994.

32. Rodriguez *v.* United States, 198 U. S. 156, 164, 49 L. Ed. 994, citing Crowley *v.* United States, 194 U. S. 461, 48 L. Ed. 1075; Serralles *v.* Esbri, 200 U. S. 103, 50 L. Ed. 391; American R. Co. *v.* Castro, 204 U. S. 453, 51 L. Ed. 564.

33. Amado *v.* United States, 195 U. S. 172, 49 L. Ed. 145.

34. Amado *v.* United States, 195 U. S. 172, 175, 49 L. Ed. 145.

35. Crowley *v.* United States, 194 U. S. 461, 48 L. Ed. 1075, cited in Rodriguez *v.* United States, 198 U. S. 156, 161, 49 L. Ed. 994.

writ of error a final decree of the district court of the United States for the district of Porto Rico overruling a motion in arrest of judgment by the accused on the ground, among others, that the jurors had not been selected or drawn in the mode required by the Revised Statutes of the United States.[36] The supreme court has jurisdiction to review, on writ of error, the proceedings of the district court of the United States for the district of Porto Rico, had under the act of February 12, 1900, 31 Stat. 77, 85, where such proceedings were in the nature of a criminal case in which the defendant claimed that rights arising under acts of congress were denied him.[37]

d. *Scope of Review.*—The review by the supreme court of the United States of the final judgments of the district court of the United States for Porto Rico is not restricted by the act of April 12th, 1900, 31 Stat. at L. 77, 84, ch. 191, § 34, to those cases in which the constitution or a treaty of the United States is brought in question and the right claimed under it denied. There may be cases, certainly civil cases, in the United States district court for Porto Rico, that do not involve any question arising under the constitution or a treaty, or an act of congress, and yet if the case be one which, if determined in the supreme court of one of the territories of the United States, could be brought here for re-examination, the final judgment could be reviewed by this court, although no right of a distinctly federal nature was involved.[38] On an appeal to this court from a decree of the district court of the United States for the district of Porto Rico, in a suit for partition, a claim not set up in the bill nor in the court below, nor suggested until after the argument in this court, will not be considered on appeal by this court.[39]

12. Review of Decisions of Interstate Commerce Commission.—**In General.**—Since the passage of the circuit court of appeals act, no direct appeal will lie from this court to review the decisions of the interstate commerce commission.[40]

Weight of Findings.—The findings of the interstate commerce commission are made by law prima facie true. This court has ascribed to them the strength due to the judgments of a tribunal appointed by law and informed by experi-

36. Rodriguez *v.* United States, 198 U. S. 156, 49 L. Ed. 994, citing Crowley *v.* United States, 194 U. S. 461, 48 L. Ed. 1075.

37. Rodriguez *v.* United States, 198 U. S. 156, 161, 49 L. Ed. 994, citing Crowley *v.* United States, 194 U. S. 461, 462, 48 L. Ed. 1075.

38. Scope of review.—Amado *v.* United States, 195 U. S. 172, 175, 49 L. Ed. 145; Royal Ins. Co. *v.* Martin, 192 U. S. 149, 160, 48 L. Ed. 385; Hijo *v.* United States, 194 U. S. 315, 320, 48 L. Ed. 994; Crowley *v.* United States, 194 U. S. 461, 48 L. Ed. 1075.

39. Rodriguez *v.* Vivoni, 201 U. S. 371, 50 L. Ed. 792.

40. Review of decisions of interstate commerce commission.—Interstate Commerce Commission *v.* Atchison, etc., R. Co., 149 U. S. 264, 37 L. Ed. 727; citing McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893; Lau Ow Bew *v.* United States, 144 U. S. 47, 36 L. Ed. 340; Hubbard *v.* Soby, 146 U. S. 56, 36 L. Ed. 886; Chicago, etc., R. Co. *v.* Osborne, 146 U. S. 354, 36 L. Ed. 1002.

Assuming that § 16 of the interstate commerce act remained unrepealed, it was nevertheless so far affected as that the appeal from the trial court had to be prosecuted to the circuit court of appeals instead of to this court. Interstate Commerce Commission *v.* Atchison, etc., R. Co., 149 U. S. 264, 37 L. Ed. 727; Louisville, etc., R. Co. *v.* Behlmer, 169 U. S. 644, 646, 42 L. Ed. 889.

By the sixteenth section of the interstate commerce act (24 Stat. c. 104, 379; 25 Stat. c. 382, 855), it was provided that where the commission had made any lawful order or requirement, and a party refused to obey or perform it, it should be lawful for the commission, or any person or company interested therein, to apply to the circuit court sitting in equity for the enforcement of such order; and it was further provided, in respect of the action of the circuit court, that "whenever the subject in dispute shall be of the value of two thousand dollars or more, either party to such proceedings before said court may appeal to the supreme court of the United States, under the same regulations now provided by law in respect of security for such appeal." In Interstate Commerce Commission *v.* Atchison, 149 U. S. 264, 37 L. Ed. 727, where an appeal was taken directly to this court after July 1, 1891, from an order in a proceeding under that act, we held that it would not lie. Little Rock, etc., R. Co. *v.* East Tenn., etc., R. Co., 159 U. S. 698, 699, 700, 40 L. Ed. 311.

ence.[41] And in any special case of conflicting evidence, a probative force must be attributed to the findings of the commission, which, in addition to "knowledge of conditions, of environment and of transportation relations," has had the witnesses before it and has been able to judge of them and their manner of testifying.[42] This court will not review and reverse the findings of the interstate commerce commission which were affirmed by the circuit court and the circuit court of appeals, because the commission declined to adopt inferences of mixed law and fact, which, like all presumptions, are rebuttable, and therefore the commission in reaching its ultimate judgment may have given them all the weight to which they were entitled.[43]

Questions of Law or Fact.—The inquiry as to the result of competition upon the reasonableness of a railroad rate, is essentially one of fact, and an attempt to make competition an inference of law dominating against the findings of the commission and their affirmance by the circuit court will be of no avail.[44] The question of the reasonableness of a railroad rate is a question of fact. But the conclusions of the commission are subject to review if it excludes facts and circumstances that ought to have been considered.[45] Whether the interstate commerce commission gave too much weight to some parts of the testimony and too little weight to other parts of it is a question of fact and not of law.[46]

Effect of Appeal.—When the interstate commerce commission was created and provision made for the enforcement of its orders by the circuit courts, while appeals were allowed from the decrees of those courts to this court, it was the legislative will that such appeals should not suspend the operation of the decrees appealed from. It is quite true that if the circuit court reversed the order of the commission and dismissed the petition, the question of superseding such a decree might not be material, but, as the section provided that either party might appeal, the inhibition on the effect of the appeal applied alike to either. But this section does not apply to appeals from circuit court of appeals; in such cases the judgment of the circuit court of appeals operates as a supersedeas.[47]

41. Louisville, etc., R. Co. *v.* Behlmer, 169 U. S. 644, 648, 42 L. Ed. 889; East Tenn., etc., R. Co. *v.* Interstate Commerce Commission, 181 U. S. 1, 27, 45 L. Ed. 719; Illinois Central R. Co. *v.* Interstate Commerce Commission, 206 U. S. 441, 454, 51 L. Ed. 1128.

"The statute gives prima facie effect to the findings of the commission, and when those findings are concurred in by the circuit court, we think they should not be interfered with, unless the record establishes that clear and unmistakable error has been committed." Cincinnati, etc., R. Co. *v.* Interstate Commerce Commission, 206 U. S. 142, 51 L. Ed. 995; Illinois Central R. Co. *v.* Interstate Commerce Commission, 206 U. S. 441, 466, 51 L. Ed. 1128.

42. Illinois Central R. Co. *v.* Interstate Commerce Commission, 206 U. S. 441, 454, 51 L. Ed. 1128.

43. Illinois Central R. Co. *v.* Interstate Commerce Commission, 206 U. S. 441, 51 L. Ed. 1128.

44. Illinois Central R. Co. *v.* Interstate Commerce Commission, 206 U. S. 441, 51 L. Ed. 1128.

45. Texas, etc., R. Co. *v.* Interstate Commerce Commission, 162 U. S. 197, 40 L. Ed. 940; Cincinnati, etc., R. Co. *v.* Interstate Commerce Commission, 206 U. S. 142, 51 L. Ed. 995

46. Illinois Central R. Co. *v.* Interstate Commerce Commission, 206 U. S. 441, 51 L. Ed. 1128.

47. Louisville, etc., R. Co. *v.* Behlmer, 169 U. S. 644, 646, 42 L. Ed. 889.

Section 11 of the act of March 3, 1891, provided among other things as follows: "And all provisions of law now in force regulating the methods and system of review, through appeals or writs of error, shall regulate the method, and system of appeals and writs of error provided for in this act in respect of the circuit court of appeals, including all provisions for bonds or other securities to be required and taken on such appeals and writs of error, and any judge of the circuit court of appeals, in respect of cases brought or to be brought to that court, shall have the same powers and duties as to the allowance of appeals or writs of error, and the conditions of such allowance, as now by law belong to the justices or judges in respect of the existing courts of the United States respectively." And it is argued that the words "all provisions for bonds or other securities," which were in force at the time of the adoption of the act of 1891, include as applicable to appeals from the circuit courts of appeals the provision of § 16 of the interstate commerce act, that the appeal therein referred to shall not operate to stay or supersede. We cannot accede to that view, for the

E. Under Circuit Court of Appeals Act—1. Causes That Brought about the Legislation.—Up to the time of the passage of the act of 1891, creating the circuit courts of appeal, the theory of federal jurisprudence had been, a single appellate court, to wit, the supreme court of the United States, by which a final review of all cases of which the lower federal courts had jurisdiction was to be made. It is true there existed certain limitations upon the right of appeal and review, based on the amount in controversy and other considerations; but such limitations did not recognize or provide for the existence of another appellate court, and did not conflict with the thought that this court was to be the single tribunal for reviewing all cases and questions of a federal nature. The rapid growth of the country and the enormous amount of litigation involving questions of a federal character so added to the number of cases brought here for review, that it was impossible for this court to keep even pace with the growing docket. The situation had become one of great peril, and many plans for relief were suggested and discussed.[48] The outcome was the act of March 3, 1891, c. 517, 26 Stat. 826, the thought of which was the creation in each of the nine circuits of an appellate tribunal composed of three judges, whose decision in certain classes of cases appealable thereto should be final.[49]

2. Effect on Prior, Inconsistent Legislation.—Section 14 of the act of 1891, after specifically repealing § 691 of the Revised Statutes and § 3 of the act of February 16, 1875, further provides that all acts and parts of acts relating to appeals or writs of error, inconsistent with the provisions for review by appeals or writs of error in the preceding §§ 5, 6, of this act, are hereby repealed.[50] The object of the specific repeal, as this court has declared, was to get rid of the pecuniary limit in the acts referred to.[51] And, although neither § 692 nor § 695 of the Revised Statutes is repealed by name, yet, taking into consideration the general repealing clause, together with the affirmative provisions of the act, the case comes within the decision in an analogous case, in which this court said: "The provisions relating to the subject matter under consideration are, however, so comprehensive, as well as so variant from those of former acts, that we think the intention to substitute the one for the other is necessarily to be inferred and must prevail."[52] Review by appeal, by writ of error or otherwise, must be as prescribed by the act, and review by certificate is limited by the act to the certificate by the circuit courts, made after final judgment, of questions raised as to their own jurisdiction and to the certificate by

appeal treated of in § 16 is an appeal from the trial court, and does not refer to an appeal from the circuit court of appeals. "Either party to such proceeding before said court may appeal," is the language, and as "said court" confessedly referred to the circuit court, the only question would be whether the scope of the provision had been enlarged by the act of 1891, in the matter under consideration, which we do not think it had. Louisville, etc., R. Co. *v.* Behlmer, 169 U. S. 644, 647, 42 L. Ed. 889.

On appeal from the decree of the circuit court of appeals, affirming the decree of the circuit court refusing to command compliance with an order of the interstate commerce commission, the supreme court of the United States, being constrained to the conclusion that the order of the commission was not sustained by the facts upon which it was predicated, cannot enter into an independent investigation of the facts, even if it be conceded the record is in a condition to enable that court to do so, in order that new and substantive findings of fact may be evolved, upon which the order of the commission may be sustained. Interstate Commerce Commission *v.* Chicago, etc., R. Co., 186 U. S. 320, 342, 46 L. Ed. 1182, citing Louisville, etc., R. Co. *v.* Behlmer, 169 U. S. 644, 648, 42 L. Ed. 889.

49. Causes that brought about the legislation.—Forsyth *v.* Hammond, 166 U. S. 506, 511, 512, 41 L. Ed. 1095, reaffirmed in Archer *v.* Building & Loan Ass'n, 179 U. S. 679, 45 L. Ed. 383.

49. McLish *v.* Roff, 141 U. S. 661, 666, 35 L. Ed. 893; Forsyth *v.* Hammond, 166 U. S. 506, 512, 41 L. Ed. 1095, reaffirmed in Archer *v.* Building & Loan Ass'n, 179 U. S. 679, 45 L. Ed. 383.

50. Effect on prior, inconsistent legislation.—26 Stat. 829, 830.

51. McLish *v.* Roff, 141 U. S. 661, 667, 35 L. Ed. 893.

52. Fish *v.* Henarie, 142 U. S. 459, 468, 35 L. Ed. 1080; The Paquete Habana, 175 U. S. 677, 684, 44 L. Ed. 320.

the circuit courts of appeals of questions of law in relation to which our advice is sought as therein provided.[53]

3. Purpose or Object of Statute.—The primary object of this act, well known as a matter of public history, manifest on the face of the act, and judicially declared in the leading cases under it, was to relieve this court of the overburden of cases and controversies, arising from the rapid growth of the country, and the steady increase of litigation; and, for the accomplishment of this object, to transfer a large part of its appellate jurisdiction to the circuit courts of appeals thereby established in each judicial circuit, and to distribute between this court and those, according to the scheme of the act, the entire appellate jurisdiction from the circuit and district courts of the United States.[54] The act has uniformly been so construed and applied by this court as to promote its general purpose of lessening the burden of litigation in this court, transferring the appellate jurisdiction in large classes of cases to the circuit court of appeals, and making the judgments of that court final, except in extraordinary cases.[55]

4. Construction of Statute—a. *In General.*—The circuit court of appeals act, like all acts of congress, and even the constitution itself, is to be read in the light of the common law, from which our system of jurisprudence is derived.[56]

b. *Retroactive Operation of Statute.*—Appeals taken prior to the passage of

53. United States *v.* Rider, 163 U. S. 132, 139, 41 L. Ed. 101.

54. Purpose or object of statute.—McLish *v.* Roff, 141 U. S. 661, 666, 35 L. Ed. 893; Law Ow Bew, 141 U. S. 583, 35 L. Ed. 868; Law Ow Bew *v.* United States, 144 U. S. 47, 36 L. Ed. 340; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 382, 37 L. Ed. 486; In re Woods, 143 U. S. 202, 36 L. Ed. 125; The Paquete Habana, 175 U. S. 677, 681, 44 L. Ed. 320; Bassette *v.* Conkey Co., 194 U. S. 324, 336, 48 L. Ed. 997; reaffirmed in In the Matter of Lewis, 202 U. S. 614, 50 L. Ed. 1172; Louisville, etc., R. Co. *v.* Behlmer, 169 U. S. 644, 646, 42 L. Ed. 889; United States *v.* American Bell Tel. Co., 159 U. S. 548, 551, 40 L. Ed. 255; Warner *v.* New Orleans, 167 U. S. 467, 474, 42 L. Ed. 239, reaffirmed in O'Neill Ry. Co. *v.* Trust Co., 172 U. S. 642, 43 L. Ed. 1180.

It is a matter of public history, and is manifest on the face of that act, that its primary object was to facilitate the prompt disposition of cases in the supreme court, and to relieve it of the enormous overburden of suits and cases resulting from the rapid growth of the country and the steady increase of its litigations. That act, in substance, creates a new and distinct circuit court of appeals, in each circuit, to be composed of three judges, namely, the circuit justice when present, and two circuit judges, and also, in the absence of any one of those three, a district judge selected by assignment for the purpose of completing the court. It then provides for the distribution of the entire appellate jurisdiction of our national judicial system, between the supreme court of the United States and the circuit court of appeals, therein established, by designating the classes of cases in respect of which each of those two courts shall respectively have final jurisdiction. McLish *v.* Roff, 141 U. S. 661, 666, 35 L. Ed. 893.

55. American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 382, 37 L. Ed. 486.

"The object of the act of March 3, 1891, c. 517, was to distribute between this court and the circuit courts of appeals the entire appellate jurisdiction over the circuit courts of the United States." United States *v.* Rider, 163 U. S. 132, 41 L. Ed. 101; Motes *v.* United States, 178 U. S. 458, 467, 44 L. Ed. 1150.

The judiciary act of March 3, 1891, in distributing the appellate jurisdiction of the national judicial system between the supreme court and the circuit court of appeals therein established, designated the classes of cases in respect of which each of these courts was to have final jurisdiction (the judgments of the latter being subject to the supervisory power of this court through the writ of certiorari as provided), and the act has uniformly been so construed and applied as to promote its general and manifest purpose of lessening the burden of litigation in this court. Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 179, 37 L. Ed. 1041.

56. Construction of statute in general.—United States *v.* Sanges, 144 U. S. 310, 36 L. Ed. 445, citing Charles River Bridge *v.* Warren Bridge, 11 Pet. 420, 545, 9 L. Ed. 773; Rice *v.* Minnesota, etc., R. Co., 1 Black 358, 374, 375, 17 L. Ed. 147; United States *v.* Carll, 105 U. S. 611, 26 L. Ed. 1135; Ex parte Wilson, 114 U. S. 417, 422, 29 L. Ed. 89; 1 Kent Com. 336.

the act of March 3, 1891, are not governed by that act.[57]

5. Time of Taking Effect.—The act of March 3, 1891, 26 Stat. 826, c. 517, went immediately into effect on its enactment.[58]

6. Effect on Pending Cases.—In view of the general rule that if a law conferring jurisdiction is repealed, without any reservation as to pending cases, all such cases fall with the law, a joint resolution was passed on March 3, 1891, providing "that nothing in said act shall be held or construed in anywise to impair the jurisdiction of the supreme court or any circuit court of the United States in any case now pending before it;" and it was added, "or in respect of any case wherein the writ of error or the appeal shall have been sued out or taken to any of said courts before the first day of July, Anno Domini, eighteen hundred and ninety-one."[59] It is settled

57. Retroactive operation of statute.—Mattingly *v.* Northwestern Va. R. Co., 158 U. S. 53, 39 L. Ed. 894.

An appeal taken prior to the passage of the act of March 3, 1891, is not governed by that act, although the citation is not signed until April 14, 1891, and not served until the 17th of the month; because neither the signing nor the service of the citation is jurisdictional, its only office being to give notice to the appellees. Mattingly *v.* Northwestern Va. R. Co., 158 U. S. 53, 39 L. Ed. 894, citing Jacobs *v.* George, 150 U. S. 415, 37 L. Ed. 1127.

58. Time of taking effect.—McLish *v.* Roff, 141 U. S. 661, 664, 35 L. Ed. 893; In re Claasen, 140 U. S. 200, 35 L. Ed. 409; Mason *v.* Pewabic Min. Co., 153 U. S. 361, 363, 38 L. Ed. 745.

59. Effect on pending cases.—26 Stat. 1115, 1116; National Exchange Bank *v.* Peters, 144 U. S. 570, 572, 36 L. Ed. 545, citing Railroad Co. *v.* Grant, 98 U. S. 398, 25 L. Ed. 231; Gurnee *v.* Patrick County, 137 U. S. 141, 34 L. Ed. 601; Wauton *v.* DeWolf, 142 U. S. 138, 35 L. Ed. 965; Lutcher *v.* United States, 157 U. S. 427, 39 L. Ed. 759, citing Cincinnati Safe, etc., Co. *v.* Grand Rapids Deposit Co., 146 U. S. 54, 36 L. Ed. 885; Ogden *v.* United States, 148 U. S. 390, 37 L. Ed. 493; Aspen Min. Co. *v.* Billings, 150 U. S. 31, 37 L. Ed. 986; Voorhees *v.* Noye Mfg. Co., 151 U. S. 135, 38 L. Ed. 101; Mason *v.* Pewabic Mining Co., 153 U. S. 361, 366, 38 L. Ed. 745.

By the joint resolution of March 3, 1891 (26 Stat. 1115), the jurisdiction was preserved as to pending cases, and cases wherein the writ of error or appeal should be sued out or taken before July 1, 1891. The language of the joint resolution of March 3, 1891 (26 Stat. 1115), is as follows: "And be it further resolved: That nothing in said act shall be held or construed in any wise to impair the jurisdiction of the supreme court or any circuit court of the United States in any case now pending before it, or in respect of any case wherein the writ of error or the appeal shall have been sued out or taken to any of said courts before the first day of July, Anno Domini eighteen hundred and ninety-one." Cincinnati, etc., Co. *v.* Grand Rapids Deposit Co., 146 U. S. 54, 36 L. Ed. 885.

Judgment was rendered in this case by the circuit court of the United States for the southern district of Ohio on April 25, 1891. An entry was made of record, June 19, 1891, that the court "allows a writ of error to the supreme court of the United States, with stay of execution, upon the filing of a supersedeas bond," as described, and such a bond was filed and approved June 20, 1891. A petition for the allowance of the writ of error and an assignment of errors were filed in the clerk's office of the circuit court, July 3, 1891, and the writ of error bears teste and was filed in that office on that day, and a citation to the adverse party signed and served. Held, the motion to dismiss must be sustained. Cincinnati, etc., Co. *v.* Grand Rapids Deposit Co., 146 U. S. 54, 55, 36 L. Ed. 885, following Wauton *v.* DeWolf, 142 U. S. 138, 35 L. Ed. 965; Brooks *v.* Norris, 11 How. 204, 13 L. Ed. 665; Credit Co. *v.* Arkansas Central R. Co., 128 U. S. 258, 32 L. Ed. 448.

In Voorhees *v.* Noye Mfg. Co., 151 U. S 135, 38 L. Ed. 101, the decree was entered January 7, 1891. On January 9, 1892, at the November term, 1891, a motion for rehearing was made; on February 3, 1892, the motion was argued; and on February 17, 1892, the rehearing was denied. March 23, 1892, the refusal of certain defendants to join in an appeal was filed, which refusal was dated January 17, 1891. April 15, 1892, an appeal bond was given, conditioned for the prosecution of the appeal allowed January 7, 1891, approved by the court and filed April 18, 1892. The record was filed in this court April 19, 1892, certified by the clerk of the circuit court April 5, 1892. The bond is certified to by the clerk of the circuit court under date April 21, 1892. It was held, that as the jurisdiction of the court below depended solely upon the diverse citizenship of the parties, the appeal must be dismissed, because the jurisdiction of this court taken away in such cases was not preserved by the joint resolution of March 3, 1891, 26 Stat. 1115, as to pending cases and cases wherein the

"that by the joint resolution of March 3, 1891, 26 Stat. 1115, the jurisdiction was preserved as to pending cases and cases wherein the writ of error or appeal should be sued out or taken before July 1, 1891."[60] Where an appeal from the circuit court of the United States to this court, does not come within any of the class of cases specified in § 5, and the appeal is not taken until after July 1, 1891, it must be dismissed in accordance with the act and joint resolution of March 3, 1891, providing "that nothing in said act shall be held or construed in anywise to impair the jurisdiction of the supreme court or any circuit court of the United States in any case now pending before it."[61] The provision of the joint resolution of March 3, 1891, "to provide for the organization of the circuit court of appeals," 26 Stat. 1115, that nothing in the act of March 3, 1891, 26 Stat. 826, c. 517, should be held or construed to impair the jurisdiction of the supreme court in any case then pending before it or in respect of any case wherein the appeal had been taken to that court before the first day of July, 1891, merely preserves the jurisdiction as stated, and does not operate to give jurisdiction as to appeals not perfected, which would not otherwise have existed.[62]

7. Remedies.—It was no purpose of the act of 1891 to change the forms of remedies theretofore pursued.[63]

8. Review by Certificate.—Review by certificate is limited to the certificates by the circuit or district courts, made after final judgment, of questions made as to their own jurisdiction, and to the certificates by the circuit courts of appeals of questions of law in relation to which the advice of this court is sought as therein provided.[64]

9. Appellate Jurisdiction of Circuit Court of Appeals—a. *In General.*—The court of appeals act provides, in § 6, that the circuit courts of appeals established by it shall exercise appellate jurisdiction to review, by appeal or by writ of error, "final decisions" in the existing circuit courts in all cases other than those provided for in § 5 of the act, unless otherwise provided by law, and that "the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy, being aliens and citizens of the United States, or citizens of different states," as well as in cases arising under the patent laws, the revenue laws, the criminal laws, and in admiralty cases.[65] By § 6, the circuit

appeal should be taken before July 1, 1891.

"Jurisdiction as existing before the passage of the act was preserved by a joint resolution of March 3, 1891, 26 Stat. 1115, as to pending cases wherein the writ of error or appeal should be sued out or taken before July 1, 1891. In this case the decree was not rendered until the first day of October of that year. It follows that the appeal must be dismissed. National Exchange Bank *v.* Peters, 144 U. S. 570, 36 L. Ed. 545." Little Rock, etc., R. Co. *v.* East Tenn., etc., R. Co., 159 U. S. 698, 699, 40 L. Ed. 311.

To what courts applicable.—Where the petition for the allowance of the writ of error from this court to the circuit court states that the circuit court of appeals refused to allow the cause to be docketed and the transcript of the record to be filed therein, on the ground that the cause should have been taken to this court and not to that court, it was held, that as the last clause of § 6 of the judiciary act of March 3, 1891, refers to the circuit court of appeals and not to the circuit court, a writ of error to the circuit court and not to the circuit court of appeals, does not reach the proceedings in the latter court. Lutcher *v.* United States, 157 U. S. 427, 39 L. Ed. 759.

60. Wauton *v.* De Wolf, 142 U. S. 138, 140, 35 L. Ed. 965; Mason *v.* Pewabic Min. Co., 153 U. S. 361, 38 L. Ed. 745; Gulf, etc., R. Co. *v.* Shane, 157 U. S. 348, 349, 39 L. Ed. 727.

61. National Exchange Bank *v.* Peters, 144 U. S. 570, 36 L. Ed. 545, citing Wauton *v.* De Wolf, 142 U. S. 138, 35 L. Ed. 965.

62. Aspen Min., etc., Co. *v.* Billings, 150 U. S. 31, 35, 37 L. Ed. 986.

63. Remedies.—In re Lennon, 150 U. S. 393, 37 L. Ed. 1120; Ekiu *v.* United States, 142 U. S. 651, 35 L. Ed. 1146; Gonzales *v.* Cunningham, 164 U. S. 612, 41 L. Ed. 572; Rice *v.* Ames, 180 U. S. 371, 374, 45 L. Ed. 577.

64. Review by certificate.—United States *v.* Rider, 163 U. S. 132, 41 L. Ed. 101; Mexican Central R. Co. *v.* Eckman, 187 U. S. 429, 432, 47 L. Ed. 245. See ante, "Appellate Jurisdiction over Particular Courts and Tribunals," III, D; post, "Certificate of Division of Opinion," V.

65. Appellate jurisdiction of circuit court of appeals in general.—Northern

courts of appeals "shall exercise appellate jurisdiction to review by appeal or by writ of error," final decisions of the circuit courts "in all cases other than those provided for in the preceding section of this act unless otherwise provided by law." The appellate jurisdiction not vested in this court was thus vested in the court created by the act, and the entire jurisdiction distributed.[66]

b. *Construction of Words "unless Otherwise Provided by Law."*—The words "unless otherwise provided by law" were manifestly inserted out of abundant caution, in order that any qualification of the jurisdiction by contemporaneous or subsequent acts should not be construed as taking it away except when expressly so provided. Implied repeals were intended to be thereby guarded against. To hold that the words referred to prior laws, would defeat the purpose of the act and be inconsistent with its context and its repealing clause.[67] In other words, in the grant of the appellate jurisdiction to the circuit court of appeals, by § 6, in all cases other than those in which this court has direct appellate jurisdiction under § 5, the exception, "unless otherwise provided by law," looks only to provisions of the same act, or to contemporaneous or subsequent acts expressly providing otherwise, and does not include provisions of earlier statutes.[68]

c. *Admiralty Cases.*—By the sixth section of the judiciary act of March 3, 1891, it is provided that the judgments or decrees of the circuit courts of appeals in admiralty cases shall be final; and no appeal to this court lies therefrom.[69] Under § 6 of the act of March 3, 1891, c. 517, 26 Stat. 827, an appeal cannot be taken to this court from an order of the district court dismissing a libel in admiralty. The remedy is by appeal to the circuit court of appeals.[70] Appeals to the supreme court of the United States will not lie from the judgments or decrees of the circuit court of appeals in proceedings to limit the liability of ship owners, such proceedings being admiralty cases.[71]

d. *Revenue Cases.*—The circuit courts of appeals exercise appellate jurisdiction under the sixth section in all cases other than those in which the juris-

Pac. R. Co. *v.* Amato, 144 U. S. 465, 471, 36 L. Ed. 506.

Where the case before us is one of habeas corpus, but the jurisdiction of the circuit court was not in issue, nor was the construction or application of the constitution of the United States involved, nor the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, drawn in question, it does not fall within either of the classes of cases which may be brought directly to this court under the act, and was, therefore, properly carried to the circuit court of appeals. Lau Ow Bew *v.* United States, 144 U. S. 47, 58, 36 L. Ed. 340.

66. McLish *v.* Roff, 141 U. S. 661, 666, 35 L. Ed. 893; Lau Ow Bew *v.* United States, 144 U. S. 47, 56, 36 L. Ed. 340.

67. Construction of words "unless otherwise provided by law."—Lau Ow Bew *v.* United States, 144 U. S. 47, 56, 57, 36 L. Ed. 340; In re Lennon, 150 U. S. 393, 398, 37 L. Ed. 1120; Mason *v.* Pewabic Min. Co., 153 U. S. 361, 365, 38 L. Ed. 745.

68. Lau Ow Bew *v.* United States, 144 U. S. 47, 57, 36 L. Ed. 340; Hubbard *v.* Soby, 146 U. S. 56, 36 L. Ed. 886; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 383, 37 L. Ed. 486.

"By § 6 of the act of 1891, this court is relieved of much of the appellate jurisdiction that it had before; the appellate jurisdiction from the district and circuit courts 'in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law,' is vested in the circuit court of appeals; and its decisions in admiralty cases, as well as in cases arising under the criminal laws, and in certain other classes of cases, are made final, except that that court may certify to this court questions of law, and that this court may order up the whole case by writ of certiorari. It is settled that the words 'unless otherwise provided by law,' in this section, refer only to provisions of the same act, or of contemporaneous or subsequent acts, and do not include provisions of earlier statutes." Lau Ow Bew *v.* United States, 144 U. S. 47, 57, 36 L. Ed. 340; Hubbard *v.* Soby, 146 U. S. 56, 36 L. Ed. 886; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 383, 37 L. Ed. 486; The Paquete Habana, 175 U. S. 677, 721, 44 L. Ed. 320.

69. Admiralty cases.—Oregon R. & Nav. Co. *v.* Balfour, 179 U. S. 55, 45 L. Ed. 82.

70. In re Morrison, 147 U. S. 14, 37 L. Ed. 60.

71. Oregon R. & Nav. Co. *v.* Balfour, 179 U. S. 55, 45 L. Ed. 82.

diction of this court is exercised under the fifth, among which cases are included all revenue cases; that is, cases under laws imposing duties or imports or tonnage, or providing in terms for revenue.[72] Cases "arising under the revenue laws" are made final in the circuit court of appeals by the judiciary act of March 3, 1891.[73] Such cases can only come here on the merits on certificate or certiorari.[74] Where in a suit against the United States under the act of March 3, 1887, 24 Stat. 505, c. 359, the application for appeal is not made until August 9, 1892, such appeal will be dismissed on motion of the solicitor general, because such appeal is not authorized by the act of March 3, 1891, 26 Stat. 826, entitled "an act to establish the circuit court of appeals."[75]

It is true that under the act of June 10, 1890, an appeal would lie directly from the circuit courts to this court if the circuit court should be of opinion that the question involved was of such importance as to require a review of its decision by this court, and that in the order allowing this appeal the circuit court of appeals stated "that the question involved is of such importance as to require a review of said decision and decree by the supreme court of the United States;" but the judiciary act of March 3, 1891, prescribes a different rule as to the prosecution of appeals.[76]

e. *Criminal Cases*—(1) *In General.*—By the sixth section, the circuit court of appeals are vested with appellate jurisdiction "to review by appeal or by writ of error final decisions in the district courts and the existing circuit courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law," and their judgments are made final in, among others, cases arising under the criminal laws.[77] But the criminal cases in

72. Revenue cases.—United States *v.* Hill, 123 U. S. 681, 31 L. Ed. 275; United States *v.* Jahn, 155 U. S. 109, 112, 39 L. Ed. 87.

Judgment in action against United States to recover compensation for services as clerk.—The judgment of the district court in an action at law under the act of March 3, 1887, c. 359, 24 Stat. 505, is reviewable by the circuit court of appeals upon a writ of error. United States *v.* Harsha, 172 U. S. 567, 43 L. Ed. 556, citing Chase *v.* United States, 155 U. S. 480, 489, 39 L. Ed. 234; United States *v.* King, 164 U. S. 703, 41 L. Ed. 1182.

73. Anglo-California Bank *v.* United States, 175 U. S. 37, 44 L. Ed. 64.

Under the judiciary act of March 3, 1891 (26 Stat. at Large, p. 828), a judgment of the circuit court, on an appeal from the decisions of the board of general appraisers is reviewable, not in the supreme court, but in the circuit court of appeals, the case being one arising under the general revenue laws. United States *v.* Hill, 123 U. S. 681, 31 L. Ed. 275; Lau Ow Bew *v.* United States, 144 U. S. 47, 36 L. Ed. 340.

No appeal will lie to this court from a decision of the circuit court of appeals, affirming a decree of the circuit court overruling a decision of the board of general appraisers in the matter of the classification of certain imported articles. The decision is one "arising under the revenue laws" which by the judiciary acts of March 3, 1891, is final in the circuit court of appeals. Anglo-Californian Bank *v.* United States, 175 U. S. 37, 44 L. Ed. 64.

74. United States *v.* Jahn, 155 U. S. 109, 112, 39 L. Ed. 87.

75. Ogven *v.* United States, 148 U. S. 390, 37 L. Ed. 493, following National Exchange Bank *v.* Peters, 144 U. S. 570, 36 L. Ed. 545; Hubbard *v.* Soby, 146 U. S. 56, 36 L. Ed. 886.

This was a suit brought October 9, 1890, in the circuit court of the United States for the district of Connecticut to recover an alleged excess of duties upon imports exacted by plaintiff in error in his capacity of collector of customs of the port of Hartford, prior to the going into effect of the act of congress of June 10, 1890, entitled "an act to simplify the laws in relation to the collection of the revenues." 26 Stat. 131. Judgment was given for defendant in error, February 27, 1892, and on June 11, 1892, the pending writ of error was sued out. Held, the motion to dismiss the writ must be sustained. Hubbard *v.* Soby, 146 U. S. 56, 60, 36 L. Ed. 886, following Lau Ow Bew *v.* United States, 144 U. S. 47, 36 L. Ed. 340; McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893.

76. Anglo-Californian Bank *v.* United States, 175 U. S. 37, 39, 44 L. Ed. 64.

77. Criminal cases in general.—Folsom *v.* United States, 160 U. S. 121, 126, 40 L. Ed. 363; Cary Mfg. Co. *v.* Acme Clasp Co., 187 U. S. 427, 47 L. Ed. 244.

The act of March 3rd, 1891, § 6, giving to the circuit courts of appeals appellate jurisdiction to review by appeal or writ of error final decisions in the district court, and the existing circuit courts, in all cases other than those provided for in

which the judgments of the circuit courts of appeals are made final by § 6 do not embrace capital cases or cases of infamous crimes. Accordingly, this court and not the circuit court of appeals has appellate jurisdiction in such cases.[78]

(2) *Contempt Cases.*—The only right of review given to the circuit court of appeals in contempt proceedings is derived from the act giving that court such right in criminal cases.[79] Proceedings for contempt may be divided into those which have for their purpose the vindication of the authority and dignity of the court, and those seeking to punish parties guilty of a disregard of such orders as are remedial in their character, and intended to enforce the rights of private parties, to compel obedience to orders and decrees made to enforce their rights and to give them a remedy to which the court deems them entitled. The one class is criminal and punitive in its nature, in which the government and the public are interested, and the other civil, remedial and coercive in its character, in which those chiefly concerned are individuals whose private rights and remedies are undertaken to be protected and enforced. Proceedings which are criminal in their nature and intended for the vindication of public justice, rather than the coercion of the opposite party to do some act for the benefit of another party to the action, are the only ones reviewable in the circuit court of appeals under its power to take jurisdiction of and determine criminal cases.[80] The circuit court of appeals has jurisdiction to review a judgment rendered in a contempt proceeding criminal in its nature, and having for its object the vindication of the authority of the court, but not one in the nature of a proceeding to enforce an order seeking the protection of the rights of the party to the suit for whose benefit it was made.[81] The circuit court of appeals has jurisdiction to review an order or judgment of the circuit court of the United States, finding a person guilty of contempt for violation of an order of that court and imposing a fine for the contempt, because they are criminal in their nature, and the orders imposing punishment are final.[82] The "act to establish circuit courts of appeals and to define and regulate in certain cases jurisdiction of the courts of the United States, and for other purposes," approved March 3, 1891 (26 Stat. 826), authorizes a review by a circuit court of appeals of a judgment or order of a circuit court of the United States, finding a person, not a party to the suit, guilty of contempt for violation of an order of that court made in such suit and imposing a fine for such contempt.[83] The circuit court of appeals has no jurisdiction to review an order made in the circuit court, undertaking to punish for contempt for violation of an order made for the production of books and papers in a common-law action under § 724 of the Revised Statutes of the United States, because such order is made in other than a proceeding of a criminal character.[84]

§ 5, construed with a subsequent clause which makes the decision of the court of appeals final "in all cases arising * * * under the criminal laws" includes criminal cases. United States *v.* Rider, 163 U. S. 132, 41 L. Ed. 101; Bessette *v.* Conkey Co., 194 U. S. 324, 48 L. Ed. 997, reaffirmed in In the Matter of Lewis, 202 U. S. 614, 50 L. Ed. 1172.

And by § 6 the judgments or decrees of the circuit courts of appeals were made final "in all cases arising under the criminal laws," and in certain other classes of cases, unless questions were certified to this court, or the whole case ordered up by writ of certiorari, as therein provided. American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 380, 37 L. Ed. 486; United States *v.* Rider, 163 U. S. 132, 138, 41 L. Ed. 101.

78. Folsom *v.* United States, 160 U. S. 121, 40 L. Ed. 363.

79. Contempt cases.—Doyle *v.* London Guarantee, etc., Co., 204 U. S. 599, 604, 51 L. Ed. 641.

80. Doyle *v.* London Guarantee, etc., Co., 204 U. S. 599, 604, 51 L. Ed. 641, following Bessette *v.* Conkey Co., 194 U. S. 324, 48 L. Ed. 997.

81. Doyle *v.* London Guarantee, etc., Co., 204 U. S. 599, 606, 51 L. Ed. 641.

82. Bessette *v.* Conkey Co., 194 U. S. 324, 325, 48 L. Ed. 997, reaffirmed in In the Matter of Lewis, 202 U. S. 614, 50 L. Ed. 1172; In re Christensen Engineering Co., 194 U. S. 458, 48 L. Ed. 1072.

83. Bessette *v.* Conkey Co., 194 U. S. 324, 325, 48 L. Ed. 997, reaffirmed in In the Matter of Lewis, 202 U. S. 614, 50 L. Ed. 1072.

84. Doyle *v.* London Guarantee Co., 204 U. S. 599, 51 L. Ed. 641, discussing at great length Bessette *v.* Conkey Co., 194 U. S. 324, 48 L. Ed. 997; In re Chris-

(3) *Writ of Scire Facias upon Recognizance.*—A writ of scire facias upon a recognizance to answer a criminal charge is a case "arising under the criminal laws," of which the jurisdiction of the circuit court of appeals is made final by the act of March 3, 1891, c. 517, § 6, 26 Stat. 828.[85]

f. *Cases Arising under Patent Laws.*—Judgments and decrees of the circuit court of appeals in all cases arising under the patent laws are made final by § 6 of the judiciary act of March 3, 1891.[86]

g. *Jurisdiction Dependent on Citizenship*—(1) *In General.*—By the act of March 3, 1891 (26 Stat. 826, c. 517), establishing the circuit courts of appeals, the jurisdiction of this court over an appeal from a circuit court, in cases dependent upon diverse citizenship, was taken away.[87] The act provides, in § 6, that the circuit courts of appeals shall have appellate jurisdiction to review judgments and decrees of the circuit courts in all cases in which a direct appeal is not allowed by § 5 to this court, and that the judgments and decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely on diversity of citizenship.[88] The jurisdiction referred to is

tensen Engineering Co., 194 U. S. 458, 48 L. Ed. 1172.

85. Writ of scire facias upon recognizance.—Hunt *v.* United States, 166 U. S. 424, 425, 41 L. Ed. 1063, reaffirmed in United States *v.* McGlashan, 170 U. S. 703, 42 L. Ed. 1218.

A writ of scire facias upon a recognizance to answer to a charge of crime, even if it be, technically considered, a civil action, and only incidental and collateral to the criminal prosecution, is certainly a case arising under the criminal laws; for it is a suit to enforce the penalty of a recognizance taken to secure the appearance of the principal to answer the charge and to abide any sentence against him; the provision of § 1014 of the Revised Statutes, under which the recognizance in suit was taken, is contained in chapter 18 of title 13 of the Revised Statutes, under the head of "Criminal Procedure," and in the first of the sections regulating arrest, bail, indictments, pleadings, commitments, challenges, witnesses, trial, verdict, sentence and execution, in criminal cases; and this recognizance is, as it is described in § 1020, a "recognizance in a criminal cause." Hunt *v.* United States, 166 U. S. 424, 426, 427, 41 L. Ed. 1063, reaffirmed in United States *v.* McGlashan, 170 U. S. 703, 42 L. Ed. 1218.

86. Cases arising under patent laws.—Cary Mfg. Co. *v.* Acme Flexible Clasp Co., 187 U. S. 427, 47 L. Ed. 244, citing Robinson *v.* Caldwell, 165 U. S. 359, 41 L. Ed. 745; American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 45 L. Ed. 859; Huguley Mfg. Co. *v.* Galeston Cotton Mills, 184 U. S. 290, 46 L. Ed. 546; Ayres *v.* Polsdorfer, 187 U. S. 585, 47 L. Ed. 314.

87. Jurisdiction dependent on citizenship in general.—Wauton *v.* DeWolf, 142 U. S. 138, 140, 35 L. Ed. 965; Howard *v.* United States, 184 U. S. 676, 680, 46 L. Ed. 754, 26 Stat. 828, § 6.

88. Huguley Mfg. Co. *v.* Galeton Cotton Mills, 184 U. S. 290, 294, 46 L. Ed. 546, reaffirmed in Harding *v.* Hart, 187 U. S. 638, 47 L. Ed. 344; Spencer *v.* Duplan Silk Co., 191 U. S. 526, 48 L. Ed. [illegible] firmed in Empire, etc., Min. Co. *v.* Bunker Hill, etc., Min. Co., 200 U. S. 613, 50 L. Ed. 620; Russell *v.* Russell, 200 U. S. 613, 50 L. Ed. 620; Warder *v.* Loomis, 197 U. S. 619, 49 L. Ed. 909; Watkins *v.* American Nat. Bank, 199 U. S. 599, 50 L. Ed. 327; Transportation Co. *v.* Mobile, 199 U. S. 604, 50 L. Ed. 330, citing Colorado, etc., Min. Co. *v.* Turck, 150 U. S. 138, 37 L. Ed. 1030; Borgmeyer *v.* Idler, 159 U. S. 408, 40 L. Ed. 199; Press Pub. Co. *v.* Monroe, 164 U. S. 105, 41 L. Ed. 367; Cochran *v.* Montgomery County, 199 U. S. 260, 50 L. Ed. 182; Empire, State-Idaho Min., etc., Co. *v.* Hanley, 198 U. S. 292, 298, 49 L. Ed. 1056; Mexican Central R. Co. *v.* Eckman, 187 U. S. 429, 433, 47 L. Ed. 245; Continental National Bank *v.* Buford, 191 U. S. 119, 122, 48 L. Ed. 119; Kimball *v.* Chicago, etc., Co., 194 U. S. 631, 48 L. Ed. 1158; Warder *v.* Loomis, 197 U. S. 619, 49 L. Ed. 909; Pope *v.* Louisville, etc., R. Co., 173 U. S. 573, 576, 43 L. Ed. 814.

"In this case appellants did not attempt to take an appeal directly to this court from the circuit court, nor could they have done so since no question was so raised as to bring the case within either of the classes named in § 5. Cornell *v.* Green, 163 U. S. 75, 41 L. Ed. 76. The ground on which the jurisdiction of the circuit court was invoked was solely diversity of citizenship, and the record does not show anything to the contrary, so that the decree of the circuit court of appeals cannot be regarded otherwise than as made final by the statute." Huguley Mfg. Co. *v.* Galeton Cotton Mills, 184 U. S. 290, 295, 46 L. Ed. 546, reaffirmed in Harding *v.* Hart, 187 U. S. 638, 47 L. Ed. 344.

This court has no jurisdiction to review the judgment of the circuit court of appeals affirming the judgment of the circuit court dismissing the cause in this court for failure of the record to show

the jurisdiction of the circuit court as originally invoked.[89]

When Questions under § 5 Are Also Raised.—The judgment of the circuit court of appeals is final if the jurisdiction of the circuit court were originally invoked solely upon the ground of citizenship.[90] And this is true although another ground of jurisdiction might be developed in the course of the proceedings, as it must appear at the outset that the suit is one of that character of which the circuit court could properly take cognizance at the time its jurisdiction is invoked.[91] The circuit court of appeals has power to review the judg-

that the suit could have been maintained in the circuit court in the name of the assignor. And the jurisdiction is none the less dependent on diverse citizenship as between complainant and defendant, because it might be defeated if the complainant did not bring himself within the restriction. "The diverse citizenship of the assignors of the claims was not another ground of jurisdiction than the diverse citizenship of complainant and defendant, and the sixth section, in referring to cases in which the jurisdiction is dependent entirely on diverse citizenship between the opposite parties to the suit or controversy, refers to cases where no other distinct ground of jurisdiction is relied on. It frequently happens that more than one ground is set up as between the same parties, and also separate and different grounds in respect of one or more of several parties." Benjamin *v.* New Orleans, 169 U. S. 161, 164, 42 L. Ed. 700; Board of Supervisors *v.* Thompson, 196 U. S. 637, 49 L. Ed. 630.

In any case in which the jurisdiction of the circuit court depends entirely on the citizenship of the parties, and in which the jurisdiction of that court is not in issue, the appeal given from its judgments and decrees, whether final or interlocutory, lies to the circuit court of appeals only; and the judgments of the latter court are final, unless either that court certifies questions or propositions of law to this court, or else this court, by certiorari or otherwise, orders the whole case to be sent up for its review and determination. American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 382, 37 L. Ed. 486; Benjamin *v.* New Orleans, 169 U. S. 161, 42 L. Ed. 700.

Death by wrongful act.—Since the passage of the act of March 3, 1891 (26 Stat. at L. 826, ch. 517, U. S. Comp. Stat. 1901, p. 547), the federal supreme court has no jurisdiction to review the judgments or decrees of the district and circuit courts directly by appeal or writ of error in cases pending in the circuit court to recover damages for death by wrongful act, where the jurisdiction of the circuit court rested on diversity of citizenship. Ex parte Glaser, 198 U. S. 171, 49 L. Ed. 1000.

Removal of causes.—Where a suit is removed from the state court to the circuit court of the United States because of prejudice or local influence, the judgment of the circuit court of appeals is final and not subject to review by the supreme court, as such a case is one where the jurisdiction is dependent entirely upon the opposite parties to it being citizens of different states. Cochran *v.* Montgomery County, 199 U. S. 260, 50 L. Ed. 182.

National bank act.—Under the judiciary act of March 3, 1891, the judgment of the circuit court of appeals is final in an action brought in a circuit court of the United States by a national bank against a banking corporation of another state where no federal questions are presented upon which the suit depends, and the only ground of jurisdiction is diversity of citizenship. The mere fact that the complaining bank is organized under the national banking law does not render the controversy one arising under the laws of the United States. Continental National Bank *v.* Buford, 191 U. S. 119, 48 L. Ed. 119, reaffirmed in Kimball *v.* Chicago, etc., Co., 194 U. S. 631, 48 L. Ed. 1158; Warder *v.* Loomis, 197 U. S. 619, 49 L. Ed. 909; Russell *v.* Russell, 200 U. S. 613, 50 L. Ed. 620.

89. Colorado, etc., Min. Co. *v.* Turck, 150 U. S. 138, 37 L. Ed. 1030; Press Pub. Co. *v.* Monroe, 164 U. S. 105, 41 L. Ed. 367; Ex parte Jones, 164 U. S. 691, 41 L. Ed. 601; American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 45 L. Ed. 859; Arkansas *v.* Kansas, etc., Coal Co., 183 U. S. 185, 46 L. Ed. 144; Huguley Mfg. Co. *v.* Galeton Cotton Mills, 184 U. S. 290, 293, 46 L. Ed. 546, reaffirmed in Harding *v.* Hart, 187 U. S. 638, 47 L. Ed. 344; Ayres *v.* Polsdorfer, 187 U. S. 585, 588, 47 L. Ed. 314.

90. Ex parte Jones, 164 U. S. 691, 41 L. Ed. 601, citing Colorado, etc., Min. Co. *v.* Turck, 150 U. S. 138, 37 L. Ed. 1030; Borymeyer *v.* Idler, 159 U. S. 408, 40 L. Ed. 199.

91. Colorado, etc., Min. Co. *v.* Turck, 150 U. S. 138, 37 L. Ed. 1030; Ex parte Jones, 164 U. S. 691, 693, 41 L. Ed. 601; Third Street, etc., R. Co. *v.* Lewis, 173 U. S. 456; Pope *v.* Louisville, etc., R. Co., 173 U. S. 573, 578, 43 L. Ed. 814; Ayers *v.* Polsdorfer, 187 U. S. 585, 588, 47 L. Ed. 314, citing and explaining at length Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 45 L. Ed. 280, reaffirmed in Wirgman *v.* Persons, 196 U. S. 636, 49 L. Ed. 629.

ment of the circuit court in every case in which the jurisdiction of that court attaches solely by reason of diverse citizenship, notwithstanding constitutional questions may have arisen after the jurisdiction attached.[92]

(2) *Construction of Term "Aliens."*—The terms "aliens" as used in § 6 of the judiciary act of March 3, 1891 making the judgments and decrees of the circuit court of appeals final in cases in which the jurisdiction is dependent entirely on the opposite parties to the suit or controversy being citizens of different states or aliens and citizens of the United States, embraces subjects or citizens of foreign countries, and not merely persons resident in this country, who owe allegiance to another.[93]

(3) *Rule Where Jurisdiction Is Not Dependent Solely on Diversity of Citizenship.*—**In General.**—When the jurisdiction of the circuit court is invoked on the ground of diversity of citizenship, and in the course of the proceedings it is claimed that a state statute or constitution is in contravention of the constitution of the United States, the case may be taken directly to the supreme court for review, or it may be reviewed by the circuit court of appeals, but if taken to the latter court, its decree is final.[94]

The rules have been summed up as follows: When the jurisdiction of

92. American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 280, 45 L. Ed. 859.

Where the plaintiff invokes the jurisdiction of the circuit court solely upon the ground of diverse citizenship, and where the claim of the invalidity of a state statute under the constitution of the United States came from the defendant or arose after the filing of the petition or during the progress of the suit, then the judgment of the circuit court of appeals is final within the meaning of the sixth section of the act of 1891, 26 Stat. 826, 828, ch. 517, declaring that "the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States or citizens of different states." Colorado, etc., Min. Co. *v.* Turck, 150 U. S. 138, 37 L. Ed. 1030; Borgmeyer *v.* Idler, 159 U. S. 408, 414, 40 L. Ed. 199; Ex parte Jones, 164 U. S. 691, 693, 41 L. Ed. 601; Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 479, 45 L. Ed. 280, explained in Ayers *v.* Polsdorfer, 187 U. S. 585, 589, 47 L. Ed. 314, in a lengthy opinion by Mr. Justice McKenna.

"Section 6 provides that the circuit courts of appeals shall exercise appellate jurisdiction to review the final decisions of the district and circuit courts 'in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law, and the judgments or decrees of the circuit courts of appeals shall be final in all cases in which the jurisdiction is dependent entirely upon the opposite parties to the suit or controversy being aliens or citizens of the United States or citizens of different states.' The jurisdiction referred to is the jurisdiction of the circuit court, and as the judgment of the court of appeals is made final in all cases in which the jurisdiction of the circuit court attaches solely by reason of diverse citizenship, it follows that the court of appeals has power to review the judgment of the circuit court in every such case, notwithstanding constitutional questions may have arisen after the jurisdiction of the circuit court attached, by reason whereof the case became embraced by § 5." American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 280, 45 L. Ed. 859.

93. Construction of term "aliens."—Hennessy *v.* Richardson Drug Co., 189 U. S. 25, 47 L. Ed. 697.

94. Rule where jurisdiction is not dependent solely on diversity of citizenship.—Ayres *v.* Polsdorfer, 187 U. S. 585, 590, 47 L. Ed. 314, reaffirmed in Wirgman *v.* Persons, 196 U. S. 636, 49 L. Ed. 629.

Thus, it was held, in Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 45 L. Ed. 280, where the jurisdiction of the circuit court rested on diverse citizenship, but the state statute involved was claimed in defense to be in contravention of the constitution of the United States, that a writ of error could be taken directly from this court to revise the judgment of the circuit court, although it was also ruled that the plaintiff might have carried the case to the circuit court of appeals, and that if a final judgment were rendered by that court against him, he could not thereafter have invoked the jurisdiction of this court directly on another writ of error to review the judgment of the circuit court. But this case is explained in Ayres *v.* Polsdorfer, 187 U. S. 585, 589, 47 L. Ed. 314.

Where the jurisdiction of the circuit court rests on diverse citizenship, and not on any other ground, if on appeal the circuit court of appeals decide the case, its decision is final, and the interposition of the supreme court of the United States can only be invoked by certiorari. This is so notwithstanding one of the defenses was that an ordinance was in contravention of the constitution of the United States. American Sugar Ref. Co. *v.* New

the circuit court is invoked solely on the ground of diversity of citizenship two classes of cases can arise, one in which the questions expressed in § 5 appear in the course of the proceedings and one in which other federal questions appear. Cases of the first class may be brought to this court directly or may be taken to the circuit court of appeals. But if taken to the latter court they cannot then be brought here. Cases of the second class must be taken to the circuit court of appeals and its judgment will be final.[95] If after the jurisdiction of the circuit court attaches on the ground of diversity of citizenship, under the circuit court of appeals act of March 3, 1891, issues are raised, the decision of which brings the case within either of the classes set forth in § 5, then the case may be brought directly to this court; although it may be carried to the circuit court of appeals, in which event the final judgment of that court could not be brought here as of right.[96] But if the jurisdiction of the circuit court rests solely on the ground that the suit arises under the constitution, laws or treaties of the United States, under the circuit court of appeals act of March 3, 1891, then the jurisdiction of this court is exclusive, but if it is placed on diverse citizenship, and also on grounds independent of that, then, if carried to the court of appeals, the decision of that court would not be made final, and appeal or writ of error would lie.[97]

Although the case is one arising under the copyright laws of the United States, and therefore may be appealed to this court from the circuit court of appeals, yet where it appears that the jurisdiction of the circuit court was obtained and exercised solely because of the parties being citizens of different states, the judgment of the circuit court of appeals is final.[98]

Corporation Organized under Acts of Congress.—The judgment of the circuit court of appeals is not made final in a case where the jurisdiction of the circuit court is not dependent entirely upon the fact that the opposite parties to the suit were one of them an alien and the other a citizen of the United States, or one of them a citizen of one state and the other a citizen of a different state, but the jurisdiction of the circuit court depends also upon the fact that the defendant being a corporation created by an act of congress, the suit arose under a

Orleans, 181 U. S. 277, 45 L. Ed. 859, citing and approving Colorado, etc., Min. Co. *v.* Turck, 150 U. S. 138, 37 L. Ed. 1030; Press Pub. Co. *v.* Monroe, 164 U. S. 105, 41 L. Ed. 367, and Ex parte Jones, 164 U. S. 691, 694, 41 L. Ed. 601.

In Colorado, etc., Min. Co. *v.* Turck, 150 U. S. 138, 37 L. Ed. 1030, the jurisdiction of the circuit court was invoked on the ground of diversity of citizenship, but the defendant claimed to have set up in defense a federal question arising under § 2322 of the Revised Statutes of the United States, and on that ground insisted that the judgment of the circuit court of appeals in the case was not final. Rejecting the contention and dismissing the writ of error, this court held, that before the defense under § 2322 of the Revised Statutes had been set up jurisdiction had "already attached and could not be affected by subsequent developments." Jurisdiction, it was said, "depended entirely upon diverse citizenship when the suit was commenced, and to that point of time the inquiry must necessarily be referred." The same idea was expressed in subsequent cases though in somewhat different language. But a distinction was not precisely made between the questions embraced in § 5 and other federal questions. That distinction was presented in Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 45 L. Ed. 280; Ayres *v.* Polsdorfer, 187 U. S. 585, 588, 47 L. Ed. 314, reaffirmed in Wirgman *v.* Persons, 196 U. S. 636, 49 L. Ed. 629.

95. Ayres *v.* Polsdorfer, 187 U. S. 585, 590, 47 L. Ed. 314, reaffirmed in Wirgman *v.* Persons, 196 U. S. 636, 49 L. Ed. 629, citing Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 45 L. Ed. 280, as the case presenting the distinction between the questions embraced in § 5 and other federal questions.

96. Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 45 L. Ed. 280; Huguley Mfg. Co. *v.* Galeton Cotton Mills, 184 U. S. 200, 295, 46 L. Ed. 546, reaffirmed in Harding *v.* Hart, 187 U. S. 638, 47 L. Ed. 344. But see the opinion of Mr. Justice McKenna in Ayres *v.* Polsdorfer, 187 U. S. 589, 47 L. Ed. 314.

97. American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 45 L. Ed. 859; Huguley Mfg. Co. *v.* Galeton Cotton Mills, 184 U. S. 290, 295, 46 L. Ed. 546, reaffirmed in Harding *v.* Hart, 187 U. S. 638, 47 L. Ed. 344.

98. Press Pub. Co. *v.* Monroe, 164 U. S. 105, 41 L. Ed. 367.

law of the United States, without reference to the citizenship of the plaintiff.[99]

(4) *Review of Ancillary, Auxiliary or Supplemental Proceedings.*—When an action or suit is commenced by a receiver, appointed by a circuit court, to accomplish the ends sought and directed by the suit in which the appointment was made, such action or suit is regarded as ancillary so far as the jurisdiction of the circuit court as a court of the United States is concerned; and we have repeatedly held that jurisdiction of these subordinate actions or suits is to be attributed to the jurisdiction on which the main suit rested; and hence that where jurisdiction of the main suit is predicated on diversity of citizenship, and the decree therein is, therefore, made final in the circuit court of appeals, the judgments and decrees in the ancillary litigation are also final.[1] Manifestly, the de-

99. Northern Pac. R. Co. *v.* Amato, 144 U. S. 465, 36 L. Ed. 506, citing and reconciling Lau Ow Bew *v.* United States, 144 U. S. 47, 36 L. Ed. 340; McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893; Chicago, etc., R. Co. *v.* Roberts, 141 U. S. 690, 35 L. Ed. 905. But see this case reviewed and explained in Ayres *v.* Polsdorfer, 187 U. S. 589, 47 L. Ed. 314.

In Sonnentheil *v.* Moerlein Brewing Co., 172 U. S. 401, 43 L. Ed. 492, an action had been brought in the circuit court of the United States for the eastern district of Texas by a citizen of Texas, against an Ohio corporation and a United States marshal, the jurisdiction depending as to one defendant on diverse citizenship and as to the other on the case arising under the constitution and laws of the United States, and the question was whether the judgment of the circuit court of appeals was made final by the act of March 3, 1891 which we held it was not, as the jurisdiction was not dependent entirely upon the opposite parties to the suit being citizens of different states. Distinguished in Chicago, etc., R. Co. *v.* Martin, 178 U. S. 245, 248, 44 L. Ed. 1055.

1. Review of ancillary, auxiliary or supplemental proceedings.—Rouse *v.* Letcher, 156 U. S. 47, 39 L. Ed. 341; Gregory *v.* Van Ee, 160 U. S. 643, 40 L. Ed. 566; Carey *v.* Houston, etc., R. Co., 161 U. S. 115, 40 L. Ed. 638; Pope *v.* Louisville, etc., R. Co., 173 U. S. 573, 577, 43 L. Ed. 814; Gableman *v.* Peoria, etc., R. Co., 179 U. S. 335, 342, 45 L. Ed. 220.

Proceedings on intervention.—In Rouse *v.* Letcher, 156 U. S. 47, 39 L. Ed. 341, we held that if the decree of a circuit court of appeals is final under the sixth section of the judiciary act of March 3, 1891, a decree upon an intervention in the same suit must be regarded as equally so because the intervention is entertained in virtue of jurisdiction in the circuit court already subsisting. It was pointed out that where property is in the actual possession of the circuit court, this draws to it the right to decide upon conflicting claims for its ultimate possession and control, and that where assets are in the course of administration all persons entitled to participate may come in under the jurisdiction acquired between the original parties, by ancillary or supplemental proceedings, even though jurisdiction in the circuit court would be lacking if such proceedings had been independently prosecuted; that the exercise of the power of disposition by a circuit court of the United States over such an intervention is the exercise of power invoked at the institution of the main suit; and that it is to that point of time that the inquiry as to the jurisdiction of the circuit court must necessarily be referred. Therefore, that, if the decree in the main suit were final, decrees in accessory and subordinate proceedings would be also final, and appeals therefrom could not be sustained. Gregory *v.* Van Ee, 160 U. S. 643, 645, 40 L. Ed. 566.

Where the jurisdiction of the circuit court of appeals is invoked throughout the litigation upon the ground of diverse citizenship, and a bill in equity is filed by a corporation or the stockholders of a corporation in the circuit court to set aside a final decree of that court against the corporation in a foreclosure suit upon the ground that such a decree was obtained by collusion and fraud, and the court had no jurisdiction to make it, as this bill must be regarded as ancillary, auxiliary or supplemental to the foreclosure suit, or, as it were, in continuation thereof, the decree of the circuit court of appeals therein is made final by the 6th section of the act of March 3, 1891, and therefore an appeal to this court from that decree will not lie. Carey *v.* Houston, etc., R. Co., 161 U. S. 115, 40 L. Ed. 638, citing Rouse *v.* Letcher, 156 U. S. 47, 39 L. Ed. 341; Colorado, etc., Min. Co. *v.* Turck, 150 U. S. 138, 37 L. Ed. 1030; Gregory *v.* Van Ee, 160 U. S. 643, 40 L. Ed. 566; Murphy *v.* Colorado Paving Co., 166 U. S. 719, 41 L. Ed. 1188; Darragh *v.* Manufacturing Co., 169 U. S. 735, 42 L. Ed. 1216.

Pope v. Louisville reviewed.—In Pope *v.* Louisville, etc., R. Co., 173 U. S. 573, 43 L. Ed. 814, the right of appeal to this court from the circuit court of appeals was asserted on the ground that the case arose under the constitution and laws of the United States, because Pope was a receiver of a federal court. We decided that the suit was ancillary to the original cases in which the receiver was appointed, and that the jurisdiction was dependent

cree in the main suit cannot be revised through an appeal from a decree on ancillary or supplemental proceedings, thus accomplishing indirectly what could not be done directly. And even if the decree on such proceedings may be in itself independent of the controversy between the original parties, yet if the proceedings are entertained in the circuit court because of its possession of the subject of the ancillary or supplemental application, the disposition of the latter must partake of the finality of the main decree, and cannot be brought here on the theory that the circuit court exercised jurisdiction independently of the ground of jurisdiction which was originally invoked as giving cognizance to that court as a court of the United States.[2]

Judgment upon Claims of Intervenors.—In accordance with that section of the circuit court of appeals act providing that the decisions of that court shall be final in all cases in which the jurisdiction of the court is dependent entirely upon the opposite parties being citizens of different states, it was held, that the judgment of the court of appeals upon the claim of an intervenor, set up in a circuit court against the receiver of a railroad by that court in a suit for the foreclosure of a mortgage upon the road, is final under this section. "Nor can the conclusion be otherwise because separate appeals may be allowed on such interventions. Decrees upon controversies separable from the main suit may indeed

on the ground of jurisdiction in those cases, and we also held, that the receiver's orders of appointment were not equivalent to laws of the United States in the meaning of the constitution, and that the mere order of a federal court, sitting in chancery, appointing a receiver, did not in itself form adequate ground of jurisdiction. We said: "The bill nowhere asserted a right under the constitution or laws of the United States, but proceeded on common-law rights of action. We cannot accept the suggestion that the mere order of a federal court, sitting in chancery, appointing a receiver on a creditor's bill, not only enables the receiver to invoke federal jurisdiction, but to do this independently of the ground of jurisdiction of the suit in which the order was entered, and thereby affect the finality of decrees in the circuit court of appeals in proceedings taken by him. The validity of the order of the appointment of the receiver in this instance depended on the jurisdiction of the court that entered it, and that jurisdiction, as we have seen, depended exclusively upon the diverse citizenship of the parties to the suits in which the appointment was made. The order, as such, created no liability against defendants, nor did it tend in any degree to establish the receiver's right to a money decree, nor to any other remedy prayed for in the amended bill. The liability of defendants arose under general law, and was neither created nor arose under the constitution or laws of the United States." The question there was as to whether or not the decision of the circuit court of appeals was made final by the sixth section of the judiciary act of March 3, 1891, and we held that it was, and dismissed the appeal. We could not, however, have arrived at that conclusion if the jurisdiction had rested on the ground that the case arose under the constitution or laws of the United States, as such cases are not among the classes enumerated in that section, in which the decisions of that court are made final. Approved in Gableman *v.* Peoria, etc., R. Co., 179 U. S. 335, 341, 342, 45 L. Ed. 220; Bausman *v.* Dixon, 173 U. S. 113, 43 L. Ed. 633.

Suits in nature of creditors' bills.—"The suits in which this receiver was appointed were in the nature of creditors' bills alleging an indebtedness due from the Atlantic Company; the insolvency of that company; that certain corporations had in their possession assets of the Atlantic Company; and praying for the appointment of a receiver; the marshaling of assets; the winding up of the Atlantic Company, and the application of its assets to the payment of its debts. The only ground of federal jurisdiction set up in the bills was diversity of citizenship, and if the decrees therein had been passed on by the circuit court of appeals, the decision of that court would have been final under the statute. And as this suit was in effect merely in collection of alleged assets of the Atlantic Company, it must be regarded as auxiliary, and the same finality attaches to the decree of the circuit court of appeals therein. And this is true although another ground of jurisdiction might be developed in the course of the proceedings, as it must appear at the outset that the suit is one of that character of which the circuit court could properly take cognizance at the time its jurisdiction is invoked. Colorado, etc., Min. Co. *v.* Turck, 150 U. S. 138, 37 L. Ed. 1030; Ex parte Jones, 164 U. S. 691, 693, 41 L. Ed. 601; Third Street R. Co. *v.* Lewis, 173 U. S. 457, 43 L. Ed. 766." Pope *v.* Louisville, etc., R. Co., 173 U. S. 573, 577, 578, 43 L. Ed. 814.

2. Gregory *v.* Van Ee, 160 U. S. 643, 646, 40 L. Ed. 566.

be separately reviewed but the jurisdiction of the circuit court over such controversies is not, therefore, to be ascribed to grounds independent of jurisdiction in the main suit. We are unable to attribute to congress the intention of allowing final orders on every incidental controversy, involving over one thousand dollars, to be brought to this court for review, while denying such review of the principal decree, although involving millions."[3]

h. *Effect of Bankruptcy Act.*—The fifth and sixth sections of the judiciary act of March 3, 1891, were not changed by the bankruptcy act. The sixth section gives the courts of appeals jurisdiction to review by appeal or writ of error final decisions in the district and circuit courts in cases other than those provided for in the fifth section.[4] Apart from § 25, the circuit courts of appeals have jurisdiction on petition to superintend and revise any matter of law in bankruptcy proceedings and also jurisdiction of controversies over which they would have appellate jurisdiction in other cases. The decisions of those courts might be reviewed here on certiorari, or in certain cases by appeal, under § 6 of the act of 1891.[5]

i. *Finality of Judgments and Decrees*[6]—(1) *In General.*—The general rule is that the circuit court of appeals has no jurisdiction to review interlocutory judgments, orders and decrees. This court is governed by the same principles in this regard as other courts of the United States.[7] The circuit court of appeals

3. Rouse *v.* Fletcher, 156 U. S. 47, 50, 39 L. Ed. 341.

Where the jurisdiction of the circuit court over a petition of intervention filed in a suit for the foreclosure of a mortgage, is clearly referable to its jurisdiction of the equity suit which depended wholly upon diverse citizenship, because this intervention is nothing more than an application for the allowance of a claim under the foreclosure proceedings and as against the property or fund being administered by the court, and therefore the case comes directly within recent decisions of this court that under such circumstances the judgments and decrees of the circuit courts of appeals are made final by § 6 of the judiciary act of March 3, 1891. Rouse *v.* Hornsby, 161 U. S. 588, 40 L. Ed. 817, citing Rouse *v.* Letcher, 156 U. S. 47, 39 L. Ed. 341; Gregory *v.* Van Ee, 160 U. S. 643, 40 L. Ed. 566; Carey *v.* Houston, etc., R. Co., 161 U. S. 115, 40 L. Ed. 638.

In Rouse *v.* Letcher, 156 U. S. 47, 50, 39 L. Ed. 341, we have already adjudged that the sixth section authorizes no appeal to this court from a decree of a circuit court of appeals in an ancillary or supplemental suit or proceeding in the circuit court, where the jurisdiction of that court in the main or original suit depends entirely upon the parties being citizens of different states. In that case the main foreclosure suit was between citizens of different states, and receivers had been appointed. A proceeding by intervention was afterwards instituted in the circuit court against the receivers, who appealed to this court from the decree of the circuit court of appeals against them, and the appeal was dismissed because the opposite parties to the foreclosure suit were citizens of different states, and the decree was therefore made final by the statute. Rouse *v.* Letcher, 156 U. S. 47, 39 L. Ed. 341, was followed in Gregory *v.* Van Ee, 160 U. S. 643, 646, 40 L. Ed. 566, and it was thus observed. Carey *v.* Houston, etc., R. Co., 161 U. S. 115, 128, 129, 40 L. Ed. 638, reaffirmed in Murphy *v.* Colorado Paving Co., 166 U. S. 719, 41 L. Ed. 1188; Darragh *v.* Manufacturing Co., 169 U. S. 735, 42 L. Ed. 1216.

4. Effect of bankruptcy act.—Elliott *v.* Toeppner, 187 U. S. 327, 334, 47 L. Ed. 200, following Bardes *v.* Hawarden First Nat. Bank, 175 U. S. 526, 44 L. Ed. 261. See the title BANKRUPTCY.

5. Mueller *v.* Nugent, 184 U. S. 1, 46 L. Ed. 405; Huntington *v.* Saunders, 163 U. S. 319, 41 L. Ed. 174; Aztec Min. Co. *v.* Ripley, 151 U. S. 79, 81, 38 L. Ed. 80; Denver First Nat. Bank *v.* Klug, 186 U. S. 203, 205, 46 L. Ed. 1127.

6. Finality of judgments and decrees.—For particular judgments and decrees, see post, "Decisions Reviewable," IV.

7. In general.—26 Stat. 826, 828, c. 517, § 6; Guarantee Co. *v.* Mechanics' Savings Bank, etc., Co., 173 U. S. 582, 585, 43 L. Ed. 818; McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893; Kingman Co. *v.* Western Mfg. Co., 170 U. S. 675, 677, 42 L. Ed. 1192. For specific instances, see post, "Decisions Reviewable," IV.

By § 6, the circuit courts of appeals are empowered to review final decisions of the district and circuit courts, except where cases are carried, under § 5, directly to this court, but by the seventh section, as amended by the act of February 19, 1895, c. 96, 28 Stat. 666, jurisdiction is given to the courts of appeals from appeals from interlocutory orders in injunction proceedings. Kirwan *v.* Murphy, 170 U. S. 205, 42 L. Ed. 1009; Kingman

act of 1891 gives no right to review other than final judgments in the district and circuit courts, except in injunction orders, as provided in § 7 of the act.[8]

(2) *Interlocutory Orders Granting or Refusing Injunctions.*—**In General.**—But § 7 of the act of March 3, 1891, c. 826, creating circuit courts of appeal, 26 Stat. 517, as amended February 18, 1895, c. 96, 28 Stat. 666, provides: "That where, upon a hearing in equity in a district court or a circuit court, an injunction shall be granted, continued, refused or dissolved by an interlocutory order or decree, or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory order or decree granting, continuing, refusing, dissolving or refusing to dissolve an injunction to the circuit court of appeals: Provided, that the appeal must be taken within thirty days from the entry of such order or decree, and it shall take precedence in the appellate court; and the proceedings in other respects in the court below shall not be stayed unless otherwise ordered by that court during the pendency of such appeal; and provided further, that the court below may in its discretion require, as a condition of the appeal, additional injunction bond."[9]

The manifest intent of this provision, read in the light of the previous practice in the courts of the United States, contrasted with the practice in courts of equity of the highest authority elsewhere, appears to this court to have been, not only to permit the defendant to obtain immediate relief from an injunction, the continuance of which throughout the progress of the cause might seriously affect his interests; but also to save both parties from the expense of further litigation, should the appellate court be of opinion that the plaintiff was not entitled to an injunction because his bill had no equity to support it.[10]

An interlocutory order appointing a receiver, standing alone, is not appealable from the circuit court to the circuit court of appeals, nor does it become so by the incorporation into it of a direction to the defendant, its officers, directors, agents and employees, to turn over and deliver to the receiver the property in their hands, under § 7 of the act of March 3, 1891, c. 826.[12]

& Co. *v.* Western Mfg. Co., 170 U. S. 675, 677, 42 L. Ed. 1192, reaffirmed in International Trust Co. *v.* Weeks, 193 U. S. 667, 48 L. Ed. 839.

8. McLish *v.* Roff, 141 U. S. 661, 668, 35 L. Ed. 893; Doyle *v.* London Guarantee, etc., Co., 204 U. S. 599, 608, 51 L. Ed. 641.

9. Interlocutory orders granting or refusing injunctions.—Highland Ave., etc., R. *v.* Columbus Equipment Co., 168 U. S. 627, 629, 42 L. Ed. 605; Kirwan *v.* Murphy, 170 U. S. 205, 209, 42 L. Ed. 1009; Smith *v.* Vulcan Iron Works, 165 U. S. 518, 520, 41 L. Ed. 810. For its present provision see act of June 6, 1900, ch. 803, as amended by act of Feb. 18, 1895, ch. 96, 28 Stat. L. 666.

10. Smith *v.* Vulcan Iron Works, 165 U. S. 518, 520, 41 L. Ed. 810.

12. Highland Ave., etc., R. Co. *v.* Columbian Equipment Co., 168 U. S. 627, 42 L. Ed. 605, distinguishing Smith *v.* Vulcan Iron Works, 165 U. S. 518, 41 L. Ed. 810; In re Tampa Suburban R. Co., 168 U. S. 583, 42 L. Ed. 589, on the ground that each of those cases proceeded upon the fact that there was a distinct order granting, continuing or dissolving an injunction, while in the case at bar there was no such order.

A writ of certiorari will not be issued by the supreme court of the United States to review interlocutory orders of the circuit court such as a preliminary restraining order, and an order appointing a receiver and continuing the injunction in aid of the receivership, on the ground that both these orders were void for want of power in the circuit judge to grant them outside of his circuit, because an appeal to the circuit court of appeals may be taken from these orders or from an order refusing to set them aside and dissolve the injunction. "By the seventh section of the judiciary act of March 3, 1891, c. 517, 26 Stat. 826, 828, as amended by the act of February 18, 1895, c. 96, 28 Stat. 666, it is provided: 'That where, upon a hearing in equity, in a district court or a circuit court, an injunction shall be granted, continued, refused or dissolved by an interlocutory order or decree or an application to dissolve an injunction shall be refused in a case in which an appeal from a final decree may be taken under the provisions of this act to the circuit court of appeals, an appeal may be taken from such interlocutory oring, dissolving or refusing to dissolve an injunction to the circuit court of appeals,'" and this even though the ques-

Fragmentary Appeals.—The provision of § 7 of the act of 1891, that where "upon a hearing in equity" in a circuit court "an injunction shall be granted or continued by an interlocutory order or decree," in a cause in which an appeal from a final decree might be taken to the circuit court of appeals, "an appeal may be taken from such interlocutory order or decree granting or continuing such injunction" to that court authorizes, according to its grammatical construction and natural meaning, an appeal to be taken from the whole of such interlocutory order or decree, and not from that part of it only which grants or continues an injunction.[13]

Orders of District Court of Alaska.—Reading the acts of Congress of June 6, 1900, 31 Stat. 321, c. 786, § 504, regulating appeals from the district court of Alaska, and § 7 of the judiciary act of March 3, 1891, as amended by the act of February 18, 1895, 28 Stat. 666, c. 96, and as further amended on June 6, 1900, 31 Stat. 660, c. 803, in pari materia, appeals from interlocutory orders from the said district court of Alaska appointing receivers may be prosecuted within sixty days from the entry of such order.[15]

Effect of Appeal.—The power of the appellate court over the cause, of which it has acquired jurisdiction by the appeal from the interlocutory decree, is not affected by the authority of the court appealed from, recognized in the last clause of the section, and often exercised by other courts of chancery, to take further proceedings in the cause, unless in its discretion it orders them to be stayed, pending the appeal.[16]

Scope of Review.—Under this section it has been decided that when an appeal is taken from an interlocutory order or decree granting or dissolving an injunction, the whole of such interlocutory order or decree is before the court of appeals for review, and not simply that part which grants or dissolves the injunction, and that on the hearing in the court of appeals, that court may consider and decide the case upon its merits.[17] In a suit in equity for the infringement of a patent, an appeal to the circuit court of appeals from an interlocutory order or decree of the circuit court, granting an injunction, and referring the case to a master to take an account of damages and profits, may be from the whole order or decree, and it is not restricted to that part of it which grants the injunction; and the circuit court of appeals, upon such an appeal, may consider and decide the merits of the case, and, if it decides them in the defendant's favor, may order the bill to be dismissed.[18]

tion of the jurisdiction of the circuit court is involved. And the appeal carries up the entire order, and the case may, indeed, on occasion, be considered and decided on its merits. In re Tampa Suburban R. Co., 168 U. S. 583, 42 L. Ed. 589, citing United States *v.* Jahn, 155 U. S. 109, 39 L. Ed. 87; Smith *v.* Vulcan Iron Works, 165 U. S. 518, 41 L. Ed. 810.

13. Smith *v.* Vulcan Iron Works, 165 U. S. 518, 524, 41 L. Ed. 810.

15. In re McKenzie, 180 U. S. 536, 45 L. Ed. 657.

16. Hovey *v.* McDonald, 109 U. S. 150, 160, 161, 27 L. Ed. 888; In re Haberman Mfg. Co., 147 U. S. 525, 37 L. Ed. 266; Smith *v.* Vulcan Iron Works, 165 U. S. 518, 525, 41 L. Ed. 810.

17. Smith *v.* Vulcan Iron Works, 165 U. S. 518, 41 L. Ed. 810; In re Tampa Suburban R. Co., 168 U. S. 583, 42 L. Ed. 589; Highland Ave., etc., R. Co. *v.* Columbia Equipment Co., 168 U. S. 627, 630, 42 L. Ed. 605; Ex parte National Enameling Co., 201 U. S. 156, 162, 50 L. Ed. 707.

In the case of In re Tampa Suburban R. Co., 168 U. S. 583, 42 L. Ed. 589, decided before the statute was amended, it was held, that an appeal would lie from an interlocutory order granting an injunction in connection with the appointment of a receiver and would bring up the entire order, including the appointment. In Highland Ave., etc., R. Co. *v.* Columbia Equipment Co., 168 U. S. 627, 42 L. Ed. 605, the order was confined to the appointment of the receiver and contained no injunction. In re McKenzie, 180 U. S. 536, 45 L. Ed. 657.

18. Smith *v.* Vulcan Iron Works Co., 165 U. S. 518, 520, 41 L. Ed. 810.

In Smith *v.* Vulcan Iron Works, 165 U. S. 518, 41 L. Ed. 810, it was held, that the circuit courts of appeals, on an appeal from an interlocutory order or decree of the circuit courts granting an injunction and ordering an accounting in a patent suit, might consider and decide the case on its merits, and thereupon render or direct a final decree dismissing the bill; and this course might be pursued in other cases. Mills *v.* Green, 159 U. S. 651, 40 L. Ed.

How Much of Cause Transferred.—Obviously that which is contemplated is a review of the interlocutory order, and of that only. It was not intended that the cause as a whole should be transferred to the appellate court prior to the final decree. The case, except for the hearing on the appeal from the interlocutory order, is to proceed in the lower court as though no such appeal had been taken, unless otherwise specially ordered.[19]

Mandamus and Prohibition.—Under the act of congress of June 6, 1900, 31 Stat. 660, c. 803, a plain and adequate remedy exists by appeal to the circuit court of appeals for the fifth circuit from an interloctuory order granting an injunction and hence neither a writ of mandamus nor prohibition will lie according to settled principles. After a final decree, an appeal to this court would lie in respect of the jurisdiction if the question were properly raised and certified, or if issues were raised and decided bringing the case within § 5 of the act of March 3, 1891; or to the circuit court of appeals.[20]

Hearing and Determination.—The power of the court of appeals to order the dismissal of the bill before answer filed, or proof taken, upon appeal from an order granting a temporary injunction must be determined on the circumstances of the particular case. If the showing made by the plaintiff be incomplete; if the order for the injunction be reversed, because injunction was not the proper remedy, or because under the particular circumstances of the case, it should not have been granted; or if other relief be possible, notwithstanding the injunction be refused, then, clearly, the case should be remanded for a full hearing upon pleadings and proofs. But if the bill be obviously devoid of equity upon its face, and such invalidity be incapable of remedy by amendment; or if, in a patent case, the patent manifestly fails to disclose a patentable novelty in the invention, to save a protracted litigation, the court may order the bill to be dismissed.[21]

But in a suit for infringement of a patent, the circuit court of appeals, should not on reversing the order of the circuit court, granting a preliminary injunction on ex parte affidavit, dismiss the bill, where it appears that the com-

293. Here, however, the court of appeals did not finally determine the case by its judgment, and whether the temporary injunction should be made permanent or not, was left to the circuit court to decide when the final decree was entered. Kirwan *v.* Murphy, 170 U. S. 205, 209, 42 L. Ed. 1009, reaffirmed in International Trust Co. *v.* Weeks, 193 U. S. 667, 48 L. Ed. 839.

19. Ex parte National Enameling Co., 201 U. S. 156, 50 L. Ed. 707, citing Smith *v.* Vulcan Iron Works, 165 U. S. 518, 41 L. Ed. 810; Mast, etc., Co. *v.* Stover Mfg. Co., 177 U. S. 485, 494, 44 L. Ed. 856, 860; S. C., 177 U. S. 495, 44 L. Ed. 861.

20. In re Huguley Mfg. Co., 184 U. S. 297, 301, 46 L. Ed. 549.

21. Mast, etc., Co. *v.* Stover Mfg. Co., 177 U. S. 485, 44 L. Ed. 856; Castner *v.* Coffman, 178 U. S. 168, 44 L. Ed. 1021; Mast, etc., Co. *v.* Stover Mfg. Co., 177 U. S. 485, 44 L. Ed. 856; Harriman *v.* Northern Securities Co., 197 U. S. 244, 287, 49 L. Ed. 739.

"In Mast, etc., Co. *v.* Stover Mfg. Co., 177 U. S. 485, 44 L. Ed. 861, we considered the question as to the power of a circuit court of appeals, in reviewing the action of a circuit court in allowing a temporary injunction pendente lite, upon affidavits, to consider the case upon the merits and direct a final decree dismissing the bill. It was held, that the propriety of the exercise of such a power must be determined from the circumstances of the particular case. And it was added: 'If the showing made by the plaintiff be incomplete; if the order for the injunction be reversed, because injunction was not the proper remedy, or because under the particular circumstances of the case it should not have been granted; or if other relief be possible, notwithstanding the injunction be refused, then clearly, the case should be remanded for a full hearing upon pleadings and proofs. But if the bill be obviously devoid of equity upon its face, and such invalidity be incapable of remedy by amendment, or if the patent manifestly fail to disclose a patentable novelty in the invention, we know of no reason why, to save a protracted litigation, the court may not order the bill to be dismissed.'" Castner *v.* Coffman, 178 U. S. 168, 183, 44 L. Ed. 1021.

In Smith *v.* Vulcan Iron Works, 165 U. S 518, 41 L. Ed. 810, the "interlocutory injunction was granted after answer and replication filed, a full hearing had upon pleadings and proofs, and an interlocutory decree entered adjudging the validity of the patent, the infringement and injunction, and a reference of the case to a

plainant had no chance prior to the hearing in the trial court, to inspect the affidavits of defendants, and was refused leave to rebut the affidavits.[22]

j. *Limitations upon Appeal.*—By § 11 of the act of March 3, 1891, c. 517, 26 Stat. 826, it is provided that "no appeal or writ of error by which any order, judgment or decree may be reviewed in the circuit courts of appeals under the provisions of this act shall be taken or sued out except within six months after the entry of the order, judgment or decree sought to be reviewed."[23] And while the language of § 11 refers to the entry of the order, judgment or decree, yet the meaning must be confined to final orders, judgments or decrees.[24] Within the meaning of this section, it is held that a judgment of the circuit court of appeals is not final so that the jurisdiction of the appellate court may be invoked, while it is under the control of the trial court through the pendency of a motion for a new trial. Therefore the limitation prescribed by this section does not commence to run until the motion for a new trial is overruled.[25]

k. *Double Appeals.*—**In General.**—The general intention of the circuit court of appeals act of March 3, 1891, was to distribute the appellate jurisdiction and to permit an appeal to only one court.[26] "The intention of the act in general was that the appellate jurisdiction should be distributed, and that there should not be two appeals, but in cases where the decisions of the courts of appeals are not made final, it is provided that 'there shall be of right an appeal or writ of error or review of the case by the supreme court of the United States where the matter in controversy exceeds one thousand dollars besides costs.'" But "the right of two appeals would exist in every case (the litigated matter having the requisite value), where the jurisdiction of the circuit court rested solely on the ground that the suit arose under the constitution, laws or treaties of the United States, if such cases could be carried to the circuit court of appeals, for their decisions would not come within the category of those made final."[27] It was not

master to take an account of profits and damages. In that case we held that, if the appellate court were of opinion that the plaintiff was not entitled to an injunction because his bill was devoid of equity, such court might, to save the parties from further litigation, proceed to consider and decide the case upon its merits, and direct a final decree dismissing the bill." Mast, etc., Co. *v.* Stover Mfg. Co., 177 U. S. 485, 494, 44 L. Ed. 856.

22. Suit for infringement of patent.—Brill *v.* Peckham, 189 U. S. 57, 47 L. Ed. 706, distinguishing Mast, etc., Co. *v.* Stover Mfg. Co., 177 U. S. 485, 44 L. Ed. 856. In this case, the court said: "The situation then is this: The order for a preliminary injunction was reversed as part of the decree directing the dismissal of the bill, and not independently of the grounds on which that conclusion rested. But the court of appeals had the power to vacate the preliminary injunction, and had only this been done, an appeal to this court could not have been taken, nor would a certiorari ordinarily have been granted in such circumstances." "Considering the peculiar attitude in which the case is presented, we prefer not to discuss the question how far the appellate courts are justified in reversing orders of the circuit courts granting preliminary injunctions, when their discretion has not been improperly exercised, and the order will be the decree of the circuit court of appeals reversed, and cause remanded to the circuit court with a direction to proceed to final hearing in due course; the latter court being left at liberty to deal with the preliminary injunction as it otherwise might but for this decree."

23. Limitations upon appeal.—Kingman & Co. *v.* Western Mfg. Co., 170 U. S. 675, 42 L. Ed. 1192, reaffirmed in International Trust Co. *v.* Weeks, 193 U. S. 667, 48 L. Ed. 839.

24. Kingman & Co. *v.* Western Mfg. Co., 170 U. S. 675, 677, 42 L. Ed. 1192, reaffirmed in International Trust Co. *v.* Weeks, 193 U. S. 667, 48 L. Ed. 839.

25. Kingman & Co. *v.* Western Mfg. Co., 170 U. S. 675, 42 L. Ed. 1192, reaffirmed in International Trust Co. *v.* Weeks, 193 U. S. 667, 48 L. Ed. 839.

26. Double appeals.—Robinson *v.* Caldwell, 165 U. S. 359, 41 L. Ed. 745; Huguley Mfg. Co. *v.* Galeton Cotton Mills, 184 U. S. 290, 295, 46 L. Ed. 546, reaffirmed in Harding *v.* Hart, 187 U. S. 638, 47 L. Ed. 344; Ayres *v.* Polsdorfer, 187 U. S. 585, 588, 47 L. Ed. 314.

27. American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 281, 45 L. Ed. 859; Spreckles Sugar Ref. Co. *v.* McClain, 192 U. S. 397, 48 L. Ed. 496.

Illustrative cases.—In Carter *v.* Roberts, 177 U. S. 496, 44 L. Ed. 861, it was held, "that when cases arise which are controlled by the construction or application of the constitution of the United States, a direct appeal lies to this court, and if

the purpose of the act to give a party who was defeated in a circuit court of the United States the right to have the case finally determined upon its merits both in this court and in the circuit court of appeals.[28] The act of March 3, 1891,

such cases are carried to the circuit courts of appeals, those courts may decline to take jurisdiction; or, where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment; or may decide the whole case in the first instance. But when the circuit court of appeals has acted on the whole case, its judgment stands unless revised by certiorari to or appeal from that court in accordance with the act of March 3, 1891. Robinson *v.* Caldwell, 165 U. S. 359, 41 L. Ed. 745; Holt *v.* Indiana Mfg. Co., 176 U. S. 68, 44 L. Ed. 374; United States *v.* Jahn, 155 U. S. 109, 39 L. Ed. 87; New Orleans *v.* Benjamin, 153 U. S. 411, 38 L. Ed. 764; Benjamin *v.* New Orleans, 169 U. S. 161, 42 L. Ed. 700." Cincinnati, etc., R. Co. *v.* Thiebaud, 177 U. S. 615, 620, 44 L. Ed. 911.

A captain of the United States army was arraigned and tried before a court martial convened according to law; found guilty upon certain charges and specifications; sentenced to dismissal; to suffer a fine; to be imprisoned; and to publication of crime and punishment. This sentence was approved by the secretary of war and confirmed by the president. A writ of habeas corpus directed to the military authority having him in custody, was issued by the circuit court of the United States. This writ was dismissed and he was remanded to custody. From this final order an appeal was taken to the circuit court of appeals which entered judgment affirming the judgment of the circuit court. On January 24, 1900 and February 5, 1905, an application for the writ of certiorari to the circuit court of appeals was made to the supreme court of the United States which on February 26, 1900, was denied. On the same day an appeal from the final order of the circuit court directly to the supreme court of the United States was allowed by a judge of the circuit court, as also a writ of error. It was held, that the appeal cannot be maintained, as a defeated party in a circuit court has no right to have his case finally determined both in the supreme court of the United States and the circuit court of appeals on independent appeals. Carter *v.* Roberts, 177 U. S. 496, 44 L. Ed. 861.

Carter v. Roberts explained.—"In Carter *v.* Roberts, 177 U. S. 496, 44 L. Ed. 861, we said: 'When cases arise which are controlled by the construction or application of the constitution of the United States, a direct appeal lies to this court, and if such cases are carried to the circuit courts of appeals, those courts may decline to take jurisdiction, or where such construction or application is involved with other questions, may certify the constitutional question and afterwards proceed to judgment, or may decide the whole case in the first instance.' These observations perhaps need some qualification. Undoubtedly where the jurisdiction of the circuit court depends solely on diverse citizenship and it turns out that the case involves the construction or application of the constitution of the United States; or the constitutionality of a law of the United States or the validity or construction of a treaty is drawn in question; or the constitution or law of a state is claimed to be in contravention of the constitution of the United States; the circuit court of appeals may certify the constitutional or treaty question to this court, and proceed as thereupon advised; or may decide the whole case; but language should not have been used susceptible of the meaning that in cases where the jurisdiction below is invoked on the ground of diverse citizenship, the circuit court of appeals might decline to take jurisdiction, or, in other words, might dismiss the appeal or writ of error for want of jurisdiction. The mere fact that in such a case one or more of the constitutional questions referred to in § 5 may have so arisen that a direct resort to this court might be had, does not deprive the court of appeals of jurisdiction or justify it in declining to exercise it." American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 282, 45 L. Ed. 859.

28. Robinson *v.* Caldwell, 165 U. S. 359, 362, 41 L. Ed. 745; McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893; Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 45 L. Ed. 280; Ayres *v.* Polsdorfer, 187 U. S. 585, 589, 47 L. Ed. 314.

In Robinson *v.* Caldwell, 165 U. S. 359, 41 L. Ed. 745, was held, that the judiciary act of March 3, 1891, does not give a defeated party in a circuit court the right to have his case finally determined both in this court and in the circuit court of appeals on independent appeals. Carter *v.* Roberts, 177 U. S. 496, 499, 44 L. Ed. 861.

The case of Robinson *v.* Caldwell, 165 U. S. 359, 41 L. Ed. 745, "was heard in the circuit court of the United States for the district of Idaho upon its merits, which included the consideration of questions involving the construction of a treaty and the validity of an act of congress. Judgment passed for plaintiff, and defendant was allowed a direct appeal to this court. Pending this, defendant had also prosecuted an appeal to the circuit court of appeals, and the case was there again heard and determined. 29 U. S. App. 468. When subsequently the appeal

c. 517, 26 Stat. 826, does not contemplate several separate appeals or writs of error, on the merits, in the same case and at the same time to two appellate courts, and therefore a writ of error to this court, which was taken while the case was pending in the circuit court of appeals, ought to be dismissed.[29]

Although a party to a patent or criminal case in the circuit court of the United States might be entitled to have the decision of the circuit court reviewed by the supreme court upon the ground that it involves the denial of constitutional rights, yet if he does not do so, and carries his case to the circuit court of appeals he must abide by the judgment of that court.[30]

But where there exists a doubt as to the right to appeal directly from the circuit court to this court, the right to appeal to this court is not waived by appealing at the same time to the circuit court of appeals.[31]

to this court was heard, it was dismissed, because we held, that we could not properly retain cognizance thereof in face of the fact that the case had been adjudicated by the court of appeals, whose judgment remained undisturbed. Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138, 43 L. Ed. 108, is not to the contrary." Approved in Carter *v.* Roberts, 177 U. S. 496, 499, 500, 44 L. Ed. 861.

"It is true that the plaintiff might have carried this case to the circuit court of appeals, and a final judgment having been rendered in that court upon his writ of error, he could not thereafter have invoked the jurisdiction of this court upon another writ of error to review the judgment of the circuit court; for, as said in Robinson *v.* Caldwell, 165 U. S. 359, 362, 41 L. Ed. 745, 'it was not the purpose of the judiciary act of 1891 to give a party who was defeated in a circuit court of the United States the right to have the case finally determined upon its merits both in this court and in the circuit court of appeals,' although the latter court, before disposing of a case which might have been brought here directly from the circuit court, may certify to this court questions or propositions as indicated in the sixth section of the above act." Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 479, 45 L. Ed. 280. But see Ayers *v.* Polsdorfer, 187 U. S. 585, 589, 47 L. Ed. 314.

29. Columbus Construction Co. *v.* Crane Co., 174 U. S. 600, 601, 43 L. Ed. 1102, distinguishes Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138, 43 L. Ed. 108, as follows: "An obvious distinction between that case and this is that there the appeal was first taken to this court. Accordingly the circuit court of appeals declined either to decide the case on its merits or to dismiss the appeal, while the case was pending on a prior appeal to this court, and continued the cause to await the result of the appeal to the supreme court. 39 U. S. App. 307."

In Columbus Construction Co. *v.* Crane Co., 174 U. S. 600, 43 L. Ed. 1102, it was laid down that the act of March 3, 1891, does not contemplate several separate appeals or writs of error, on the merits, in the same case and at the same time to or from two appellate courts; and as the record disclosed in that case that two writs of error to the judgment of the circuit court were pending, one in the circuit court of appeals and the other and subsequent writ in this court, the latter was dismissed. Cincinnati, etc., R. Co. *v.* Thiebaud, 177 U. S. 615, 620, 621, 44 L. Ed. 911.

30. Cary Manf. Co. *v.* Acme Flexible Clasp Co., 187 U. S. 427, 47 L. Ed. 244, citRobinson *v.* Caldwell, 165 U. S. 359, 41 L. Ed. 745; American Sugar Ref. Co. *v.* New Orleans, 181 U. S. 277, 45 L. Ed. 859; Huguley Mfg. Co. *v.* Galeton Cotton Mills, 184 U. S. 290, 46 L. Ed. 546; Ayres *v.* Polsdorfer, 187 U. S. 585, 47 L. Ed. 314.

31. Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138, 43 L. Ed. 108, followed in Johnson *v.* Southern Pac. R. Co., 196 U. S. 1, 13, 49 L. Ed. 363; Montana Min. Co. *v.* St. Louis Min. Co., 204 U. S. 204, 51 L. Ed. 444, but distinguished in Columbus Construction Co. *v.* Crane Co., 174 U. S. 600, 43 L. Ed. 1102; Union, etc., Bank *v.* Memphis, 189 U. S. 71, 74, 47 L. Ed. 712.

This case was also distinguished in Carter *v.* Roberts, 177 U. S. 496, 44 L. Ed. 861, as follows: In Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138, 43 L. Ed. 108, 'The Pullman Company had taken an appeal directly from the circuit court to this court, on the theory that the case involved the construction or application of the constitution, and had also taken an appeal to the circuit court of appeals for the third circuit. The circuit court of appeals overruled a motion to dismiss, but postponed further argument until the appeal to this court was disposed of. 39 U. S. App. 307. A motion to dismiss was also made in this court, whereupon an application was made for a writ of certiorari to the circuit court of appeals, and by reason of the circumstances, was granted, and the record returned by virtue of that writ. And we proceeded to dispose of the case on the merits without passing on the question, which had become immaterial, whether

The result of the authorities may be stated as follows: If the case, as made by the plaintiff's statement, involves no other question than some of those mentioned in § 5 of the court of appeals act, as, for example, the constitutionality of an act of congress, or the construction or application of the federal constitution, this court alone has jurisdiction to review the judgment of the circuit court. But where the jurisdiction of the circuit court involves questions other than those relating to grounds that would bring the case within § 5 of the act of 1891, the circuit court of appeals has jurisdiction to review the judgment of the circuit court, although if the plaintiff elects to bring it here directly, this court has jurisdiction to determine all the questions arising upon the record. In other words, the plaintiff is entitled to bring it here directly from the circuit court, or at his election, to go to the circuit court of appeals for a review of the whole case. Of course, where the plaintiff has elected to go to the circuit court of appeals for a review of the judgment, he cannot thereafter, if unsuccessful in that court upon the merits, prosecute a writ of error directly to this court.[32]

Cases Arising under Revenue Laws.—As the judgment of the circuit court of appeals may be brought to this court, as of right, where the jurisdiction of the circuit court rested upon the diversity of citizenship, and also upon grounds that would bring the case within § 5 of the act of 1891, it must be held, that the judgment of the circuit court of appeals is not final, within the meaning of the sixth section, in a case which, although arising under a law providing for internal revenue and involving the construction of that law, is yet a case also involving, from the outset, from the plaintiff's showing, the construction or application of the constitution or the constitutionality of an act of congress.[33]

1. *Rule in Jahn's Case.*—Yet if in any of the above cases a final judgment were rendered because of want of jurisdiction, that judgment could be reviewed by this court upon a certificate of the circuit court, while if jurisdiction were sustained and the merits adjudicated, although the question of jurisdiction might be brought up directly, the circuit court of appeals would undoubtedly have jurisdiction to review the case upon the merits. The provision that any case in which the question of jurisdiction is in issue may be taken directly to this court, necessarily extends to other cases than those in which the final judgment rests on the ground of want of jurisdiction, for in them that would be the sole question, and the certificate, though requisite to our jurisdiction under the statute, would not be in itself essential, however, valuable in the interest of brevity of record. But in such other cases, the requirement that the question of jurisdiction alone should be certified for decision was intended to operate as a limitation upon the jurisdiction of this court of the entire case and of all questions involved in it, a jurisdiction which can be exercised in any other class of cases taken directly to this court under § 5.[34] The act certainly did not contemplate

the direct appeal could have been maintained or not.'"

32. Huguley Mfg. Co. *v.* Galeton Cotton Mills, 184 U. S. 290, 46 L. Ed. 546; Robinson *v.* Caldwell, 165 U. S. 359, 41 L. Ed. 745; Loeb *v.* Columbia Township Trustees, 179 U. S. 472, 45 L. Ed. 280; Ayres *v.* Polsdorfer, 187 U. S. 585, 47 L. Ed. 314; American Sugar Refin. Co. *v.* New Orleans, 181 U. S. 277, 45 L. Ed. 859; Union Pac. R. Co. *v.* Harris, 158 U. S. 326, 39 L. Ed. 1003; Spreckels Sugar Refin. Co. *v.* McClain, 192 U. S. 397, 48 L. Ed. 496.

Ayres *v.* Polsdorfer, 187 U. S. 585, 47 L. Ed. 314, was an action of ejectment brought in the circuit court by citizens of one state against those of another, and the case, having gone to judgment, was carried to the circuit court of appeals, and the judgment affirmed. A writ of error from this court was then sought to be sustained because, as was contended, the evidence disclosed, though the pleadings did not, that the parties claimed under grants of different states. But we held, that if the emergence of such a question might have justified taking the case directly to this court, having gone to the court of appeals, it could not after judgment then be brought here. Approved in Stevenson *v.* Fain, 195 U. S. 165, 170, 49 L. Ed. 142.

33. Spreckels Sugar Refin. Co. *v.* McClain, 192 U. S. 397, 410, 48 L. Ed. 496.

34. Rule in Jahn's case.—Horner *v.*

two appeals or writs of error at the same time by the same party to two different courts, nor does it seem to us that it was intended to compel a waiver of the objection to the jurisdiction altogether or of the consideration of the merits. By taking a case directly to this court on the question of jurisdiction, the contention on the merits would be waived, but it does not follow that the jurisdictional question could not be considered, if the case were taken to the circuit court of appeals. The act was passed to facilitate the prompt disposition of cases in this court and to relieve it from the oppressive burden of general litigation, but the rights of review by appeal or writ of error, and of invoking the supervisory jurisdiction of this tribunal, were sought to be amply secured and should not be circumscribed by too narrow a construction.[35]

m. *Mandate.*—The circuit court of appeals cannot review by writ of error the judgment of the circuit court in execution of the mandate of this court.[36]

F. Appellate Jurisdiction as Dependent upon Amount or Value in Controversy—1. HISTORY OF LEGISLATION—a. *Under Early Statutes.*—**In General.**—The judiciary acts of the United States, for a century after the organization of the government under the constitution, did impose pecuniary limits upon appellate jurisdiction.[37]

In actions at law and suits in equity, the pecuniary limit of the appellate jurisdiction of this court from the circuit court of the United States was for a long time fixed at $2,000.[38] In 1875 it was raised to $5,000.[39] And in 1889 this was modified by providing that, where the judgment or decree did not exceed the sum of $5,000, this court should have appellate jurisdiction upon the question of the jurisdiction of the circuit court, and upon that question only.[40]

United States, 143 U. S. 570, 577, 36 L. Ed. 266; United States *v.* Jahn, 155 U. S. 109, 112, 39 L. Ed. 87; In re Tampa Suburban R. Co., 168 U. S. 583, 587, 42 L. Ed. 589; Anglo-American Provision Co. *v.* Davis Provision Co., 191 U. S. 373, 376, 48 L. Ed. 225.

35. United States *v.* Jahn, 155 U. S. 109, 113, 39 L. Ed. 87.

36. Mandate.—Cook *v.* Burnley, 11 Wall. 659, 672, 677, 20 L. Ed. 29; Stewart *v.* Salamon, 97 U. S. 361, 24 L. Ed. 1044; Humphrey *v.* Baker, 103 U. S. 736, 26 L. Ed. 456; Texas, etc., R. Co. *v.* Anderson, 149 U. S. 237, 242, 37 L. Ed. 717.

37. History of legislation under early statutes.—The Paquete Habana, 175 U. S. 677, 680, 44 L. Ed. 320.

38. Acts of September 24, 1789, c. 20, § 22; 1 Stat. 84; March 3, 1803, c. 40; 2 Stat. 244; Gordon *v.* Ogden, 3 Pet. 33, 7 L. Ed. 592.

39. Act of February 16, 1875, c. 77, § 3; 18 Stat. 316.

40. Act of February 25, 1889, c. 236, § 1; 25 Stat. 693; Parker *v.* Ormsby, 141 U. S. 81, 35 L. Ed. 654; The Paquete Habana, 175 U. S. 677, 680, 44 L. Ed. 320.

History of the increase given chronologically—Five hundred.—By the first act of congress upon the subject, the jurisdiction of this court was limited to controversies in which the sum or value of the object in controversy, should amount to $500. Hulsecamp *v.* Teel, 2 Dall. 358, 1 L. Ed. 414.

Two thousand.—But the judiciary act of September 24, 1789, ch. 20, § 22, authorized "final judgments and decrees in civil actions and suits in equity in a circuit court, where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs," to be revised by this court on writ of error or appeal. 1 Stat. 84. Kurtz *v.* Moffitt, 115 U. S. 487, 494, 29 L. Ed. 458.

Where the final decree of the circuit court was for less than $2,000, no appeal from its decree will lie to this court. Sampson *v.* Welsh, 24 How. 207, 16 L. Ed. 632.

Section 692, Rev. Stat., permitted appeals to this court "from all final decrees of any circuit court, or of any district court acting as a circuit court, in cases of equity, and of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of costs, exceeds the sum or value of $2,000." Terry *v.* Hatch, 93 U. S. 44, 45, 23 L. Ed. 796.

As the Code of Practice of Louisiana provides that all definite or final judgments must be signed by the judge rendering them, this court, under § 691 of the Revised Statutes, as amended by the act of Feb. 16, 1875 (18 Stat. 316), cannot, where the matter in dispute does not exceed the sum or value of $5,000, exclusive of costs, review the judgment of a circuit court of the United States sitting in that state, signed subsequently to May 1, 1875. "Section 691 of the Revised Statutes, as amended by the act of Feb. 16, 1875 (18 Stat. 316) provides for the re-examination in this court of all final judgments of the circuit courts rendered previous to May 1, 1875, where the matter in dispute exceeds the sum or

As to cases of admiralty and maritime jurisdiction, including prize causes, the judiciary act of 1789, in § 9, vested the original jurisdiction in the district courts, without regard to the sum or value in controversy; and in § 21, permitted an appeal from them to the circuit court where the matter in dispute exceeded the sum or value of $300.[41] By the act of March 3, 1803, c. 40, appeals to the circuit court were permitted from all final decrees of a district court where the matter in dispute exceeded the sum or value of $50; and from the circuit courts to this court in all cases of admiralty and maritime jurisdiction, and of prize or no prize, in which the matter in dispute exceeded the sum or value of $2,000.[42] The acts of March 3, 1863, c. 86, § 7, and June 30, 1864, c. 174, § 13, provided that appeals from the district courts in prize causes should lie directly to this court, where the amount in controversy exceeded $2,000, or on the certificate of the district judge that the adjudication involves a question of general importance.[43] The provision of the act of 1803, omitting the words, "and of prize or no prize," was re-enacted in § 692 of the Revised Statutes; and the provision of the act of 1864, concerning prize causes, was substantially re-enacted in § 695 of the Revised Statutes.[44]

b. *Under Circuit Court of Appeals Act.*—But all this has been changed by the act of March 3, 1891, c. 517, establishing the circuit courts of appeals, and creating a new and complete scheme of appellate jurisdiction, depending upon the nature of the different cases, rather than upon the pecuniary amount involved.[45] By that act, as this court has declared, the entire appellate jurisdiction from the circuit and district courts of the United States was distributed, "according to the scheme of the act," between this court and the circuit courts of appeals thereby established, "by designating the classes of cases" of which each of these courts was to have final jurisdiction.[46] The intention of congress, by the act of 1891, to make the nature of the case, and not the amount in dispute, the test of the appellate jurisdiction of this court from the district and circuit courts, clearly appears upon examination of the leading provisions of the act.[47]

Direct Appeals from Circuit and District Courts.—Section 5 provides that "appeals or writs or error may be taken from the district courts, or from the existing circuit courts, direct to the supreme court, in the following cases: First, in any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the supreme court from the court below for decision." This clause includes "any case," without regard to amount, in which the jurisdiction of the court below is in issue.[48] Second. "From the final sentences and decrees in prize causes." This clause includes the whole class of "the final sentences and decrees in prize causes," and omits all pro-

value of $2,000, and of such as were rendered after that date where it exceeds $5,000." Yznaga Del Valle *v.* Harrison, 93 U. S. 233, 23 L. Ed. 892.

Five thousand.—By the act of February 16, 1875, c. 77, § 3, which differs from earlier laws only in increasing the amount required to give this court appellate jurisdiction from a circuit court of the United States, it is necessary that "the matter in dispute shall exceed the sum or value of five thousand dollars, exclusive of costs." 18 Stat. 316. Gibson *v.* Shufeldt, 122 U. S. 27, 28, 30 L. Ed. 1083; Western Union Tel. Co. *v.* Rogers, 93 U. S. 565, 23 L. Ed. 977; Shacker *v.* Hartford Fire Ins. Co., 93 U. S. 241, 23 L. Ed. 862; Thompson *v.* Butler, 95 U. S. 694, 696, 24 L. Ed. 540.

41. 1 Stat. 77, 83; Glass *v.* The Betsy, 3 Dall. 6, 16, 1 L. Ed. 485; The Amiable Nancy, 3 Wheat. 546, 4 L. Ed. 456; Stratton *v.* Jarvis, 8 Pet. 4, 11, 8 L. Ed. 846.

42. 2 Stat. 244; Stratton *v.* Jarvis, 8 Pet. 4, 11, 8 L. Ed. 846; The Admiral, 3 Wall. 603, 612, 18 L. Ed. 58.

43. 12 Stat. 760; 13 Stat. 310.

44. The Paquete Habana, 175 U. S. 677, 680, 44 L. Ed. 320.

45. Under circuit court of appeals act.—26 Stat. 826; The Paquete Habana, 175 U. S. 677, 681, 44 L. Ed. 320.

46. McLish *v.* Roff, 141 U. S. 661, 666, 35 L. Ed. 893; American Construction Co. *v.* Jacksonville, etc., Co., 148 U. S. 372, 382, 37 L. Ed. 486; Carey *v.* Houston, etc., R. Co., 150 U. S. 170, 179, 37 L. Ed. 1041; The Paquete Habana, 175 U. S. 677, 681, 44 L. Ed. 320.

47. The Paquete Habana, 175 U. S. 677, 681, 44 L. Ed. 320.

48. The Paquete Habana, 175 U. S. 677, 682, 44 L. Ed. 320.

visions of former acts regarding amount in controversy, or certificate of a district judge.[49] The act of March 3rd, 1891, confers upon this court jurisdiction of appeals from all final sentences and decrees in prize causes from the district and circuit courts of the United States, without regard to the amount in dispute, and without any certificate of the district judge as to the importance of the particular case.[50] Fourth. "In any case that involves the construction or application of the constitution of the United States."[51] Fifth. "In any case in which the constitutionality of any law of the United States, or the validity or construction of any treaty made under its authority, is drawn in question."[52] Sixth. "In any case in which the constitution or law of a state is claimed to be in contravention of the constitution of the United States." Each of these last three clauses, again, includes "any case" of the class mentioned. They all relate to what are commonly called federal questions, and cannot reasonably be construed to have intended that the appellate jurisdiction of this court over such questions should be restricted by any pecuniary limit—especially in their connection with the succeeding sentence of the same section: "Nothing in this act shall affect the jurisdiction of the supreme court in cases appealed from the highest court of a state, nor the construction of the statute providing for review of such cases." Writs of error from this court to review the judgments of the highest court of a state upon such questions have never been subject to any pecuniary limit.[53]

2. WHAT LAW GOVERNS—a. *In General.*—Where a court is established by an act of congress, but there is no special provision in the act which regulates appeals to this court, it will be governed by the general law.[54]

b. *Rule Governing Appeals.*—The amount prescribed for writs of error applies also to appeals under that section which provides that appeals shall be subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error.[55]

49. The Paquete Habana, 175 U. S. 677, 682, 44 L. Ed. 320.

50. The Paquete Habana, 175 U. S. 677, 44 L. Ed. 320, approved in Holt *v.* Indiana Mfg. Co., 176 U. S. 68, 44 L. Ed. 374, reaffirmed in Woey Ho *v.* United States, 191 U. S. 558, 48 L. Ed. 301.

51. The Paquete Habana, 175 U. S. 677, 682, 44 L. Ed. 320.

52. The Paquete Habana, 175 U. S. 677, 682, 44 L. Ed. 320.

53. Act of September 24, 1789, c. 20, § 25; 1 Stat. 85; Buel *v.* Van Ness, 8 Wheat. 312, 5 L. Ed. 624; Act of February 5, 1867, c. 28, § 2; 14 Stat. 386; Rev. Stat., § 709; The Paquete Habana, 175 U. S. 677, 682, 44 L. Ed. 320.

54. What law governs in general—Appeals from district courts.—Appeals to this court from the circuit courts of the United States, and from districts courts exercising the jurisdiction of circuit courts, are regulated by the act of 1803, ch. 40, where not otherwise specially provided for by act of congress. There is no special provision in the act establishing the district court in Wisconsin which regulates appeals to this court, and consequently they are governed by the general law above referred to; and by that law an appeal will lie, unless the sum or value in controversy exceeds $2,000; and that fact must be shown to the court in order to give jurisdiction in the appeal. Richmond *v.* Milwaukee, 21 How. 80, 16 L. Ed. 60.

55. Rule governing appeals.—"Appeals from decrees of the circuit court to this court are allowed where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars, and the provisions is that such appeals shall be subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error. 2 Stat. at Large 244." Bigler *v.* Waller, 12 Wall. 142, 148, 20 L. Ed. 260.

Power to re-examine the decrees of the circuit court, removed there by appeal from the district courts, was conferred upon this court by the 22d section of the judiciary act, where the matter in dispute exceeds the sum or value of $2,000, exclusive of costs. Such decrees, however, could only be removed here under that act by virtue of a writ of error, but the subsequent act allowing the removal to be made by appeal in cases of equity, or admiralty, and maritime jurisdiction, and of prize or no prize, contains the same limitation that the matter in dispute "shall exceed the sum or value of $2,000, exclusive of costs," and also provides that such appeals shall be subject to the same rules, regulations, and restrictions as are prescribed in law in case of writs of error. 1 Stat. at Large 84; 2 Stat. at Large 244; The San Pedro, 2 Wheat. 132, 140, 4 L. Ed. 202, 205; United States *v.* Good-

3. Review of Proceedings in Particular Courts—a. *Appeals from Territorial Courts.*—Formerly, this court had jurisdiction to review the final judgments and decrees of the supreme courts of any territory except Washington, only when the amount exceeded one thousand dollars.[56]

But, "under the existing acts of congress, (except in the cases so transferred to the circuit courts of appeals, and in cases of habeas corpus, cases involving the validity of a copyright, and cases depending upon the constitution or a statute or treaty of the United States) the appellate jurisdiction of this court to review and reverse or affirm the final judgments and decrees of the supreme court of a territory includes those cases, and those cases only, at law or in equity, in which "the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars."[57]

By the act of March 3, 1885, 23 Stat. 443, c. 355, "no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity * * * in the supreme court of any of the territories of the United States, unless the matter in dispute exclusive of costs, shall exceed the

win, 7 Cranch. 108, 111, 3 L. Ed. 284; Wiscart *v.* D'Auchy, 3 Dall. 321, 328, 1 L. Ed. 619; Glass *v.* The Betsey, 3 Dall. 6, 16; The Admiral, 3 Wall. 603, 18 L. Ed. 58; Merrill *v.* Petty, 16 Wall. 338, 341, 21 L. Ed. 499.

56. Appeals from territorial courts.—Thomas *v.* Murray, 34 L. Ed. 539; Simms *v.* Simms, 175 U. S. 162, 166, 44 L. Ed. 115; Potts *v.* Chumasero, 92 U. S. 358, 23 L. Ed. 499; United States *v.* Union Pac. R. Co., 105 U. S. 263, 26 L. Ed. 1021.

57. Simms *v.* Simms, 175 U. S. 162, 166, 44 L. Ed. 115.

Five thousand dollars is the amount now required for our jurisdiction, on appeals and writs of error from the supreme courts of the territories. Act of March 3, 1885, 23 Stat. 443, c. 355; Talkinton *v.* Dumbleton, 123 U. S. 745, 746, 31 L. Ed. 313.

By the act of congress organizing the inhabitants of Oregon territory into a government it is provided (§ 9) that writs of error and appeals from final decisions of the supreme court of Oregon shall be allowed to the supreme court of the United States, where the value of the property, or the amount in controversy, shall exceed two thousand dollars, to be ascertained by the oath of either party, or by a competent witness. Lownsdale *v.* Parrish, 21 How. 290, 16 L. Ed. 80.

Montana territory.—This court has no jurisdiction to review the judgment of the supreme court of the territory of Wyoming, unless the record shows that the matter actually in dispute exceeds $1,000. Nagle *v.* Rutlege, 100 U. S. 675, 25 L. Ed. 772.

Section 702 of the Revised Statutes provides as follows: "The final judgments and decrees of the supreme court of any territory, except the territory of Washington, in cases where the value of the matter in dispute, exclusive of costs, to be ascertained by the oath of either party, or of other competent witnesses, exceeds one thousand dollars, may be reviewed and reversed or affirmed in the supreme court, upon writ of error or appeal, in the same manner and under the same regulations as the final judgments and decrees of a circuit court. In the territory of Washington, the value of the matter in dispute must exceed two thousand dollars, exclusive of costs. And any final judgment or decree of the supreme court of said territory in any cause (when) the constitution or a statute or treaty of the United States is brought in question may be reviewed in like manner." This does not apply to or cover a case from the territory of Montana. Farnsworth *v.* Montana, 129 U. S. 104, 109, 32 L. Ed. 616.

Section 1909 of the Revised Statutes provides, that writs of error and appeals from the final decisions of the supreme court of any one of eight named territories, of which Montana is one, "shall be allowed to the supreme court of the United States, in the same manner and under the same regulations as from the circuit courts of the United States, where the value of the property or the amount in controversy, to be ascertained by the oath of either party, or of other competent witnesses, exceeds one thousand dollars, except that a writ of error or appeal shall be allowed to the supreme court of the United States upon writs of habeas corpus involving the question of personal freedom." This does not apply to or cover a case from the territory of Montana. Farnsworth *v.* Montana, 129 U. S. 104, 110, 32 L. Ed. 616.

Writs of error and appeals lie to this court from the supreme court of the territory of Montana only in cases where the value of the property or the amount in controversy exceeds the sum of one thousand dollars, and from decisions upon writs of habeas corpus involving the question of personal freedom. Rev. Stat., § 1909. Potts *v.* Chumasero, 92 U. S. 358, 23 L. Ed. 499.

sum of five thousand dollars."[58]

b. *Appeals in Admiralty.*—The district court, as a court of original jurisdiction, had general jurisdiction of all causes of admiralty and maritime jurisdiction, without reference to the sum or value of the matter in controversy. But the appellate jurisdiction of this court and of the circuit courts, depends upon the sum or value of the matter in dispute between the parties, having independent interests.[59]

c. *Appeals from Circuit Courts.*—Although the act of March 3, 1875, ch. 137 (18 Stat., pt. 3, p. 470), gave the circuit courts of the United States original cognizance of suits of a civil nature arising under the constitution and laws of the United States, where the matter in dispute exceeds, exclusive of costs, the sum or value of $500, it did not change our jurisdiction for the review of the judgments and decrees of those courts. That depended on the value of the matter in dispute, which must exceed $5,000.[60]

d. *Appeals from District of Columbia.*—**One Hundred Dollars.**—At first, this court had jurisdiction upon appeals or writs of error to the District of Columbia, if the amount in controversy exceeded one hundred dollars.[61]

One Thousand Dollars.—But the act of April 2, 1816, ch. 39, § 1, provided that no cause should be brought to this court by appeal or writ of error from the circuit court for the District of Columbia "unless the matter in dispute in such cause shall be of the value of one thousand dollars or upwards, exclusive of costs."[62]

58. Cameron *v.* United States, 146 U. S. 533, 534, 36 L. Ed. 1077.

This court may review the final judgment of the supreme court of one of the territories of the United States in any case, without regard to the sum or value in dispute, where the constitution or a statute or treaty is brought in question, and in every other case whatever where the sum or value in dispute exceeds $5,000, exclusive of costs. Royal Ins. Co. *v.* Martin, 192 U. S. 149, 159, 48 L. Ed. 385, reaffirmed in Rosales Cueli *v.* Rodriguez, 198 U. S. 581, 49 L. Ed. 1172; Garrozi *v.* Dastas, 204 U. S. 64, 51 L. Ed. 369.

59. Appeals in admiralty.—Stratton *v.* Jarvis, 8 Pet. 4, 11, 8 L. Ed. 846.

Although no apportionment of the salvage among the various claimants was formally directed to be made by any interlocutory order of the district court, an apportionment appears to have been in fact made under its authority. A schedule is found in the record containing the names of all the owners and claimants, the gross sales of their property, and the amount of salvage apportioned upon each of them respectively. By this schedule the highest salvage chargeable on any distinct claimant is nine hundred and six dollars and seventeen cents, and the lowest forty-seven dollars and sixty cents, the latter sum being below the amount for which an appeal by the act of 3d of March, 1803 (ch. 93), is allowed from a decree of the district court in admiralty and maritime causes. Stratton *v.* Jarvis, 8 Pet. 4, 8 L. Ed. 846.

60. Appeals from circuit courts.—Whitsitt *v.* Depot and R. Co., 103 U. S. 770, 26 L. Ed. 337; Stickney *v.* Wilt, 23 Wall. 150, 23 L. Ed. 50.

Appeals from district to circuit courts.—"Appeals from the decrees of the district court to the circuit court were allowed by the judiciary act, where the matter in dispute exceeded, exclusive of costs, the sum or value of three hundred dollars, and the final judgments rendered in the district courts might be re-examined in the circuit court on writ of error, where the matter in dispute exceeded, exclusive of costs, the sum or value of fifty dollars; and a similar provision is made for the re-examination by this court of the final judgments and decrees of the circuit courts, where the matter in dispute, exclusive of costs, exceeds the sum or value of two thousand dollars." The Baltimore, 8 Wall. 377, 389, 19 L. Ed. 463.

61. Appeals from District of Columbia.—Curtiss *v.* Georgetown, etc., Co., 6 Cranch 233, 3 L. Ed. 209.

Upon a writ of error to the circuit court for the District of Columbia, this court has no jurisdiction if the sum awarded be less than $100, although a greater sum may have been originally claimed. Wise *v.* Columbian Turnpike Co., 7 Cranch 276, 3 L. Ed. 341.

62. 3 Stat. 261; Kurtz *v.* Moffitt, 115 U. S. 487, 495, 29 L. Ed. 458; Columbian Ins. Co. *v.* Wheelwright, 7 Wheat. 534, 5 L. Ed. 516; Peyton *v.* Robertson, 9 Wheat. 527, 6 L. Ed. 151; Keogh *v.* Orient Fire Ins. Co., 154 U. S. 639, 24 L. Ed. 558.

The law does not give to this court jurisdiction of appeals from the supreme court of the District of Columbia when the amount in controversy is less than $1,000. Pierce *v.* Cox, 9 Wall. 786, 787, 19 L. Ed. 786.

To give us jurisdiction in appeals from the supreme court of the District of Co-

Two Thousand, Five Hundred Dollars.—By a later statute, the amount was increased to two thousand, five hundred dollars.[63]

Five Thousand Dollars.—By the act of March 3, 1885, regulating appeals from the supreme court of the District of Columbia (23 Stat. 443, ch. 355), no appeal or writ of error can be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, unless the matter in dispute exclusive of costs shall exceed the sum of five thousand dollars, except that where the case involves the validity of any patent or copyright, or the validity of a treaty or statute of, or an authority exercised under, the United States, is drawn in question, jurisdiction may be maintained irrespective of the amount of the sum or value in dispute.[64] By the act of February 9, 1893, c. 74, 27 Stat. 434, the supreme court of the United States was authorized to review a final judgment or decree of the court of appeals of the District of Columbia in any case where the matter in dispute, exclusive of costs, shall exceed the sum of $5,000.[65]

e. *Original Jurisdiction of Circuit Courts.*[66]—The language of the first section of the act of March 3, 1887, as corrected by the act of August 13, 1888, is: "That the circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common-law or in equity, where the matter in dispute exceeds, exclusive of interest and costs,

lumbia, the amount in dispute must exceed $1,000. Keogh *v.* Orient Fire Ins. Co., 154 U. S. 639, 24 L. Ed. 558, citing Rev. Stat., § 705.

To give this court jurisdiction of appeals from the orphans' court, through the circuit court for the county of Washington, the matter in dispute, exclusive of costs, must exceed the value of $1,000. Nicholls *v.* Hodges, 1 Pet. 562, 7 L. Ed. 263.

The supreme court of the United States has jurisdiction of appeals from the orphans' court, through the circuit court for the county of Washington, by virtue of the act of congress of February 13, 1801, by which the circuit court for the District of Columbia was created; and by the act of congress subsequently passed, but the matter in dispute, exclusive of costs, must exceed the value of $1,000 in order to entitle the party to an appeal. Nicholls *v.* Hodges, 1 Pet. 562, 7 L. Ed. 263.

63. National Bank *v.* Miller, 25 L. Ed. 529; Baltimore, etc., R. Co. *v.* Grant, 98 U. S. 398, 25 L. Ed. 231; Bank *v.* Millard, 154 U. S. 656, 25 L. Ed. 529; Keller *v.* Ashford, 133 U. S. 610, 33 L. Ed. 667; Hilton *v.* Dickinson, 108 U. S. 165, 176, 27 L. Ed. 688.

Where on a writ of error to the supreme court of the District of Columbia, the value of the matter in dispute is less than $2,500, the judgment is not reviewable here. National Bank *v.* Miller, 25 L. Ed. 529, citing Baltimore, etc., R. Co. *v.* Grant, 98 U. S. 398, 25 L. Ed. 231.

In Baltimore, etc., R. Co. *v.* Grant, 98 U. S. 398, 25 L. Ed. 231, we held that the act of Feb. 25, 1879, ch. 99, §§ 4, 5 (20 Stat. 320), took away our right to hear and determine cases from the supreme court of the District of Columbia where the matter in dispute did not exceed $2,500, and that it operated on pending cases which had been brought here under the provisions of § 847 of the Revised Statutes relating to the district. Dennison *v.* Alexander, 103 U. S. 522, 26 L. Ed. 313.

64. Washington, etc., R. Co. *v.* District of Columbia, 146 U. S. 227, 231, 36 L. Ed. 951; Shappirio *v.* Goldberg, 192 U. S. 232, 240, 48 L. Ed. 419; In re Craft, 124 U. S. 370, 31 L. Ed. 449; District of Columbia *v.* Brewer, 131 U. S. 434, 33 L. Ed. 213

Where an appeal from the supreme court of the District of Columbia was claimed and allowed February 16, 1885, at which time this court had jurisdiction over that court and the matter in dispute exceeded $2,500, "the case is not affected by the act of March 3, 1885, c. 355, § 1, further limiting the appellate jurisdiction of this court, because that act only provides that 'no appeal or writ of error shall hereafter be allowed' from any such judgment or decree, unless the matter in dispute, exclusive of costs, exceeds the sum of five thousand dollars. 23 Stat. 443. The change of phraseology, referring to the time when the appeal or writ of error is allowed, instead of to the time when it is entertained by this court, was evidently intended to prevent cutting off appeals taken and allowed before the passage of the act, as had been held to be the effect of the language used in the act of 1879. Baltimore, etc., R. Co. *v.* Grant, 98 U. S. 398, 25 L. Ed. 231." Keller *v.* Ashford, 133 U. S. 610, 617, 33 L. Ed. 667.

65. Overby *v.* Gordon, 177 U. S. 214, 218, 44 L. Ed. 741, approving Shields *v.* Thomas, 17 How. 3, 15 L. Ed. 93; Magruder *v.* Armes, 180 U. S. 496, 45 L. Ed. 638.

66. Original jurisdiction of circuit courts.—See the title COURTS.

the sum or value of two thousand dollars, and arising under the constitution or laws of the United States, or treaties made, or which shall be made, under their authority. It was held, that the sum or value named was jurisdictional, and that the circuit court could not, under the statute, take original cognizance of a case arising under the constitution or laws of the United States unless the sum or value of the matter in dispute, exclusive of costs and interest, exceeded two thousand dollars.[67] And the conclusion reached is not affected by the fact that the operation of the act of March 3, 1891, was to do away with any pecuniary limitation on appeals directly from the circuit courts to this court.[68]

4. The Phrase "Matter in Dispute" Defined.—By matter in dispute is meant the subject of litigation, the matter upon which the action is brought and issue is joined, and in relation to which, if the issue be one of fact, testimony is taken. It is conceded that the pecuniary value of the matter in dispute may be determined, not only by the money judgment prayed, where such is the case, but in some cases by the increased or diminished value of the property directly affected by the relief prayed, or by the pecuniary result to one of the parties immediately from the judgment. Thus, a suit to quiet the title to parcels of real property, or to remove a cloud therefrom, by which their use and enjoyment by the owner are impaired, is brought within the cognizance of the court, under the statute, only by the value of the property affected.[69] By matter in dispute is meant the subject of litigation—the matter for which the suit is brought—and upon which issue is joined, and in relation to which jurors are called and witnesses examined. In an action upon a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed; and its amount, as stated in the body of the declaration, and not merely the damages alleged, or the prayer for judgment at its conclusion, must be considered in determining the question whether this court can take jurisdiction on a writ of error sued out by the plaintiff.[70] For the purposes of jurisdiction, this court may consider that as in dispute which would be settled by the decree if it had not been appealed from.[71]

67. United States *v.* Sayward, 160 U. S. 493, 40 L. Ed. 508, reaffirmed in Fishback *v.* Western Union Tel. Co., 161 U. S. 96, 99, 40 L. Ed. 630.

68. The Paquete Habana, 175 U. S. 677, 44 L. Ed. 320; Holt *v.* Indiana Mfg. Co., 176 U. S. 68, 72, 44 L. Ed. 374.

69. The phrase "matter in dispute" defined.—Alexander *v.* Pendleton, 8 Cranch 462, 3 L. Ed. 624; Peirsoll *v.* Elliott, 6 Pet. 95, 8 L. Ed. 332; Stark *v.* Starr, 6 Wall. 402, 18 L. Ed. 925; Jones *v.* Bolles, 9 Wall. 364, 369, 19 L. Ed. 734, and Holland *v.* Challen, 110 U. S. 15, 28 L. Ed. 52; Smith *v.* Adams, 130 U. S. 167, 175, 32 L. Ed. 895.

The words "matter in dispute," in the 12th section of the judiciary act, do not refer to disputes in the country, or the intentions or expectations of the parties concerning them, but to the claim presented on the record to the legal consideration of the court. What the plaintiff thus claims, is the matter in dispute, though that claim may be incapable of proof, or only in part well founded. So it was held under this section of the statute, and in reference to the right of removal, in Gordon *v.* Longest, 16 Pet. 97, 10 L. Ed. 900; and the same construction has been put upon the eleventh and twenty-second sections of the judiciary act which makes the jurisdiction of this court and the circuit court dependent on the amount or value of "the matter in dispute." The settled rule is, that until some further judicial proceedings have taken place, showing upon the record that the sum demanded is not the matter in dispute, that sum is the matter in dispute in an action for damages. (Green *v.* Liter, 8 Cranch 229, 3 L. Ed. 545; Wise *v.* Columbian Turnpike Co., 7 Cranch 276, 3 L. Ed. 341; Gordon *v.* Ogden, 3 Pet. 33, 7 L. Ed. 592; Smith *v.* Honey, 3 Pet. 469, 7 L. Ed. 744; Den *v.* Wright, 1 Pet. C. C. 64; Miner *v.* Dupont, 2 Wash. C. C. 463; Sherman *v.* Clark, 3 McLean 91.) Kanouse *v.* Martin, 15 How. 198, 207, 14 L. Ed. 467.

70. Lee *v.* Watson, 1 Wall. 337, 339, 17 L. Ed. 557.

71. Germanica Nat. Bank *v.* Case, 131 U. S. appx. cxliv, 23 L. Ed. 961.

Where the decree requires the stockholders of an insolvent bank to pay not only 70 per cent. upon the amount of the stock held by them, but also adjudges that each shall be liable to further contribution as stockholders until a sufficient sum is realized to pay the debts of the bank, it is apparent that the matter in dispute is not alone the 70 per cent. but a sum in addition that may amount to 30 per cent. of

5. MUST EXCEED JURISDICTIONAL AMOUNT.—The jurisdiction of this court to re-examine judgments of the circuit courts is limited to cases where the matter in dispute exceeds the amount prescribed. Where it but equals that sum, the jurisdiction does not exist.[72]

6. EFFECT OF REPEAL PENDING APPEAL.—Where a law regulating the appellate jurisdiction of this court with respect to the amount in controversy is repealed without any reservation as to pending cases, all such cases fall with the law, and it takes away our right to hear and determine the cause, if the matter in dispute is less than the jurisdictional amount prescribed by the repealing act.[73]

7. GENERAL CONSTRUCTION OF STATUTE.—Congress, it is conceded, has not expressly enacted that final judgments and decrees shall not be re-examined here where the matter in dispute does not exceed the sum or value mentioned, but inasmuch as the appellate power of the court is conferred by the constitution, with such exceptions and under such regulations as congress shall make, the rule of construction is that the negative of any other jurisdiction in that respect is implied from the intent manifested by the affirmative description contained in that section of the judiciary act.[74]

the stock. For the purposes of jurisdiction this court may consider that as in dispute which would be settled by the decree if it had not been appealed from. Germanica Nat. Bank *v.* Case, 131 U. S. appx. cxliv, 23 L. Ed. 961.

72. Must be in excess of required amount.—Walker *v.* United States, 4 Wall. 163, 18 L. Ed. 319, discussing and explaining Knapps *v.* Banks, 2 How. 73, 11 L. Ed. 184; The D. R. Martin, 91 U. S. 365, 366, 23 L. Ed. 439; Western Union Tel. Co. *v.* Rogers, 93 U. S. 565, 567, 23 L. Ed. 977; Thompson *v.* Butler, 95 U. S. 694, 695, 24 L. Ed. 540; Hilton *v.* Dickinson, 108 U. S. 165, 173, 27 L. Ed. 688; Henderson *v.* Wadsworth, 115 U. S. 264, 276, 29 L. Ed. 377; District of Columbia *v.* Gannon, 130 U. S. 227, 228, 32 L. Ed. 922.

73. Effect of repeal pending appeal.—United States *v.* Boisdore, 8 How. 113, 12 L. Ed. 1009; McNulty *v.* Batty, 10 How. 72, 13 L. Ed. 333; Norris *v.* Crocker, 13 How. 429, 14 L. Ed. 210; Insurance Co. *v.* Ritchie, 5 Wall. 541, 18 L. Ed. 540; Ex parte McCardle, 7 Wall. 506, 514, 19 L. Ed. 264; The Assessor *v.* Osbornes, 9 Wall. 567, 19 L. Ed. 748; United States *v.* Tynen, 11 Wall. 88, 20 L. Ed. 153; Baltimore, etc., R. Co. *v.* Grant, 98 U. S. 398, 25 Ed. 231.

The jurisdiction conferred upon this court by § 847 of the Revised Statutes relating to the District of Columbia was taken away by the act of congress approved Feb. 25, 1879, which enacts that a judgment or a decree of the supreme court of that district may be re-examined here "where the matter in dispute, exclusive of costs, exceeds the value of $2,500." This court, therefore, dismisses a writ of error sued out Dec. 6, 1875, to reverse a final judgment of that court where the matter in dispute is of the value of $2,250. Baltimore, etc., R. Co. *v.* Grant, 98 U. S. 398, 25 L. Ed. 231.

In Baltimore, etc., R. Co. *v.* Grant, 98 U. S. 398, 402, 25 L. Ed. 231, Mr. Chief Justice Waite said: "Usually where a limited repeal only is intended, it is so expressly declared. Thus, in the act of 1875 (18 Stat. 316), raising the jurisdictional amount in cases brought here for review from the circuit courts, it was expressly provided that it should apply only to judgments thereafter rendered; and in the act of 1874 (Id. 27), regulating appeals to this court from the supreme courts of the territories, the phrase is, 'that this act shall not apply to cases now pending in the supreme court of the United States where the record has already been filed.' Indeed, so common is it, when a limited repeal only is intended, to insert some clause to that express effect in the repealing act, that if nothing of the kind is found, the presumption is always strong against continuing the old law in force for any purpose."

74. General construction of statute.—Durousseau *v.* United States, 6 Cranch 307, 318, 3 L. Ed. 232; Merrill *v.* Petty, 16 Wall. 338, 345, 21 L. Ed. 499.

"The spirit as well as the letter of a statute must be respected, and where the whole context of the law demonstrates a particular intent in the legislature to effect a certain object, some degree of implication may be called in to aid that intent. It is upon this principle that the court implies a legislative exception from its constitutional appellate power in the legislative affirmative description of those powers. Thus, a writ of error lies to the judgment of a circuit court, where the matter in controversy exceeds the value of 2,000 dollars. There is no express declaration that it will not lie where the matter in controversy shall be of less value. But the court considers this affirmative description as manifesting the intent of the legislature to except from its appellate jurisdiction all cases decided in the circuits where the matter in controversy is of less value, and implies negative

8. Consent or Agreement of Parties.—The consent or agreement of parties cannot give jurisdiction to this court. Its appellate power is regulated and limited by law.[75] In accordance with this rule, that consent cannot give jurisdiction, an agreement between the parties that two cases should be heard together, cannot avail the parties.[76] Though consent cannot give jurisdiction to this court by way of appeal, where the matter in dispute is less than the required amount, yet an admission of a sufficient value by the parties is presumed to be correct where the record does not establish the contrary.[77]

9. To What Parties Applicable.—**In General.**—To justify this court in taking jurisdiction, there must be a controversy which involves pecuniary value exceeding $5,000 to the party appealing. In other words, there must be a dispute which involves a sum in excess of $5,000, and such sum, or property of its value, must be taken from him by the judgment which he seeks to review. The plaintiff in error and appellant must show that he has an interest in the matter in dispute.[78]

words." Durousseau *v.* United States, 6 Cranch 307, 314, 3 L. Ed. 232, cited in Baltimore, etc., Co. *v.* Grant, 98 U. S. 398, 25 L. Ed. 231.

75. Consent or agreement of parties.—Sampson *v.* Welsh, 24 How. 207, 16 L. Ed. 632.

Upon a libel to recover damages against ship owners, a decree passed against them for over $2,000, with leave to set off a sum due them for freight, which would reduce the amount decreed against them to less than $2,000, the party elected to make the set-off, saving his right to appeal to this court. The reduced decree was the final decree, and the party cannot save a right of appeal where it is not allowed by act of congress. Sampson *v.* Welsh, 24 How. 207, 16 L. Ed. 632.

Therefore, where a vessel was libeled in the district court and sold by agreement of parties, and the proceeds of sale amounted only to $850, which was paid into the registry, this is insufficient to bring the case within the jurisdiction of this court, although an agreement of counsel was filed admitting the value of the vessel to be more than two thousand dollars. This agreement would be evidence of the value if nothing to the contrary appeared in the record. But the decision of the court would only determine the right to the proceeds of sale, viz, $850, and the case must therefore be dismissed, for want of jurisdiction. Gruner *v.* United States, 11 How. 163, 13 L. Ed. 647.

76. An appeal on a libel in personam for a collision by the owners of a schooner against the owners of a sloop that had been sunk in the collision, dismissed; the decree having been for $1,292.84, and therefore, "not exceeding the sum or value of $2,000." The fact that prior to this libel in personam, the owners of the sloop had filed in another district a libel in rem against the schooner, laying their damages at $4781.84, and that in the district and circuit courts below, both cases might have been heard as one (a fact asserted by counsel but not apparent in the record), held not to affect the matter; the cases never having been brought into the same district or circuit, nor in any manner consolidated. Merrill *v.* Petty, 16 Wall. 338, 21 L. Ed. 499.

77. Oliver *v.* Alexander, 6 Pet. 143, 148, 8 L. Ed. 349, citing Sheppard *v.* Taylor, 5 Pet. 675, 8 L. Ed. 269.

78. To what parties applicable.—Caffrey *v.* Oklahoma, 177 U. S. 346, 348, 44 L. Ed. 799.

The assessed valuation of the property of Oklahoma county was increased twenty-four per cent. by the territorial board of equalization and plaintiff in error as county clerk, notified thereof; he refused to comply with the order and a writ of mandamus was issued by the supreme court of the territory to compel a compliance therewith. Declining to obey the writ, he was cited for contempt, and such proceedings were had on the citation that he was adjudged guilty, and committed to jail until he should comply with the writ; and the case was then brought to the supreme court of the United States. There is controversy between the parties, respectively supported by affidavits, whether the effect of the order of the territorial board of equalization has increased the taxes of the county $3179.27, or $28751.87. But whether it is one sum or the other, plaintiff in error and appellant did not show that he had any interest in it. He did not allege that he is a property owner or a taxpayer of the county, but alleged he is its county clerk, and bases his residence to the order of the territorial board of equalization upon his duty as such officer. It was held that the supreme court of the United States had no jurisdiction. Caffrey *v.* Oklahoma, 177 U. S. 346, 44 L. Ed. 799.

Colvin *v.* Jacksonville, 158 U. S. 456, 39 L. Ed. 1053, was a suit in equity to restrain the issue of bonds by the city of Jacksonville, and was brought in the circuit court of the United States for the northern district of Florida. Colvin alleged that he was a taxpayer, and that the amount

The United States.—Section 3 of the "act to facilitate the disposition of cases in the supreme court of the United States, and for other purposes," approved February 16, 1875, 18 Stat. 315, c. 77, § 3, fixing the amount necessary to give jurisdiction to this court of writs of error from the circuit courts at a sum in excess of five thousand dollars, applies to the United States as well as to other parties, except in the cases enumerated in § 699 of the Revised Statutes.[79]

10. Cross Appeals.—A motion to dismiss a cross appeal of the defendants below, for want of jurisdiction, on the ground that the amount in controversy is less than the jurisdictional amount, will be overruled, where such cross appeal is from a part of the judgment rendered against him and in favor of the plaintiffs below for an amount sufficient to give this court jurisdiction, because the cross appeal is incident to the other which opens the whole controversy here.[80]

11. Amount Actually in Dispute Controls—a. *In General.*—The jurisdiction of this court is limited to the amount actually in dispute in the suit.[81] In determining the appellate jurisdiction, the amount of the judgment from which the appeal or writ of error may be prosecuted, and not the amount originally involved in the suit, is the amount in controversy.[82] It may be laid down as a

of taxes that would be assessed upon the property owned by him in the city would exceed two thousand dollars. This was denied, and the complainant then contended that not the amount of his taxes but the amount of the bonds proposed to be issued (one million dollars) was the amount in controversy. The circuit court dismissed the case for want of jurisdiction, and this court sustained the ruling, saying by the chief justice, that "the amount of the interest of complainant, and not the entire issue of bonds, was the amount in controversy, and, in respect to that, we have no doubt the ruling of the circuit court was correct." El Paso Water Co. *v.* El Paso, 152 U. S. 157, 38 L. Ed. 396, was cited and approved. Caffrey *v.* Oklahoma, 177 U. S. 346, 348, 44 L. Ed. 799.

79. United States *v.* Broadhead, 127 U. S. 212, 213, 32 L. Ed. 147; United States *v.* Union Pac. R. Co., 105 U. S. 263, 26 L. Ed. 1021.

Under §§ 702 and 1909 of the Revised Statutes, writs of error and appeals from the final judgments and decrees of the supreme court of Wyoming lie to this court only when the amount in controversy exceeds $1,000, or the judgment is on a writ of habeas corpus, involving a question of personal freedom. No exception is made in favor of the United States, and this is not an action brought for the enforcement of any revenue law. Consequently the United States are not entitled to a writ of error or appeal if the same remedy would not be afforded under similar circumstances to a private party. United States *v.* Thompson, 93 U. S. 586, 23 L. Ed. 982; United States *v.* Railroad, 105 U. S. 263, 26 L. Ed. 1021.

80. Cross appeals.—Walsh *v.* Mayer, 111 U. S. 31, 38, 28 L. Ed. 338.

81. Amount actually in dispute controls in general.—Gray *v.* Blanchard, 97 U. S. 564, 24 L. Ed. 1108; Tintsman *v.* National Bank, 100 U. S. 6, 25 L. Ed. 530; Parker *v.* Morrill, 106 U. S. 1, 27 L. Ed. 72; Elgin *v.* Marshall, 106 U. S. 578, 27 L. Ed. 249; Jenness *v.* Citizens' Nat. Bank, 110 U. S. 52, 28 L. Ed. 67; Farmers' Bank *v.* Hooff, 7 Pet. 168, 8 L. Ed. 646; Vicksburgh, etc., R. Co. *v.* Smith, 135 U. S. 195, 34 L. Ed. 95; Dows *v.* Johnson, 110 U. S. 223, 28 L. Ed. 128; The Steamship Haverton, 137 U. S. 145, 34 L. Ed. 603.

Where the judgment below was for $7,000, but it appears affirmatively on the face of the record that the dispute was only in reference to an amount less than $5,000, this court has no jurisdiction. Jenness *v.* Citizens' Nat. Bank, 110 U. S. 52, 28 L. Ed. 67, citing Gray *v.* Blanchard, 97 U. S. 564, 24 L. Ed. 1108; Tintsman *v.* National Bank, 100 U. S. 6, 25 L. Ed. 530; Hilton *v.* Dickinson, 108 U. S. 165, 27 L. Ed. 688.

Plaintiff sued in the district court of a territory for several items and recovered judgment for less than amount sued for but over $5,000 with interest at six per cent. Defendant alone sued out a writ of error from the supreme court of the territory which disallowed $4,880 of the judgment including interest at six per cent. Plaintiff having appealed to this court and prayed for reinstatement of the district court judgment, when the case was reached for hearing here, assigned as additional error that the district court had not allowed twenty-five per cent. instead of six per cent. interest which would have made the amount disallowed exceed $5,000. Held, that as plaintiff had not complained of the district court judgment the only matter in dispute was that part of the district court judgment which the territorial supreme court disallowed and that being less than $5,000 the appeal to this could not be maintained under act of March 3, 1885, 23 Stat. 443. New Mexico *v.* Atchison, etc., R. Co., 201 U. S. 41, 50 L. Ed. 651.

82. New Mexico *v.* Atchison, etc., R. Co., 201 U. S. 41, 386, 50 L. Ed. 651.

general proposition that no mere pretense as to the amount in dispute will avail to create jurisdiction.[83]

b. *Value of Property.*—**In General.**—In accordance with the rule stated above that the real amount in controversy determines the jurisdiction of this court, it has been held, that if the title to the property claimed or recovered is not in fact in issue, but only a part thereof, the value of that part will control.[84]

Where an action at law is brought to recover a tract of land part of a larger tract, and it appears that the parcel of land in controversy is below the jurisdictional amount, the appeal will be dismissed for want of jurisdiction although the value of the larger tract may be above this amount, because such latter parcel of land was not actually in controversy.[85]

Where upon a libel filed to recover the value of a vessel sunk in a collision and also of certain personal effects on board of her at the time, the total valuation of boat and personal effects is determined to have been $6,057, and for this amount a decree is entered by the district court, but on appeal the circuit court awards the sum of $3,028.50, one-half the valuation, this court has no jurisdiction of an appeal from the circuit court, because the matter actually in dispute in this court is not $6,057, but only $3,028.50.[86]

c. *Usurious Claims.*—Where only that part of a claim sued on which the court decides to be usurious is in controversy, the amount in dispute is only the usurious sum, unaffected by any contingent loss which may be sustained by either one of the parties through the probative effect of the judgment, however certain it may be that such loss will occur.[87]

83. Schunk *v.* Moline, etc., Co., 147 U. S. 500, 37 L. Ed. 255, citing Bowman *v.* Chicago, etc., R. Co., 115 U. S. 611, 29 L. Ed. 502; Upton *v.* McLaughlin, 105 U. S. 640, 26 L. Ed. 1197.

84. Value of property.—Vicksburg, etc., R. Co. *v.* Smith, 135 U. S. 195, 34 L. Ed. 95; Old Grant *v.* McKee, 1 Pet. 248, 7 L. Ed. 131.

Thus in Old Grant *v.* McKee, 1 Pet. 248, 7 L. Ed. 131, it was held, that the court would not take jurisdiction of a case where the title to a piece of land of less value than the jurisdictional sum was directly involved, although the whole property claimed by the lessor of the plaintiff under a patent, and which was recovered in ejectment in the court below, exceeded that sum.

The value of the undivided part in controversy and not that of the whole of the land determines the appellate jurisdiction in a petition. McCarthy *v.* Provost, 103 U. S. 673, 26 L. Ed. 337.

Where a bill in equity is filed by an owner of land which is worth more than $5,000, to set aside and cancel, as creating a cloud upon his title, a tax deed, and a certificate of tax sale procured by the other defendants, and the defendant in his answer, offers to waive his claim of title to the land and reconvey it to the plaintiff, if the plaintiff would pay him the sums paid by him, with penalties accrued thereon and ten per cent. interest, and the circuit court holds that the sums which the plaintiff was in equity bound to pay the defendants amounted to less than $5,000, and entered a final decree in favor of the defendants from which they appealed, the amount in controversy is insufficient to support the appellate jurisdiction of this court, and the appeal must be dismissed. "Upon the admissions of the answers, and upon the claims made by the defendants in the circuit court, and renewed in this court, it clearly appears that the plaintiff's title to the land was not really contested, but that the only matter in controversy was the amount of money which the plaintiff was equitably bound to pay to the defendants, and that the difference between the sum which the circuit court held him to pay and the highest sum claimed by the defendants was less than $5,000." Carne *v.* Russ, 152 U. S. 250, 251, 38 L. Ed. 428, citing Act of February 16, 1875, c. 77, § 3; 18 Stat. 316; Peyton *v.* Robertson, 9 Wheat. 527, 6 L. Ed. 151; Farmers' Bank *v.* Hooff, 7 Pet. 168, 8 L. Ed. 646; Ross *v.* Prentiss, 3 How. 771, 11 L. Ed. 824; Tintsman *v.* National Bank, 100 U. S. 6, 25 L. Ed. 530.

85. Vicksburg, etc., R. Co. *v.* Smith, 135 U. S. 195, 34 L. Ed. 95, citing Elgin *v.* Marshall, 106 U. S. 578, 27 L. Ed. 249; Opelika City *v.* Daniel, 109 U. S. 108, 27 L. Ed. 873; Bruce *v.* Manchester, etc., R. Co., 117 U. S. 514, 29 L. Ed. 990; Gibson *v.* Shufeldt, 122 U. S. 27, 30 L. Ed. 1083.

86. Steamship Haverton, 137 U. S. 145, 34 L. Ed. 603, citing Dows *v.* Johnson, 110 U. S. 223, 28 L. Ed. 128, and distinguishing The Alaska, 130 U. S. 201, 32 L. Ed. 923.

87. Usurious claims.—New England Mortgage Security Co. *v.* Gay, 145 U. S. 123, 36 L. Ed. 646.

In New England Mortgage Security Co. *v.* Gay, 145 U. S. 123, 36 L. Ed. 646, it

d. *Settlement of Decedents' Estates.*—Where it appears upon an appeal in equity to compel the defendant to turn over to the executor the estate of the deceased, that the total amount involved is only $5,377.83, and the interest of the plaintiff in that sum is, under the will, only one sixth thereof, or $896.30½, this court has no jurisdiction of the appeal.[88]

e. *Collateral Effect of Judgment.*—It has been uniformly held, in actions at law, where the plaintiff's claim is for money, that the amount in controversy is determined by that particular demand which the plaintiff sues for, and not by any contingent loss which either party may sustain through the indirect or probative effect of the judgment, however certain it may be that such loss will occur.[89] Or, as the rule has been otherwise stated, it is well settled that our appellate jurisdiction, when dependent upon the sum or value really in dispute between the parties, is to be tested without regard to the collateral effect of the judgment in another suit between the same or other parties. No matter that it may appear that the judgment would be conclusive in a subsequent action, it is the direct effect of the judgment that can alone be considered.[90]

appeared that, while the plaintiff sued to recover $8,500 and interest, he actually recovered $6,800 and interest and attorney fees, amounting in all to $9,725.66, so that the amount actually in dispute between the parties in this court is the difference between the amount claimed and the amount of the verdict. Computing interest at eight per cent. upon the entire amount of the notes and adding an attorney fee of ten per cent., the amount due according to the plaintiff's theory was approximately $12,155, or $2,429.34 more than the amount recovered. This is the proper method of ascertaining the amount in dispute in this court. Tintsman *v.* National Bank, 100 U. S. 6, 25 L. Ed. 530; Jenness *v.* Citizens' Nat. Bank, 110 U. S. 52, 27 L. Ed. 67; Wabash, etc., R. Co. *v.* Knox, 110 U. S. 304, 27 L. Ed. 155; Hilton *v.* Dickinson, 108 U. S. 165, 27 L. Ed. 688.

88. Settlement of decedent's estates.—Miller *v.* Clark, 138 U. S. 223, 34 L. Ed. 966; Stearns *v.* Todd, 204 U. S. 669, 51 L. Ed. 672.

On the other hand, where judgment is sought against a bank for the sum of $65,000 and the defendant disputes the whole of that claim, the sum sued for, the entire claim having been rejected, is the value of the matter in dispute here; and our jurisdiction to determine that dispute cannot depend upon an inquiry as to whether the estate of the deceased, when fully distributed, may or may not yield to the plaintiff, if successful here, something in excess of $5,000. "Such an inquiry is as inadmissible, on this writ of error, as it would be if the judgment had established the claim of the plaintiff against Green's administrator for the full amount, and a writ of error had been prosecuted by him to reverse that judgment. The case is different from Miller *v.* Clark, 138 U. S. 223, 34 L. Ed. 966, decided at the present term, where the appeal was dismissed, because it appeared, affirmatively that the appellant, who was the plaintiff below, did not claim, and could not possibly recover for himself, a sum in excess of $5,000." Clark *v.* Bever, 139 U. S. 96, 35 L. Ed. 88.

89. Collateral effect of judgment.—New England Mortgage Security Co. *v.* Gay, 145 U. S. 123, 36 L. Ed. 646; Elgin *v.* Marshall, 106 U. S. 578, 27 L. Ed. 249; Gibson *v.* Shufeldt, 122 U. S. 27, 30 L. Ed. 1083; Clay Center *v.* Farmers' Loan & Trust Co., 145 U. S. 224, 225, 36 L. Ed. 685; Washington, etc., R. Co. *v.* District of Columbia, 146 U. S. 227, 36 L. Ed. 951; Trask *v.* Wanamaker, 147 U. S. 149, 37 L. Ed. 118; Hollander *v.* Fechheimer, 162 U. S. 326, 328, 40 L. Ed. 985; The Jessie Williamson, Jr., 108 U. S. 305, 310, 27 L. Ed. 730; Ross *v.* Prentiss, 3 How. 771, 11 L. Ed. 824.

90. New England Mortgage Security Co. *v.* Gray, 145 U. S. 123, 36 L. Ed. 646; Clay Center *v.* Farmers' Loan and Trust Co., 145 U. S. 224, 36 L. Ed. 685; Gibson *v.* Shufeldt, 122 U. S. 27, 30 L. Ed. 1083; Washington, etc., R. Co. *v.* District of Columbia, 146 U. S. 227, 231, 36 L. Ed. 951; Elgin *v.* Marshall, 106 U. S. 578, 27 L. Ed. 249; Hilton *v.* Dickinson, 108 U. S. 165, 27 L. Ed. 688; The Jessie Williamson, Jr., 108 U. S. 305, 27 L. Ed. 730; New Jersey Zinc Co. *v.* Trotter, 108 U. S. 564, 27 L. Ed. 828; Opelika City *v.* Daniel, 109 U. S. 108, 27 L. Ed. 873; Wabash, etc., Railroad *v.* Knox, 110 U. S. 304, 27 L. Ed. 155; Bradstreet Co. *v.* Higgins, 112 U. S. 227, 28 L. Ed. 715; Bruce *v.* Manchester, etc., R. Co., 117 U. S. 514, 29 L. Ed. 990; The Sydney, 139 U. S. 331, 35 L. Ed. 117.

Sections 691 and 692, Rev. Stat., which as amended by § 3 of the act of Feb. 16, 1875, c. 77, limit the jurisdiction of this court, on writs of error and appeal, to review final judgments in civil actions, and final decrees in cases of equity and of admiralty and maritime jurisdiction, to those where the matter in dispute, exclusive of costs, exceeds the sum or value of $5,000, have reference to the matter

Modification of General Rules—Railroad Rates.—But a very important modification of these rules was made in a suit brought for the dissolution of an association of railroad companies, and to enjoin them from further conspiring to-

which is directly in dispute, in the particular cause in which the judgment or decrees ought to be reviewed, has been rendered, and do not permit us, for the purpose of determining its sum or value, to estimate its collateral effect in a subsequent suit between the same or other parties. Elgin *v.* Marshall, 106 U. S. 578, 27 L. Ed. 249, reaffirmed in Plainview *v.* Marshall, 106 U. S. 583, 27 L. Ed. 250, citing Grant *v.* M'Kee, 1 Pet. 248, 7 L. Ed. 131; Stinson *v.* Dousman, 20 How. 461, 15 L. Ed. 966; Gray *v.* Blanchard, 97 U. S. 564, 24 L. Ed. 1108; Tintsman *v.* National Bank, 100 U. S. 6, 25 L. Ed. 530; Parker *v.* Morrill, 106 U. S. 1, 27 L. Ed. 72.

If jurisdiction is invoked because of the collateral effect a judgment may have in another action, it must appear that the judgment conclusively settles the rights of the parties in a matter actually in dispute, the sum or value of which exceeds the required amount. Troy *v.* Evans, 97 U. S. 1, 3, 24 L. Ed. 941.

Reason of rule.—"The language of the rule limits, by its own force, the required valuation to the matter in dispute, in the particular action or suit in which the jurisdiction is invoked; and it plainly excludes, by a necessary implication, any estimate of value as to any matter not actually the subject of that litigation. It would be, clearly, a violation of the rule, to add to the value of the matter determined any estimate in money, by reason of the probative force of the judgment itself in some subsequent proceeding. That would often depend upon contingencies, and might be mere conjecture and speculation, while the statute evidently contemplated an actual and present value in money, determined by a mere inspection of the record. The value of the judgment, as an estoppel, depends upon whether it could be used in evidence in a subsequent action between the same parties; and yet, before the principal sum, in the present case, or any future installments of interest shall have become due, the bonds may have been transferred to a stranger, for or against whom the present judgment would not be evidence. And in every such case it would arise as a jurisdictional question, not how much is the value of the matter finally determined between the parties to the suit, but also, whether and in what circumstances, and to what extent, the judgment will conclude other controversies thereafter to arise between them, and thus require the trial and adjudication of issuable matter, both of law and fact, entirely extraneous to the actual litigation, and altogether in anticipation of further controversies, that may never arise. It is not the actual value of the judgment sought to be reviewed which confers jurisdiction, otherwise it might be required to hear evidence that it could not be collected; but it is the nominal or apparent sum or value of the subject matter of the judgment. It is impossible to foresee into what mazes of speculation and conjecture we may not be led by a departure from the simplicity of the statutory provision." Elgin *v.* Marshall, 106 U. S. 578, 580, 27 L. Ed. 249; reaffirmed in Plainview *v.* Marshall, 106 U. S. 583, 27 L. Ed. 250.

Illustrative cases.—A promise by a third person to grant to a litigant certain lands or make particular donations in case of a successful prosecution of a suit, will not confer jurisdiction on this court to review the judgment, if without such promise or conditional donation the court would not have the requisite jurisdiction. Smith *v.* Adams, 130 U. S. 167, 176, 32 L. Ed. 895.

Where a suit was for an account involving a very large sum of money, the claimant claiming sums greatly exceeding $2,000, and the defendant insists on an award as a bar to the whole claim, it was held that the amount in controversy was sufficient to justify an appeal to this court, and it was no answer to say that if this suit should be defeated the claimant may have some other title which will not be worth $2,000 less than the value of what he now claims. McCormick *v.* Gray, 13 How. 26, 39, 14 L. Ed. 36.

Usurious claims.—In New England Mortgage Co. *v.* Gay, 145 U. S. 123, 36 L. Ed. 646, which was an action in assumpsit upon promissory notes, there had been a finding by a jury that the transaction was usurious. The amount involved in the particular suit was less than $5,000, but the effect of the judgment under the laws of Georgia was to invalidate a mortgage given as security upon property worth over $200,000. It was held that, notwithstanding such indirect effect, this court had no jurisdiction, the amount directly in dispute being only the usurious sum.

Suit to collect interest on railroad bonds.—A good application of this doctrine will be found in Bruce *v.* Manchester, etc., R. Co., 117 U. S. 514, 515. 29 L. Ed. 990. In that case two bond holders of a certain railroad brought a suit to collect interest due on certain bonds of the railroad by the foreclosure of a mortgage made to trustees to secure a series of bonds. There were other parties, both plaintiff and defendant, when the suit was begun, but a discontinuance was entered before the decree as to all but two. These two complainants although in no way authorized to represent the other bond

gether to control rates, etc. It was claimed by way of defense that without such an agreement the competition between them for traffic would be so severe as to cause great losses to each defendant and possibly ruin the companies repre-

holders, sued for themselves and all others in like situation who might join with them, but no one saw fit to join. The record shows that the two parties to the suit owned bonds for $7500, on which interest was past due and unpaid to the amount of not more than $3400. As the others would not join these two were allowed to proceed alone and the payment to them of their interest would have been a bar to the further prosecution of the suit. "So, if a decree had been rendered in their favor without others joining in the suit, either by petition or by proof before a master, or otherwise, it would have been satisfied by the payment of the amount found due to them, and no further proceedings could thereafter be had. It is true, if such a payment should not be made, and a resort to a sale of the mortgaged property should be necessary to collect what was due to them, the other bondholders would have an interest in the proceeds and could be called in before a master for that purpose; but that would be only one of the collateral or indirect effects of the decree not to be considered in determining our jurisdiction. * * * It follows that the matter in dispute here is less than our jurisdictional limit."

Suit to enjoin collection of tax.—This rule has been applied to a bill to restrain the collection of the specific tax levied under a general and continuing law. The matter in dispute in its relation to jurisdiction is the particular taxes attacked, and unaccrued or unspecified taxes cannot be included, upon conjecture, to make up the requisite amount. Washington, etc., R. Co. *v.* District of Columbia, 146 U. S. 227, 36 L. Ed. 951.

Effect of judgment of ouster.—The effect of a judgment of ouster from office in a suit to recover emoluments for the past is collateral, even though the judgment might be conclusive in such subsequent action. Albright *v.* New Mexico, 200 U. S. 9, 50 L. Ed. 346, citing New England Mortgage Co. *v.* Gay, 145 U. S. 123, 36 L. Ed. 646; Washington, etc., R. Co. *v.* District of Columbia, 146 U. S. 227, 36 L. Ed. 951.

Where entire title to property incidentally involved.—In Farmers' Bank *v.* Hooff, 7 Pet. 168, 8 L. Ed. 646, a bill was filed for the purpose of foreclosing a deed of trust given to secure a sum of money less than $1,000. It appeared that the property covered by the deed exceeded that sum in value, but the court held the real matter in controversy to be the debt claimed in the bill, "and, though the title of the lot may be inquired into incidentally, it does not constitute the object of the suit."

A similar ruling was made in Ross *v.* Prentiss, 3 How. 771, 11 L. Ed. 824, where a bill was filed to enjoin the marshal from levying an execution of less than $2,000 upon certain property, the value of which was more than $2,000. In this case as in the other, the argument was made that the defendant might lose the whole benefit of his property by the forced sale under the execution, but the court held that it did not depend upon the amount of any contingent loss, and dismissed the bill.

Ejectment to recover portion of land.—In Grant *v.* McKee, 1 Pet. 248, 7 L. Ed. 131, it refused to take jurisdiction, because the value of the premises, the title to which was involved in that action, was less than the jurisdictional limit, although they were part of a larger tract, held under one title, on which the recovery in ejectment had been obtained against several tenants, whose rights all depended on the same questions.

Action to recover on municipal securities.—In Elgin *v.* Marshall, 106 U. S. 578, 27 L. Ed. 249, an action was brought against a town to recover the amount due upon certain coupons or interest warrants, detached from municipal bonds, alleged to have been issued by it in aid of a railroad company. The defense set up was that the bonds and coupons were void, the statute under the assumed authority of which they had been issued, being, as was alleged, unconstitutional. Judgment was given for less than $5,000, but the bonds were for a larger sum than $5,000. This court nevertheless dismissed the writ of error for want of jurisdiction over the contention of counsel that though the judgment recovered was less than $5,000 yet the value of the matter in dispute was in excess of that sum, because the defendants in error being the holders and owners of the bonds, to the amount of $7,500, have obtained, by the present judgment, an adjudication, conclusive upon the plaintiff in error, as an estoppel, of its liability to pay the entire amount of the principal sum. "Section 691 and 692, Rev. Stat., which, as amended by § 3 of the act of Feb. 16, 1875, c. 77, limit the jurisdiction of this court, on writs of error and appeal, to review final judgments in civil actions, and final decrees in cases of equity and of admiralty and maritime jurisdiction, to those where the matter in dispute, exclusive of costs, exceeds the sum or value of $5,000, have reference to the matter which is directly in dispute, in the particular cause in which the judgment or decrees ought to be reviewed, has been rendered, and do not permit us, for the purpose of determining its sum or value, to estimate its collateral effect

sented in the agreement. Upon these facts appearing in the record and a stipulation between the parties, it was held, that it sufficiently appeared that the right in a subsequent suit between the same or other parties."

Effect of refusal to give instructions.—The declaration was for a balance of accounts of nine hundred and eighty-eight dollars and ninety-four cents, and the ad damnum was laid at two thousand dollars. The bill of exceptions showed that the United States claimed interest on the balance due them. Under those circumstances it is no objection to the jurisdiction that the bill of exceptions was taken by the counsel for the United States, to a refusal of the court to grant an instruction asked by the United States, which was applicable to certain items of credit only claimed by the defendants, which would reduce the debt below the sum of one thousand dollars. The court cannot judicially know what influence that refusal had upon the verdict. United States *v.* McDaniel, 6 Pet. 634, 8 L. Ed. 527.

Suits in admiralty.—When the libelant is awarded a decree for $8252.47 against two vessels by the circuit court, and both boats are condemned therefor, and one of the boats is sold for $2100 and the proceeds are paid into court, and a stipulation for value as to the other boat in the amount of $1000 is filed by consent, but the owner of both the boats, appeals to this court, it was held that, in as much as the aggregate value of the two boats does not exceed $5000 and there is no decree against any person in personam, this court has no jurisdiction. The Sydney, 139 U. S. 331, 35 L. Ed. 177, following Elgin *v.* Marshall, 106 U. S. 578, 27 L. Ed. 249; The Jesse Williamson, Jr., 108 U. S. 305, 27 L. Ed. 730.

"The principle involved in Elgin *v.* Marshall, 106 U. S. 578, 27 L. Ed. 249, was, on the authority of that case, applied by this court in an admiralty cause, The Jessie Williamson, Jr., 108 U. S. 305, 27 L. Ed. 730, the facts in which were substantially like those in the present case. In the case of The Jessie Williamson, Jr., the counsel for the appellant invoked the authority of The Enterprise, 2 Curtis 317, as taking the case out of the rule laid down in Elgin *v.* Marshall. In The Jessie Williamson, Jr., the libelant in a suit in rem, in admiralty, against a vessel, claimed in his libel to recover $27,000 for damages growing out of a collision. A stipulation in the sum of $2,100, as the appraised value of the vessel, was given in the district court. The libel having been, on appeal, dismissed by the circuit court, the libelant appealed to this court, which held that the matter in dispute did not exceed the sum or value of $5,000, exclusive of costs, and that it had no jurisdiction of the appeal. In The Jessie Williamson, Jr., it was said by this court, that, although the libelant might recover $27,000 against the vessel, it was plain that he could not recover on the stipulation for value, which represented her more than $2,100, and could not recover against the sureties in the stipulation more than that amount; and that, the suit being one in rem only, the value of the vessel, represented by the stipulation, was all that was in dispute, because that was all that the libelant could obtain or the stipulators lose in the suit. It was further shown, in the opinion in The Jessie Williamson, Jr., that the facts in that case differed from the facts in the case of The Enterprise; so that, whatever was said by this court in apparent recognition of the propriety of the decision in the case of The Enterprise must be regarded as obiter dictum, and the views set forth in the opinion in the last-mentioned case, so far as they conflict with the actual rulings of this court in the cases of Elgin *v.* Marshall and The Jessie Williamson, Jr., must be regarded as not having had the affirmative approval of this court." The Sydney, 139 U. S. 331, 335, 35 L. Ed. 177.

Effect of decision on future taxation.—"Treating this bill as setting up a case arising under the constitution or laws of the United States on the ground that the laws of Indiana authorized the taxation in question, and were therefore void because patent rights granted by the United States could not be subjected to state taxation, or because the obligation of the contract existing between the inventor and the general public would be thereby impaired, or for any other reason, the difficulty is that the pecuniary limitation of over two thousand dollars applied, and the taxes in question did not reach that amount. And the effect on future taxation of a decision that the particular taxation is invalid cannot be availed of to add to the sum or value of the matter in dispute. New England Mortgage Co. *v.* Gay, 145 U. S. 123, 36 L. Ed. 646; Clay Center *v.* Farmers Loan & Trust Co., 145 U. S. 224, 36 L. Ed. 685; Citizens' Bank *v.* Cannon, 164 U. S. 319, 41 L. Ed. 451." Holt *v.* Indiana Mfg. Co., 176 U. S. 68, 72, 44 L. Ed. 374.

Where decision will affect other persons and interests.—A writ of error will not lie to the supreme court of the District of Columbia, to review an order denying mandamus to the postmaster general seeking to compel him to readjust the salary of a postmaster when the additional amount to become due will be less than the jurisdictional amount, although it is stated that the questions of law involved "concern the interest of more than one thousand persons, ex-postmasters, who reside in many different states and terri-

involved is a right which is of a requisite pecuniary value. Because a reduction of the rates by only the fractional part of one per centum would, in the aggre-

tories, and are in like case with herself and who have presented claims for like relief before the postmaster general, and that all of such claims amount to more than one hundred thousand dollars;" and praying that the writ be allowed "under § 706 of the Revised Statutes." Trask *v.* Wanamaker, 147 U. S. 149, 37 L. Ed. 118, distinguishing United States *v.* Vilas, 124 U. S. 86, 31 L. Ed. 329.

In a suit to recover two installments of hydrant rental for $1,850 each, the bill prayed that the defendant be decreed to pay directly to it so much of the hydrant rental as might be necessary to pay the interest on the bonds issued by the water company for the purpose of borrowing money to complete the construction of its works. The decree sustained the contract and awarded recovery to the amount of $4,042. The court, in dismissing the appeal for want of jurisdiction, said: "The value of the matter in dispute was the accrued rental and interest, and although the determination that such rental was due and should be paid to the trustee involved the existence and validity of the contract, yet causes of action for hydrant rental which had not accrued but might subsequently accrue cannot be availed of to make out jurisdiction of the case by this court upon appeal. New England Mortgage Security Co. *v.* Gay, 145 U. S. 123, 36 L. Ed. 646." Clay Center *v.* Farmers Loan & Trust Co., 145 U. S. 224, 36 L. Ed. 685.

Removal of county seat.—The mere fact that the county may acquire or lose a parcel of land in a certain locality, which exceeded in value $5,000, according as the county seat is kept at or removed from the place designated as county seat by the election, the validity of which is contested, is not sufficient to give this court jurisdiction. "The acquisition or loss of the land in question is not a necessary consequence of the election for the county seat, such result not being created by law, but by a mere accident arising from a voluntary gift by Aberdeen, made contingent upon the removal of the county seat to that place and its continuance there." Smith *v.* Adams, 130 U. S. 167, 176, 32 L. Ed. 895.

Case reconciled.—Stinson *v.* Dousman, 20 How. 461, 15 L. Ed. 966, was an action at law for the recovery of rent, where the claim and judgment against the defendant below were less than the amount required to give this court jurisdiction on a writ of error; but in giving judgment for the plaintiff below, for any sum at all, the court necessarily passed upon a defense of the defendant, set up by way of answer in the nature of a counterclaim, insisting upon an equitable right to a conveyance of the land, out of which it was alleged the rent issued, and the value of which was in excess of the limit required for the jurisdiction of the court. The effect of the judgment was to adjust the legal and equitable claims of the parties to the subject of the suit, which was, not merely the amount of the rent claimed, but the title of the respective parties to the land. On that ground alone the jurisdiction of the court was upheld. Cited and reconciled with the above rule in Elgin *v.* Marshall, 106 U. S. 578, 581, 27 L. Ed. 249; New England Mortgage Co. *v.* Gay, 145 U. S. 123, 131, 36 L. Ed. 646.

Where judgment will operate an estoppel.—Although the question actually litigated below relates to the title of the parties to the land, and the verdict will be conclusive on that question as an estoppel in some other case, yet for the purpose of estimating the value on which our jurisdiction depends, reference can only be had to the matter actually in dispute in the particular cause in which the judgment to be reviewed was rendered, and this court is not permitted to consider the collateral effect of the judgment in another suit between the same or other parties. It is the money value of what has been actually adjudged in the cause that is to be taken into the account, not the probative force of the judgment in some other suit. New Jersey Zinc Co. *v.* Trotter, 108 U. S. 564, 27 L. Ed. 828, citing Hilton *v.* Dickinson, 108 U. S. 165, 27 L. Ed. 688; Elgin *v.* Marshall, 106 U. S. 578, 27 L. Ed. 249.

Conclusiveness of judgment in another proceeding.—In Troy *v.* Evans, 97 U. S. 1, 24 L. Ed. 941, action was brought to recover certain installments upon bonds, the aggregate of which bonds exceeded $5,000, but the judgment was for less. The case was dismissed, although it appeared that the judgment would be conclusive in another action upon future installments upon the same bonds.

A like ruling was made in Elgin *v.* Marshall, 106 U. S. 578, 27 L. Ed. 249, where a judgment was rendered for $1,660.75, against a town, on interest coupons detached from bonds which it had issued under a statute claimed to be unconstitutional. The case was dismissed in an elaborate opinion by Mr. Justice Matthews, although it appeared that the judgment might be conclusive as an estoppel in any subsequent action upon other coupons, or upon the bonds themselves.

New Jersey Zinc Co. *v.* Trotter, 108 U. S. 564, 27 L. Ed. 828, was an action of trespass, the declaration in which there were three counts: Two quare clausum fregit, joined with one de bonis asportatis. The plea was not guilty. No other

gate, soon amount to more than the jurisdictional requirement.[91] In general terms, the appellate jurisdiction may be sustained where the value of the right in controversy exceeds the jurisdictional amount, although such value is made up in part of the future exercise of the right, when the continuance of the right is fixed and the value thereof is certainly ascertainable.[92]

f. *Where There Is a Valid Defense to the Action.*—The fact of a valid defense to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in dispute; for who can say in advance that that defense will be presented by the defendant, or, if presented, sustained by the court? We do not mean that a claim, evidently fictitious, and alleged simply to create a jurisdictional amount, is sufficient to give jurisdiction.[93]

g. *Where Part of Demand Is Not Due.*—Where an action is brought on a claim before it is due in accordance with the statute; and the amount actually due and payable is less than the jurisdictional amount, but the entire claim exceeds the amount, this court, nevertheless, has jurisdiction. "Although there might be a perfect defense to the suit for at least the amount not yet due, yet the fact of a defense, and a good defense, too, would not affect the question as to what was the amount in dispute. Suppose an action were brought on a nonnegotiable note for $2,550, the consideration for which was fully stated in the petition, and which was a sale of lottery tickets, or any other matter distinctly prohibited by statute, can there be a doubt that the circuit court would have jurisdiction? There would be presented a claim to recover the $2,500; and whether that claim was sustainable or not, that would be the real sum in dispute."[94]

issue was raised by the pleadings. Neither party set up title, so that the only matter in dispute was the liability of the defendant to pay for the property which it was alleged had been wrongfully taken and carried away. The plaintiff recovered a judgment for $3,320 damages $750 costs of suit. It was held that the matter in dispute was the judgment for damages, and as that is less than $5,000, the appeal must be dismissed. The court said: "It may be that the question actually litigated below related to the title of the parties to the land from which the ore in controversy was taken, and that the verdict will be conclusive on that question as an estoppel in some other case; but, as was also said at the present term, in Elgin *v.* Marshall, 106 U. S. 578, 27 L. Ed. 249, for the purpose of estimating the value on which our jurisdiction depends, reference can only be had to the matter actually in dispute in the particular cause in which the judgment to be reviewed was rendered, and we are not permitted to consider the collateral effect of the judgment in another suit between the same or other parties. It is the money value of what has been actually adjudged in the cause that is to be taken into the account, not the probative force of the judgment in some other suit."

91. United States *v.* Freight Ass'n, 166 U. S. 290, 310, 41 L. Ed. 1007.

92. Harris *v.* Barber, 129 U. S. 366, 32 L. Ed. 697; United States *v.* Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007.

Where a creditor's suit is instituted by A on behalf of himself and of other creditors of the company, who may come in and contribute to the costs of the suit, and it appears from the record that A claimed to be the holder and owner of a very large amount of the debts, which were first liens upon the property in litigation, which had been sold by special commissioners appointed by the court to the complainant A, which debts were first liens upon the property, and to which the surplus of the cash payment which would remain after paying the costs of suit and expenses of sale would be applicable, that the sale was for $380,700, and of that sum $38,070 was paid in cash, and that A insisted that after deducting the costs of suit and expenses of sale therefrom, the larger part, if not the whole of the balance should be repaid to him, it was held, that a motion to dismiss would be denied, because A's interest as claimed might cover more than $5,000, if the disallowances should be sufficiently large. Stuart *v.* Boulware, 133 U. S. 78, 33 L. Ed. 568.

93. Where there is a valid defense to the action.—Schunk *v.* Moline, etc., Co., 147 U. S. 500, 505, 37 L. Ed. 255.

94. Where part of demand is not due.—Schunk *v.* Moline, etc., Co., 147 U. S. 500, 504, 37 L. Ed. 255.

In Schunk *v.* Moline, etc., Co., 147 U. S. 500, 505, 37 L. Ed. 255, the court cited Upton *v.* McLaughlin, 105 U. S. 640, 26 L. Ed. 1197, as a case very much in point, and reviewed it in the following words: "In other words, it was held, that although there was a perfect defense apparent upon the face of the petition, yet the court had jurisdiction—i. e., the right

12. Matter in Dispute Not Susceptible of Pecuniary Estimation—a. *In General.*—In order to give this court jurisdiction in cases dependent upon the amount in controversy, the matter in dispute must be money, or some right, the value of which can be calculated in money.[95]

to hear and determine; and further, in that case, that the defense was not available when suggested for the first time in the appellate court. So, here, the circuit court had jurisdiction, because the amount claimed was over two thousand dollars; and although it appeared upon the face of the petition that a part of the claim was not yet due, still the court had jurisdiction—the right to hear and determine whether this matter constituted a good defense to any part of the amount claimed."

95. Matter in dispute must be susceptible of pecuniary estimation.—De Krafft *v.* Barney, 2 Black 704, 17 L. Ed. 350, citing Old Grant *v.* McKee, 1 Pet. 248, 7 L. Ed. 131; Ritchie *v.* Mauro, 2 Pet. 243, 7 L. Ed. 411; Scott *v.* Lunt, 6 Pet. 349, 8 L. Ed. 423; Ross *v.* Prentiss, 3 How. 771, 772, 11 L. Ed. 824; United States *v.* Addison, 22 How. 174, 181, 16 L. Ed. 304; Sparrow *v.* Strong, 3 Wall. 97, 101, 17 L. Ed. 49; Barry *v.* Mercein, 5 How. 103, 12 L. Ed. 70; Pratt *v.* Fitzhugh, 1 Black 271, 17 L. Ed. 206; Potts *v.* Chumasero, 92 U. S. 358, 361, 23 L. Ed. 499; Youngstown Bank *v.* Hughes, 106 U. S. 523, 524, 27 L. Ed. 268; De La Rama *v.* De La Rama, 201 U. S. 303, 307, 50 L. Ed. 765.

The right of a party to a writ of error from this court, under the 22d section of the judiciary act, is expressly confined to cases where the matter in dispute exceeds the sum or value of two thousand dollars exclusive of costs. This means a property value capable of being ascertained and measured by the ordinary standard of value, and unless the fact necessary to bring the case within the statute be shown by the record or by evidence aliunde, this court has no jurisdiction to review the judgment of the circuit court. Pratt *v.* Fitzhugh, 1 Black 271, 17 L. Ed. 206, distinguishing Weston *v.* Charleston, 2 Pet. 449, 7 L. Ed. 481; Holmes *v.* Jennison, 14 Pet. 540, 10 L. Ed. 579.

"The rule, it is true, is an arbitrary one, as it is based upon a fixed amount, representing pecuniary value, and, for that reason, excludes the jurisdiction of this court, in cases which involve rights that, because they are priceless, have no measure in money. Lee *v.* Lee, 8 Pet. 44, 8 L. Ed. 860; Barry *v.* Mercein, 5 How. 103, 12 L. Ed. 70; Pratt *v.* Fitzhugh, 1 Black 271, 17 L. Ed. 206; Sparrow *v.* Strong, 3 Wall. 97, 17 L. Ed. 49. But, as it draws the boundary line of jurisdiction, it is to be construed with strictness and rigor. As jurisdiction cannot be conferred by consent of parties, but must be given by the law, so it ought not to be extended by doubtful constructions." Elgin *v.* Marshall, 106 U. S. 578, 580, 27 L. Ed. 249, reaffirmed in Plainview *v.* Marshall, 106 U. S. 583, 27 L. Ed. 250.

Contested election over removal of county seat.—This court has no jurisdiction upon error to the supreme court of the territory of Montana in a contested election over the removal of the seat of government, where the petitioners, to show that they have such a special interest in the question presented for adjudication as entitled them to maintain the action, allege that they are attorneys and counsellors at law, and that by the removal of the seat of government, their expenses will be increased while in attendance upon the courts pursuant to their professional engagement, because the contest is not for money, or any right the value of which can be measured by money. Potts *v.* Chumasero, 92 U. S. 358, 23 L. Ed. 499.

Suit for freedom.—The plaintiffs in error filed a petition for freedom in the circuit court of the United States for the county of Washington, and they proved that they were born in the state of Virginia as slaves of Richard B. Lee, now deceased, who moved with his family into the county of Washington, in the District of Columbia, about the year 1816, leaving the petitioners residing in Virginia as his slaves, until the year 1820, when the petitioner Barbara was removed to the county of Alexandria in the District of Columbia, where she was hired to Mrs. Muir, and continued with her thus hired for the period of one year. That the petitioner Sam was in like manner removed to the county of Alexandria, and was hired to General Walter Jones for a period of about five or six months. That after the expiration of the said periods of hiring, the petitioners were removed to the said county of Washington, where they continued to reside as the slaves of the said Richard B. Lee, until his death, and since as the slaves of his widow, the defendant. On the part of the defendant in error a preliminary objection was made to the jurisdiction of this court, growing out of the act of congress of the 2nd of April, 1816, which declares that no cause shall be removed from the circuit court for the District of Columbia to the supreme court by appeal or writ of error, unless the matter in dispute shall be of the value of one thousand dollars, or upwards. By the court: The matter in dispute in this case is the freedom of the petitioners. The judgment of the court below is against their claims to freedom; the matter in dispute is, therefore, to the

The value of color of title to property is hardly capable of pecuniary estimate.[96]

b. *Appeals from District of Columbia and the Territories.*—Under the act of March 3, 1885, 23 Stat. 443, which provides that: "No appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, or in the supreme court of any of the Territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars," it has uniformly been held, that the first section of that statute applies solely to judgments or decrees in suits at law or in equity measured by a pecuniary value.[97] While the

plaintiffs in error, the value of their freedom, and this is not susceptible of a pecuniary valuation. Had the judgment been in favor of the petitioners, and the writ of error brought by the party claiming to be the owner, the value of the slaves as property would have been the matter in dispute, and affidavits might be admitted to ascertain such value. But affidavits estimating the value of freedom are entirely inadmissible, and no doubt is entertained of the jurisdiction of the court. Lee *v.* Lee, 8 Pet. 44, 8 L. Ed. 860.

Where the averments in the petition for a mandamus do not, under the principles of the law of false imprisonment prevailing in this country, state a cause of action even against individuals, much less against a sovereignty; nor is it shown that the alleged wrong was actionable under the laws of Germany, so far as appears, the right to assert the demand in question upon the German Empire is merely a right to appeal to the grace of that country. The value of such a right is manifestly purely conjectural, and not susceptible of a pecuniary estimate. It certainly cannot be said to have the value declared by the statute to be essential to our power to entertain a writ of error. The writ of error must therefore be dismissed. Holzendorf *v.* Hay, 194 U. S. 373, 376, 48 L. Ed. 1025.

Bill to enjoin investigation into false return of personalty for taxation.—In Youngstown Bank *v.* Hughes, 106 U. S. 523, 27 L. Ed. 268, the auditor of a county in Ohio under the authority of a statute of that state enabling him to summon and charge anybody whom he suspects having made an erroneous return of his personal property subject to taxation, called on the cashier of a bank to appear and testify, and because he could not testify without, to bring with him the books of the bank showing its deposits. Thereupon the bank filed a bill in equity to enjoin the auditor, alleging for cause that such a proceeding on his part would unlawfully expose its business affairs, lessen public confidence in it as a depository of moneys, diminish its deposits, and greatly impair the value of its franchises. The circuit court dismissed the bill, and the bank appealed. A motion in this cause to dismiss the appeal for want of jurisdiction was granted, because the value of the matter in dispute did not exceed $5,000. Under the rule that to give this court jurisdiction in cases dependent upon the amount in controversy, the matter in dispute must be money, or some right, the value of which, in money, can be calculated and ascertained. "The present suit is not for money, nor for anything the value of which can be measured by money. The bank has no interest in the taxes to be placed on the tax duplicate. There is no property in dispute between the auditor and the bank. If the cashier is compelled to testify and to produce the books to be used in evidence for the purposes required, the damages, if any, resulting to the bank, would be, in the highest degree, remote and speculative."

The value of a "mining claim" in Nevada may be the subject of estimate in money; and this court will take jurisdiction of a suit concerning such a claim, if of the requisite value, though the land where the claim exists has never been surveyed and brought into market. Sparrow *v.* Strong, 3 Wall. 97, 17 L. Ed. 49, distinguishing Lownsdale *v.* Parrish, 21 How. 290, 15 L. Ed. 80, distinguished in Durham *v.* Seymour, 161 U. S. 235, 239, 40 L. Ed. 682.

Distinguishing this case, it was said: "In Sparrow *v.* Strong, 3 Wall. 97, 17 L. Ed. 49, there was an affidavit, uncontradicted by anything in the record, that the mining claim in dispute was of the requisite pecuniary value." South Carolina *v.* Seymour, 153 U. S. 353, 358, 38 L. Ed. 742.

96. Cameron *v.* United States, 146 U. S. 533, 36 L. Ed. 1077.

97. **Appeals from District of Columbia and the territories.**—Farnsworth *v.* Montana, 129 U. S. 104, 111, 32 L. Ed. 616; Snow *v.* United States, 118 U. S. 346, 351, 30 L. Ed. 207; Kurtz *v.* Moffitt, 115 U. S. 487, 495, 496, 29 L. Ed. 458; Durham *v.* Seymour, 161 U. S. 235, 40 L. Ed. 682; Perrine *v.* Slack, 164 U. S. 452, 41 L. Ed. 510; Simms *v.* Simms, 175 U. S. 162, 167, 44 L. Ed. 115.

Both sections of the act of March 3, 1885, regulating appeals from the supreme court of the District of Columbia (23 Stat. 443, ch. 355), apply to cases where

act of congress of March 3, 1885, allowing appeals or writs of error from the supreme court of a territory to this court in certain cases without regard to the sum or value in dispute, does not prescribe the amount, some sum or value must be in dispute.[98]

By § 8 of the Act of February 9, 1893, c. 74, establishing a court of appeals for the District of Columbia, as in the previous act of March 3, 1885, c. 355, regulating appeals from the supreme court of the district and the supreme courts of the territories, no case can be brought to this court by appeal or writ of error, unless "the matter in dispute, exclusive of costs shall exceed the sum of $5,000." In order to bring a case within this provision, the matter in dispute, according to the settled construction, must be money, or some right the value of which can be estimated and ascertained in money, and which appears by the record to be of the requisite pecuniary value.[99] In short, the term "matter in

there is a matter in dispute measurable by some sum or value in money. Farnsworth *v.* Montana, 129 U. S. 104, 112, 32 L. Ed. 616; Cross *v.* Burke, 146 U. S. 82, 36 L. Ed. 896; Washington, etc., R. Co. *v.* District of Columbia, 146 U. S. 227, 231, 36 L. Ed. 951.

Both sections of the act of March 3rd, 1885, 23 Stat. 443, c. 355, regarding appeals to this court from the supreme court of a territory, apply to cases where there is a matter in dispute measurable by some sum or value in money although the amount is not restricted under the second section. Washington, etc., R. Co. *v.* District of Columbia, 146 U. S. 227, 36 L. Ed. 951; Farnsworth *v.* Montana, 129 U. S. 104, 32 L. Ed. 616; Albright *v.* New Mexico, 200 U. S. 9, 50 L. Ed. 346, reaffirmed in Gutierrnez *v.* New Mexico, 202 U. S. 614, 50 L. Ed. 1171.

98. McLean *v.* Denver, etc., R. Co., 203 U. S. 38, 51 L. Ed. 78, citing Albright *v.* New Mexico, 200 U. S. 9, 50 L. Ed. 346.

99. Columbian Ins. Co. *v.* Wheelright, 7 Wheat. 534, 5 L. Ed. 516; Kurtz *v.* Moffitt, 115 U. S. 487, 29 L. Ed. 458; Street *v.* Ferry, 119 U. S. 385, 30 L. Ed. 439; Smith *v.* Adams, 130 U. S. 167, 176, 32 L. Ed. 895; Cross *v.* Burke, 146 U. S. 82, 88, 36 L. Ed. 896; Washington, etc., R. Co. *v.* District of Columbia, 146 U. S. 227, 36 L. Ed. 951; Cameron *v.* United States, 146 U. S. 533, 535, 36 L. Ed. 1077; Cameron *v.* United States, 148 U. S. 301, 303, 37 L. Ed. 459; South Carolina *v.* Seymour, 153 U. S. 353, 357, 38 L. Ed. 742; Chapman *v.* United States, 164 U. S. 436, 41 L. Ed. 504; Prather *v.* United States, 164 U. S. 452, 41 L. Ed. 510; Holzendorf *v.* Hay, 194 U. S. 373, 376, 48 L. Ed. 1025.

Appeals to this court from the court of appeals of the District of Columbia are governed by § 8 of the act of February 9, 1893. It is essential to our jurisdiction that it should appear that the matter in dispute in the courts below was money to an amount exceeding five thousand dollars exclusive of costs, or some right, the value of which could be ascertained in money and exceeded that sum; or that the validity of a patent or copyright was involved; or that the validity of a treaty or statute of or an authority exercised under the United States was drawn in question. South Carolina *v.* Seymour, 153 U. S. 353, 38 L. Ed. 742, and cases cited. Durham *v.* Seymour, 161 U. S. 235, 237, 40 L. Ed. 682.

The eighth section of the act of February 9, 1893, establishing the court of appeals of the District of Columbia, is as follows: "Sec. 8. That any final judgment or decree of the said court of appeals may be re-examined and affirmed, reversed or modified by the supreme court of the United States, upon writ of error or appeal, in all causes in which the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars, in the same manner and under the same regulations as heretofore provided for in cases of writs of error on judgment or appeals from decrees rendered in the supreme court of the District of Columbia; and also in cases, without regard to the sum or value of the matter in dispute, wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States." We regard this section and the act of 1885 as the same in their meaning and legal effect. The act of 1885 prohibits appeals or writs of error unless the matter in dispute exceeds the sum of $5,000 and provides that the restriction shall not apply to certain enumerated cases, "but that in all such cases an appeal or writ of error shall be brought without regard to the sum or value in dispute." Chapman *v.* United States, 164 U. S. 436, 449, 41 L. Ed. 504; Falk *v.* United States, 180 U. S. 636, 45 L. Ed. 709.

The act of 1893 allows appeals or writs of error whenever the matter in dispute exceeds the sum of $5,000, and also in cases "without regard to the sum or value of the matter in dispute," wherein the validity of any patent or copyright or of a treaty or statute of or an authority exercised under the United States is drawn in question, being the same cases mentioned in the second section of the act of 1885. We think as that section

dispute" as used in the statutes regulating appeals from the District of Columbia, as respects a money demand, has relation to justiciable demands according to the settled construction, and must be money, or some right the value of which can be estimated and ascertained in money, and which appears by the record to be of the requisite pecuniary value.[1]

c. *Criminal Prosecutions.*—The uniform ruling of this court in construing statutes regulating appeals to this court from the supreme court and court of appeals of the District of Columbia, and in fact in the construction of any statute prescribing an amount as a prerequisite to the appellate jurisdiction of this court, is that they have no application to criminal cases, because of the rule that the matter in dispute must be susceptible of pecuniary estimation.[2] And the same rule

clearly applied to cases where there was a pecuniary matter in dispute, measurable by some sum or value, as has been repeatedly decided, the last clause of section eight of the act of 1893, must receive the same construction. The meaning of both statutes is that in the cases enumerated the limitation on the amount is removed, but both alike refer to cases where there is a pecuniary matter in dispute, measurable by some sum or value, and they alike have no application to criminal cases. Chapman *v.* United States, 164 U. S. 436, 450, 41 L. Ed. 504; Falk *v.* United States, 180 U. S. 636, 45 L. Ed. 709.

1. South Carolina *v.* Seymour, 153 U. S. 353, 38 L. Ed. 742; Holzendorf *v.* Hay, 194 U. S. 373, 376, 48 L. Ed. 1025.

2. **Criminal prosecutions.**—Farnsworth *v.* Montana, 129 U. S. 104, 32 L. Ed. 616; Cross *v.* Burke, 146 U. S. 82, 36 L. Ed. 896; Washington, etc., R. Co. *v.* District of Columbia, 146 U. S. 227, 36 L. Ed. 951; United States *v.* Sanges, 144 U. S. 310, 36 L. Ed. 445; Snow *v.* United States, 118 U. S. 345, 30 L. Ed. 207; Chapman *v.* United States, 164 U. S. 436, 41 L. Ed. 504; United States *v.* More, 3 Cranch 159, 2 L. Ed. 397.

On the same third of March, A. D. 1885, congress passed an act "regulating appeals from the supreme court of the District of Columbia and the supreme courts of the several territories." 23 Stat. 443, c. 355. The first section of this act provided "that no appeal or writ of error shall hereafter be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, or in the supreme court of any of the territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars;" and the second section, that the first section should not apply to any case "wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute." We have repeatedly decided that this act did not apply, in either section, to any criminal case, and that it was only applicable to judgments and decrees in suits at law or in equity in which there was a pecuniary matter in dispute. Gonzales *v.* Cunningham, 164 U. S. 612, 617, 41 L. Ed. 572.

On examining the act "concerning the District of Columbia," the court is of opinion that the appellate jurisdiction, granted by that act, is confined to civil cases. The words "matter in dispute," seem appropriate to civil cases, where the subject in contest has a value beyond the sum mentioned in the act. But in criminal cases, the question is the guilt or innocence of the accused. And although he may be fined upwards of $100, yet that is, in the eye of the law, a punishment for the offense committed, and not the particular object of the suit. United States *v.* More, 3 Cranch 159, 173, 2 L. Ed. 397, opinion of Mr. Chief Justice Marshall; Albright *v.* New Mexico, 200 U. S. 9, 50 L. Ed. 346, reaffirmed in Gutierrnez *v.* New Mexico, 202 U. S. 614, 50 L. Ed. 1171.

Embezzlement by fiduciary.—A writ of error will not lie from this court to the court of appeals of the District of Columbia to review its judgment affirming the judgment of the supreme court by which a defendant was convicted of embezzlement under § 841 of the District Code, because the collateral effect of the conviction operates as a forfeiture of all right or claim to any commissions which the accused may have, for the reason that under the provisions of § 233 of the act regulating the review by this court of the judgments or decrees of the court of appeals of the District of Columbia, the matter in dispute must be susceptible of pecuniary estimation, while the only direct pecuniary result of a conviction under this statute is a fine not exceeding $1,000, and that as a punishment for the offense. Fields *v.* United States, 205 U. S. 292, 51 L. Ed. 807, citing United States *v.* More, 3 Cranch 159, 2 L. Ed. 397, and distinguishing Smith *v.* Whitney, 116 U. S. 167, 29 L. Ed. 601.

And the rule is the same in judgments in criminal cases, although the life or liberty of the party may depend on the de-

was applied in construing the act of March 3, 1885, authorizing a writ of error from this court to the supreme court of any territory in any case "in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States."[3]

Imposition of Fine.—And because the punishment for conviction by the statute under which plaintiff in error is indicted, tried and convicted, embraces a fine, does not alter the rule. In the language of Mr. Chief Justice Marshall: "In criminal cases, the question is of the guilt or innocence of the accused. And although he may be fined upwards of one hundred dollars, yet that is, in the eye of the law, a punishment for the offense committed, and not the particular object of the suit."[4]

d. *Habeas Corpus.*—**In General.**—As it is well settled that a proceeding in habeas corpus is a civil and not a criminal proceeding, and is only availed of to assert the civil right of personal liberty, the matter in dispute has no money value, and an appeal will not lie.[5] In order to give this court jurisdiction under the act

cision of the circuit court. Kurtz *v.* Moffitt, 115 U. S. 487, 29 L. Ed. 458, citing Barry *v.* Mercein, 5 How. 103, 12 L. Ed. 70.

3. Farnsworth *v.* Montana, 129 U. S. 104, 32 L. Ed. 616; Snow *v.* United States, 118 U. S. 346, 30 L. Ed. 207; United States *v.* Sanges, 144 U. S. 310, 36 L. Ed. 445.

4. United States *v.* More, 3 Cranch 159, 2 L. Ed. 397; Chapman *v.* United States, 164 U. S. 436, 41 L. Ed. 504; Prather *v.* United States, 164 U. S. 452, 41 L. Ed. 510; Fields *v.* United States, 205 U. S. 292, 51 L. Ed. 807.

5. Habeas corpus.—Cross *v.* Burke, 146 U. S. 82, 36 L. Ed. 896; Farnsworth *v.* Montana, 129 U. S. 104, 32 L. Ed. 616; United States *v.* Sanges, 144 U. S. 310, 320, 36 L. Ed. 445; Washington, etc., R. Co. *v.* District of Columbia, 146 U. S. 227, 36 L. Ed. 951; In re Lennon, 150 U. S. 393, 397, 37 L. Ed. 1120; In re Chapman, 156 U. S. 211, 215, 39 L. Ed. 401; Ex parte Belt, 159 U. S. 95, 100, 40 L. Ed. 88; Chapman *v.* United States, 164 U. S. 436, 41 L. Ed. 504; Perrine *v.* Slack, 164 U. S. 452, 41 L. Ed. 510; Gonzales *v.* Cunningham, 164 U. S. 612, 618, 41 L. Ed. 572; Fisher *v.* Baker, 203 U. S. 174, 51 L. Ed. 142; Ex parte Tom Tong, 108 U. S. 556, 27 L. Ed. 826; Kurtz *v.* Moffitt, 115 U. S. 487, 29 L. Ed. 458; Campbell *v.* Waite, 180 U. S. 635, 45 L. Ed. 709; In re Burrus, 136 U. S. 586, 34 L. Ed. 500.

"From this review of the statutes and decisions, the conclusion is inevitable that a jurisdiction, conferred by congress upon any court of the United States, of suits at law or in equity in which the matter in dispute exceeds the sum or value of a certain number of dollars, includes no case in which the right of neither party is capable of being valued in money; and therefore that writs of habeas corpus are not removable from a state court into a circuit court of the United States under the act of March 3, 1875, ch. 137, § 2." Kurtz *v.* Moffitt, 115 U. S. 487, 498, 29 L. Ed. 458. See, also, Barry *v.* Marcein, 5 How. 103, 12 L. Ed. 70.

Therefore, where a cause comes into this court on writ of error to a circuit court of the United States, and it appears that no question is controverted between the parties, except whether the defendants below were liable to imprisonment, and that question is raised upon an order of the circuit court discharging them on habeas corpus, the writ of error must be dismissed for want of jurisdiction. Pratt *v.* Fitzhugh, 1 Black 271, 17 L. Ed. 206.

In Pratt *v.* Fitzhugh, 1 Black 271, 17 L. Ed. 206, decided in 1861, this court dismissed for want of jurisdiction a writ of error to reverse a judgment of the circuit court for the Northern District of New York, discharging on habeas corpus persons imprisoned upon an execution issued by that court directing the marshal to levy the amount of a decree for $21,581.28 out of their goods and chattels, and, for want thereof, to arrest and keep them until the moneys were paid. Mr. Justice Nelson, in delivering the opinion, said that the 22d section of the judiciary act had always been held to mean a property value; and he distinguished the case of Holmes *v.* Jennison, 14 Pet. 540, 10 L. Ed. 579 (which was a writ of error to reverse a judgment of the supreme court of Vermont on habeas corpus, remanding to custody a prisoner under a warrant of extradition from the governor of that state), upon the ground that it was brought up from a state court under the 25th section of the judiciary act, in which case no value was required. Kurtz *v.* Moffitt, 115 U. S. 487, 496, 29 L. Ed. 458.

Under the act of 1789, ch. 20, § 22, providing that final judgments and decrees in civil actions and suits in equity in a circuit court, where the matter in dispute exceeds the sum or value of $2,000, exclusive of costs, may be re-examined and reversed or affirmed in the supreme court, it was held, that no writ of error will lie upon the judgment of the circuit court refusing to grant a writ of habeas corpus. Because this court can exercise no appellate power unless it is conferred by act

of March 3, 1885, entitled an act regulating appeals from the supreme court of the District of Columbia, and the supreme courts of the several territories, the matter in dispute must be money, or some right, the value of which in money can be calculated and ascertained. Therefore habeas corpus proceedings are not reviewable.[6]

Construction of Circuit Court of Appeals Act.—As a case of habeas corpus is not one in which the matter in controversy involves a money value, no appeal lies from the circuit court of appeals to this court under § 6 of the circuit court of appeals act.[7]

e. *Title and Right to Office.*—It has been held that a judgment awarding a peremptory writ of mandamus to admit one to an office, or a judgment of ouster from an office, might be reviewed by this court upon writ of error, if the salary during the term of office would exceed the sum named in the statute defining its appellate jurisdiction.[8] So in a case impeaching the right to an office, the amount of the salary attached to it is considered as determining the value of the matter in dispute.[9] But an appeal will not lie to this court from the supreme court of

of congress, and this act, under which the case can only be brought up, gives the right of revision in those cases unless where the rights of property are concerned, and where the matter in dispute has a known and certain value, which can be proved and calculated in the ordinary mode of a business transaction. Barry *v.* Mercein, 5 How. 103, 12 L. Ed. 70, reviewed in In re Burrus, 136 U. S. 586, 594, 34 L. Ed. 500, and followed in Perrine *v.* Slack, 164 U. S. 452, 454, 41 L. Ed. 510.

6. Kurtz *v.* Moffitt, 115 U. S. 487, 29 L. Ed. 458; Cross *v.* Burke, 146 U. S. 82, 88, 36 L. Ed. 896.

7. Lau Ow Bew *v.* United States, 144 U. S. 47, 58, 36 L. Ed. 340, citing Kurtz *v.* Moffitt, 115 U. S. 487, 29 L. Ed. 458; Whitney *v.* Dick, 202 U. S. 132, 50 L. Ed. 963.

8. **Title and right to office.**—Columbia Ins. Co. *v.* Wheelwright, 7 Wheat. 534, 5 L. Ed. 516; United States *v.* Addison, 22 How. 174, 16 L. Ed. 304; Smith *v.* Whitney, 116 U. S. 167, 173, 29 L. Ed. 601.

The deprivation of a man's political and social rights properly may be alleged to involve damage up to the jurisdictional amount, capable of estimation in money. Giles *v.* Harris, 189 U. S. 475, 485, 47 L. Ed. 909, citing Wiley *v.* Sinkler, 179 U. S. 58, 45 L. Ed. 84; Swafford *v.* Templeton, 185 U. S. 487, 46 L. Ed. 1005.

A writ of error will lie from this court to the circuit court for the District of Columbia to reverse the judgment of the circuit court awarding a peremptory mandamus to admit the defendants in error to the offices of directors in the Columbian Insurance Company if the amount in controversy amounts to $1,000, that sum being required to give this court appellate jurisdiction from the former judgment or decrees of the circuit court for the District of Columbia. The amount in controversy is the value of the office, and its value must be ascertained by the salary. Columbian Ins. Co. *v.* Wheelright, 7 Wheat. 534, 5 L. Ed. 516.

Where the matter in controversy was the right to the mayoralty in Georgetown, the salary of which office was $1,000 per annum, payable monthly, and the duration of which office was two years, this court has jurisdiction of a case coming up by writ of error from the circuit court of the United States for the District of Columbia. The fact that the salary is payable monthly makes no difference; the appropriation, when made, being made for the whole sum. United States *v.* Addison, 22 How. 174, 16 L. Ed. 304; S. C., 6 Wall. 291, 296, 18 L. Ed. 919, distinguishing Columbus Ins. Co. *v.* Wheelright, 7 Wheat. 534, 5 L. Ed. 516.

But in United States *v.* Addison, 22 How. 174, 16 L. Ed. 304, it was said: "In the Columbian Ins. Co. *v.* Wheelright, 7 Wheat. 534, 5 L. Ed. 516, it was held, that a writ of error will lie from this court upon the judgments of the circuit courts awarding a peremptory mandamus, if the matter in controversy is of sufficient value. But in that case, it did appear that the office of director of the insurance company, which was the matter in controversy, was of less value than $1,000 and that its value was to be ascertained by the salary paid; the court held it had no jurisdiction. The weight of this authority is not lessened by the fact on which the question of jurisdiction turned. The salary of the mayor of Georgetown was established by law at $1,000 per annum; and if this be the matter of controversy, it settles the jurisdiction."

9. Thus in Smith *v.* Whitney, 116 U. S. 167, 173, 29 L. Ed. 601, where the application was for a writ of prohibition restraining proceedings by court martial against an officer, an objection being taken to the appellate jurisdiction of this court on the ground that the subject matter of the suit was incapable of pecuniary estimation, the court, by Mr. Justice Gray, replied: "The matter in dispute is

a territory under either section of the act of March 3rd, 1885, c. 355, regarding appeals to this court from a supreme court, of a territory in a quo warranto proceeding for the alleged usurpation of office, where the matter in dispute is the alleged usurpation; and the liability to a fine on judgment of ouster does not make that matter measurable by some sum or value in money. The fine is, in the eye of the law, a punishment for the offense committed, and not the particular object of the suit, and, moreover, the appellant cannot invoke our jurisdiction on the ground that if his appeal were sustained he might be fined on a new judgment.[10]

f. *Right to Have Goods Transported by a Carrier.*—At common-law, a cause of action arose from the refusal of the common carrier to transport goods for carriage. Therefore, where the matter in dispute is a right of the appellants to have their goods which were tendered for shipment transported by railroad companies to the place of destination, this is a valuable right, measurable in money, within the meaning of the act of congress of March 3, 1885.[11]

g. *Custody of Children.*—A claim to the guardianship of the person and property of children, not on account of any pecuniary value attached to the office, but upon other considerations, is not within the jurisdiction of this court.[12] Thus,

whether the petitioner is subject to a prosecution which may end in a sentence dismissing him from the service, and depriving him of a salary, as paymaster general during the residue of his term as such, and as pay inspector afterwards, which in less than two years would exceed the sum of five thousand dollars. Rev. Stat., §§ 1556, 1565, 1624, arts. 8, 22, 48, 53." Smith *v.* Adams, 130 U. S. 167, 175, 32 L. Ed. 895.

Where the matter in dispute is whether the petitioner for a writ of prohibition is subject to a prosecution which may end in a sentence dismissing him from the service, and depriving him of a salary as paymaster general during the residue of his term as such, and as pay inspector afterwards, which in less than two years, would exceed the sum of five thousand dollars, this court has appellate jurisdiction. And an objection that this court has no appellate jurisdiction because there is nothing in dispute the value of which can be estimated in money, cannot be sustained. Smith *v.* Whitney, 116 U. S. 167, 29 L. Ed. 601, citing Kurtz *v.* Moffitt, 115 U. S. 487, 29 L. Ed. 458; Columbian Ins. Co. *v.* Wheelright, 7 Wheat. 534, 5 L. Ed. 516; United States *v.* Addison, 22 How. 174, 16 L. Ed. 304, distinguished in Fields *v.* United States, 205 U. S. 292, 51 L. Ed. 807.

"The case cannot be distinguished in principle from those in which it has been held, that a judgment awarding a peremptory writ of mandamus to admit one to an office, or a judgment of ouster from an office, might be reviewed by this court upon writ of error, if the salary during the term of the office would exceed the sum named in the statute defining its appellate jurisdiction. Columbian Ins. Co. *v.* Wheelright, 7 Wheat. 534, 5 L. Ed. 516; United States *v.* Addison, 22 How. 174, 16 L. Ed. 304." Smith *v.* Adams, 130 U. S. 167, 176, 32 L. Ed. 895.

In Columbian Ins. Co. *v.* Wheelright, 7 Wheat. 534, 5 L. Ed. 516, this court quashed a writ of error to review a judgment upon a writ of mandamus to admit to an office, the salary of which was not shown to be of the pecuniary value required to support the jurisdiction of this court. See, also, United States *v.* Addison, 22 How. 174, 16 L. Ed. 304; Smith *v.* Whitney, 116 U. S. 167, 173, 29 L. Ed. 601; United States *v.* Wanamaker, 147 U. S. 149, 37 L. Ed. 118; South Carolina *v.* Seymour, 153 U. S. 353, 358, 38 L. Ed. 742.

10. Albright *v.* New Mexico, 200 U. S. 9, 50 L. Ed. 346, reaffirmed in Gutierrez *v.* New Mexico, 202 U. S. 614, 50 L. Ed. 1171.

11. Right to have goods transported by a carrier.—McLean *v.* Denver, etc., R. Co., 203 U. S. 38, 51 L. Ed. 78.

12. Custody of children.—De Krafft *v.* Barney, 2 Black 704, 17 L. Ed. 350.

In DeKrafft *v.* Barney, 2 Black 704, 17 L. Ed. 350, decided in 1862, an appeal was taken from a decree of the circuit court for the District of Columbia, awarding the custody of a child to the father as against the divorced mother; and Lee *v.* Lee, 8 Pet. 44, 8 L. Ed. 860, was referred to as supporting the right of appeal. But this court dismissed the appeal for want of jurisdiction, Chief Justice Taney saying that the case was not distinguishable from Barry *v.* Mercein, 5 How. 103, 12 L. Ed. 70; and in that case it was held, "that in order to give this court jurisdiction under the 22d section of the judiciary act of 1789, the matter in dispute must be money, or some right, the value of which could be calculated and ascertained in money." Kurtz *v.* Moffitt, 115 U. S. 487, 496, 29 L. Ed. 458.

In Barry *v.* Mercein, 5 How. 103, 12 L. Ed. 70, decided in 1847, this court dismissed for want of jurisdiction a writ of error to reverse a judgment of the circuit court for the Southern District of New York, refusing to grant to a father

where the controversy is between the mother and the testamentary guardian of infant children, each claiming the right to their custody and care, since the matter in dispute is of such a nature as to be incapable of being reduced to any pecuniary standard of value, the writ of error will be dismissed.[13]

h. *Guardian and Ward.*—The value of the interest a guardian has in the minor's estate is not the value of the estate, but that of the office of guardian. This is of no value, except so far as it affords a compensation for labors and services; and in a controversy between persons claiming adversely as guardians, having no distinct interest of their own, it cannot be considered as amounting to a sufficient sum to authorize an appeal to this court, from a circuit court of the District of Columbia.[14]

i. *Registration of Trademarks.*—A writ of error will not lie from this court to review a judgment of the court of appeals of the District of Columbia, denying a writ of mandamus to the commissioner of patents to register a trademark, where the matter in dispute is not the right to the trademark, but the right to have it registered, and there is no evidence whatever in the record that the value of the registration is susceptible of an estimate in money.[15]

j. *Denial of Application for a Patent.*—The matter in dispute must have actual value, and that cannot be supplied by speculation on the possibility that, in a given case, an invention might be held patentable.[16] Therefore, the right to apply for a patent cannot be regarded for jurisdictional purposes as in itself property or a right of property having an actual value susceptible of estimation in money. Where the question was whether the alleged invention was patentable or not, that question has no relation to its value in money. If the invention is not patentable, the applicant has suffered no loss; if the invention were patentable, it is immaterial whether it had or had not a money value.[17]

k. *Divorce and Alimony.*—No appeal lies to this court from a decision of the supreme court of a territory granting or refusing a divorce, since it is a matter which cannot be estimated in money.[18] But the long-established rule that the courts of the United States have no jurisdiction on the subject of divorce or for the allowance of alimony, either as an original proceeding in chancery, or an in-

a writ of habeas corpus to take his child out of the custody of his wife who was living apart from him. Chief Justice Taney, in delivering the opinion, after quoting the 22d section of the judiciary act of 1789, said: "In order, therefore, to give us appellate power under this section, the matter in dispute must be money, or some right, the value of which in money can be estimated and ascertained." The words of the act of congress are plain and unambiguous. They give the right of revision in those cases only where the rights of property are concerned, and where the matter in dispute has a known and certain value, which can be proved and calculated, in the ordinary mode of a business transaction. There are no words in the law, which by any just interpretation can be held to extend the appellate jurisdiction beyond those limits, and authorize us to take cognizance of cases to which no test of money value can be applied. Nor indeed is this limitation upon the appellate power of this court confined to cases like the one before us. It is the same in judgments in criminal cases, although the liberty or life of the party may depend on the decision of the circuit court. And since this court can exercise no appellate power unless it is conferred by act of congress, the writ of error in this case must be dismissed. Cited in Kurtz *v.* Moffitt, 115 U. S. 487, 495, 29 L. Ed. 458.

13. Perrine *v.* Slack, 164 U. S. 452, 41 L. Ed. 510, following Barry *v.* Mercein, 5 How. 103, 12 L. Ed. 70; Chapman *v.* United States, 164 U. S. 436, 41 L. Ed. 504; Campbell *v.* Waite, 180 U. S. 635, 45 L. Ed. 709; Woey Ho *v.* United States, 191 U. S. 558, 48 L. Ed. 301.

14. Guardian and ward.—Ritchie *v.* Mauro, 2 Pet. 243, 7 L. Ed. 411.

15. Registration of trademarks.—South Carolina *v.* Seymour, 153 U. S. 353, 38 L. Ed. 742.

16. Denial of application for a patent.—Durham *v.* Seymour, 161 U. S. 235, 239, 40 L. Ed. 682.

17. Durham *v.* Seymour, 161 U. S. 235, 40 L. Ed. 682, distinguishing Sparrow *v.* Strong, 3 Wall. 97, 17 L. Ed. 49, and distinguishing Gandy *v.* Marble, 122 U. S. 432, 30 L. Ed. 1223; Hill *v.* Wooster, 132 U. S. 693, 33 L. Ed. 502; Morgan *v.* Daniels, 153 U. S. 120, 38 L. Ed. 657.

18. Divorce and alimony.—Simms *v.* Simms, 175 U. S. 162, 44 L. Ed. 115.

cident of a divorce, on the ground that no pecuniary value is involved, has no application to the jurisdiction of territorial courts, or to the appellate jurisdiction of this court over those courts.[19] Hence, an appeal may be allowed from the supreme court of a territory to the supreme court of the United States on a decree dismissing a suit of a husband for divorce and awarding the wife counsel fees and alimony, to the sum of $5,000 or more.[20]

13. AGGREGATE AMOUNT OF DEMAND—a. *In General.*—It is well settled in this court that when two or more plaintiffs, having several interests, unite for the convenience of litigation in a single suit, it can only be sustained in the court of original jurisdiction, or on appeal in this court, as to those whose claims exceed the jurisdictional amount; and when two or more defendants are sued by the same plaintiff in one suit the test of jurisdiction is the joint or several character of the liability to the plaintiff.[21] The rule is clearly stated as follows by Mr. Justice Gray: When a suit is brought by two or more plaintiffs, or against two or more defendants, or to recover or charge property owned or held by different persons (which more often happens under the flexible and comprehensive forms of proceeding in equity and admiralty, than under the stricter rules of the common-law), the question what is the matter in dispute becomes more difficult. Generally speaking, however, it may be said, that the joinder in one suit of several plaintiffs or defendants, who might have sued or been sued in separate actions, does not enlarge the appellate jurisdiction; that when property or money is claimed by several persons suing together, the test is whether they claim it under one common right, the adverse party having no interest in its apportionment or distribution among them, or claim it under separate and distinct rights, each of which

19. De La Rama *v.* De La Rama, 201 U. S. 303, 50 L. Ed. 765, citing Simms *v.* Simms, 175 U. S. 162, 44 L. Ed. 115; and distinguishing Barber *v.* Barber, 21 How. 582, 16 L. Ed. 226; Kurtz *v.* Moffitt, 115 U. S. 487, 29 L. Ed. 458; Durham *v.* Seymour, 161 U. S. 235, 40 L. Ed. 682; Perrine *v.* Slack, 164 U. S. 452, 41 L. Ed. 510.

20. Simms *v.* Simms, 175 U. S. 162, 44 L. Ed. 115.

A decree for alimony and counsel fees, although in one sense an incident to the suit for divorce, is a distinct and severable final judgment in favor of the defendant for a sum of money of a sufficient jurisdictional amount, and is therefore good ground of appeal, for the same reason that a judgment for or against the defendant upon a counterclaim of like amount would support the appellate jurisdiction. Dushane *v.* Benedict, 120 U. S. 630, 636, 30 L. Ed. 810; Stuart *v.* Boulware, 133 U. S. 78, 33 L. Ed. 568; Block *v.* Darling, 140 U. S. 234, 35 L. Ed. 476; Simms *v.* Simms, 175 U. S. 162, 169, 44 L. Ed. 115.

21. In general.—Seaver *v.* Bigelow, 5 Wall. 208, 18 L. Ed. 595; Russell *v.* Stansell, 105 U. S. 303, 26 L. Ed. 989; Farmers' Loan and Trust Co. *v.* Waterman, 106 U. S. 265, 27 L. Ed. 115; Hawley *v.* Fairbanks, 108 U. S. 543, 27 L. Ed. 820; Stewart *v.* Dunham, 115 U. S. 61, 29 L. Ed. 329; Gibson *v.* Shufeldt, 122 U. S. 27, 30 L. Ed. 1083; Clay *v.* Field, 138 U. S. 464, 34 L. Ed. 1044; Walter *v.* Northeastern R. Co., 147 U. S. 370, 373, 37 L. Ed. 206; Wheeler *v.* Cloyd, 134 U. S. 537, 33 L. Ed. 1008; Davis *v.* Schwartz, 155 U. S. 631, 647, 39 L. Ed. 289; McDaniel *v.* Traylor, 196 U. S. 415, 49 L. Ed. 533.

The general principle observed in all is, that if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction; but where their interests are distinct, and they are joined for the sake of convenience only, and because they form a class of parties whose rights or liabilities arose out of the same transaction, or have relation to a common fund or mass of property sought to be administered, such distinct demands or liabilities cannot be aggregated together for the purpose of giving this court jurisdiction by appeal, but each must stand or fall by itself alone. Shields *v.* Thomas, 17 How. 3, 15 L. Ed. 93; Market Co. *v.* Hoffman, 101 U. S. 112, 25 L. Ed. 782; The Connemara, 103 U. S. 754, 26 L. Ed. 322; The Mamie, 105 U. S. 773, 26 L. Ed. 937; Davies *v.* Corbin, 112 U. S. 36, 28 L. Ed. 627; Estes *v.* Gunter, 121 U. S. 183, 30 L. Ed. 884; Handley *v.* Stutz, 137 U. S. 366, 34 L. Ed. 706; Clay *v.* Field, 138 L. Ed. 464, 479, 34 L. Ed. 1044.

Distinct and separate interests cannot be united for the purpose of making up the amount necessary to give us jurisdiction on appeal. Russell *v.* Stansell, 105 U. S. 303, 26 L. Ed. 989.

If the matter before the court is divisible, each of these separate claims must be of itself sufficient in amount to give jurisdiction to an appellate court. Elgin *v.* Marshall, 106 U. S. 578, 27 L. Ed. 249;

is contested by the adverse party; that when two persons are sued, or two parcels of property are sought to be recovered or charged, by one person in one suit, the test is whether the defendants' alleged liability to the plaintiff, or claim to the property, is joint or several; and that, so far as affected by any such joinder, the right of appeal is mutual, because the matter in dispute between the parties is that which is asserted on the one side and denied on the other.[22]

Tupper *v.* Wise, 110 U. S. 398, 28 L. Ed. 189; Fourth Nat. Bank *v.* Stout, 113 U. S. 684, 28 L. Ed. 1152.

"Indeed, so strictly has it been applied, that, in cases where, although the entire matter in dispute in the suit exceeds in value the jurisdictional limit, nevertheless, if there are several and separate interests in that sum, belonging to distinct parties, and constituting distinct causes of action, although actually united in one suit and growing out of the same transaction, the jurisdiction of the court has been constantly denied. We have had occasion to repeat and apply this principle in several cases at the present term. Ex parte Baltimore & Ohio Railroad Co., Schwed *v.* Smith, Farmers' Loan & Trust Co. *v.* Waterman, Adams *v.* Crittenden, ante, pp. 5, 188, 265, 576." Elgin *v.* Marshall, 106 U. S. 578, 582, 27 L. Ed. 249, reaffirmed in Plainview *v.* Marshall, 106 U. S. 583, 27 L. Ed. 250.

"In some of these cases, the value of the matter in dispute, actually determined against the party invoking our appellate jurisdiction, actually was largely in excess of its limit, and yet its exercise was forbidden, because it was divided into distinct claims, no one of which was sufficient of itself to entitle either party to an appeal, although the decision in one was necessarily the same in all, because rendered upon precisely the same state of facts. Russell *v.* Stansell, 105 U. S. 303, 26 L. Ed. 989." Elgin *v.* Marshall, 106 U. S. 578, 582, 27 L. Ed. 240, reaffirmed in Plainview *v.* Marshall, 106 U. S. 583, 27 L. Ed. 250.

22. Gibson *v.* Shufeldt, 122 U. S. 27, 30, 30 L. Ed. 1083.

Illustrative cases.—Several judgments severally held by different complainants who unite in the prosecution of a creditors' bill cannot be added together in order to make the amount exceeding two thousand dollars, which is necessary in order to enable the court to take appellate jurisdiction. Hunt *v.* Bender, 154 U. S. 556, 18 L. Ed. 915, citing Seaver *v.* Bigelow, 5 Wall. 208, 18 L. Ed. 595.

In a creditors' bill brought by distinct creditors upon distinct judgments to reach the property of their common debtor, the amount due the several creditors could not be joined to give jurisdiction on an appeal by the defendants. Hawley *v.* Fairbanks, 108 U. S. 543, 549, 27 L. Ed. 820, citing Schwed *v.* Smith, 106 U. S. 188, 27 L. Ed. 156; Seaver *v.* Bigelow, 5 Wall. 208, 18 L. Ed. 595.

Where a bill is filed by several creditors to set aside a fraudulent conveyance by their debtor, unless the claim of each one of the claimants is sufficient to give this court jurisdiction, the appeal will be dismissed as to any one of such creditors whose claim is for less than that amount. Smith Middlings Purifier Co. *v.* McGroarty, 136 U. S. 237, 34 L. Ed. 346, citing Stewart *v.* Dunham, 115 U. S. 61, 29 L. Ed. 329; Gibson *v.* Shufeldt, 122 U. S. 27, 30 L. Ed. 1083.

An appeal by creditors who are joined in a suit to set aside a fraudulent conveyance by their debtor, will be dismissed where the amounts found due the appellants respectively are less than the jurisdictional amount. Seaver *v.* Bigelow, 5 Wall. 208, 18 L. Ed. 595; Schwed *v.* Smith, 106 U. S. 188, 27 L. Ed. 156; Chatfield *v.* Boyle, 105 U. S. 231, 26 L. Ed. 944.

In a suit by several creditors secured under a deed of assignment, to set aside a fraudulent conveyance made by that debtor, it was held, that the claims of the several complainants are separate and distinct, and cannot be united for the purpose of making up the amount necessary to give us jurisdiction. Chatfield *v.* Boyle, 105 U. S. 231, 26 L. Ed. 944.

In a suit to set aside a fraudulent conveyance by a debtor, which consisted in the confession of a judgment against himself in favor of one of its creditors, it was held, that if each several claim of the appealing creditor is less than $5,000, but the aggregate claims exceed that amount, an appeal will not lie. Because the creditors have separate and distinct interest depending on separate and distinct judgments as well as separate and distinct attachments. Schwed *v.* Smith, 106 U. S. 188, 27 L. Ed. 156, following Seaver *v.* Bigelow, 5 Wall. 208, 18 L. Ed. 595.

In Gibson *v.* Schufeldt, 122 U. S. 27, 30 L. Ed. 1083, a suit was brought by general creditors to set aside as fraudulent a conveyance in trust for the benefit of preferred creditors. The decree set aside the conveyance as fraudulent so far only as it affected the rights of the plaintiffs. But one of such general creditors had a claim, amounting to $5,000. A motion to dismiss the appeal as to all other plaintiffs was sustained, the court holding that the sole matter in dispute between the defendants and each plaintiff was as to the amount which the latter should recover, and that the motion to dismiss the

b. *Several Liabilities of Different Defendants.*—It is also settled that neither

appeal of the defendants as to all the plaintiffs, except the one whose debt exceeded the jurisdictional amount, should be granted. "Had the appellants recovered against the appellees the amount collected by the latter upon their judgments, it is clear that the amount in dispute for the purpose of determining jurisdiction would be the amount of recovery assessed against each defendant separately. Henderson *v.* Wadsworth, 115 U. S. 264, 29 L. Ed. 377; Friend *v.* Wise, 111 U. S. 797, 28 L. Ed. 602." Followed in Chamberlin *v.* Browning, 177 U. S. 605, 608, 44 L. Ed. 906; People's Nat. Bank of Charlottesville *v.* Saville, 201 U. S. 641, 50 L. Ed. 901.

Where one of several creditors secured under a deed of assignment, filed a creditor's bill, in behalf of himself and the other creditors secured under the assignment, to set aside a fraudulent conveyance in favor of one Davis, and prevent him from participating in the benefits of the general assignment, on the ground that he was not in reality a creditor of the insolvent firm, but one of the partners, it was held that the matter in dispute is not the whole amount of the fund in the court which is claimed by Davis, but only so much as would be distributable to the complainants under the assignment, if Davis is adjudged to be a partner and not a creditor. Chatfield *v.* Boyle, 105 U. S. 231, 26 L. Ed. 944, citing and following Terry *v.* Hatch, 93 U. S. 44, 23 L. Ed. 796.

Where attaching creditors are not jointly asserting their claims nor claiming under a common right, but their claims and the judgments based thereon were separate and distinct, the one from the other, their claims cannot be united to make out the amount requisite to give jurisdiction of an appeal from a decree denying an injunction against the enforcement of their judgments against real estate. Chamberlain *v.* Browning, 177 U. S. 605, 44 L. Ed. 906, following Gibson *v.* Shufeldt, 122 U. S. 27, 30 L. Ed. 1083; People's Nat. Bank of Charlottesville *v.* Saville, 201 U. S. 641, 50 L. Ed. 901.

Where a suit is brought to set aside sundry mortgages to different persons on the ground that they were executed in fraud of creditors, if the validity of each depended upon its own consideration, independent of the others, and the decree in favor of each mortgagee is several and distinct, a motion to dismiss will be granted. Davis *v.* Schwartz, 155 U. S. 631, 38 L. Ed. 289.

In Seaver v. Bigelow, 5 Wall. 208, 18 L. Ed. 595, a bill in equity by two judgment creditors for less than $1,000 each, against their debtor and a person alleged to have fraudulently obtained possession of a fund of more than $2,000 in value, to compel satisfaction of the debts out of that fund, was dismissed, and the plaintiffs appealed. This court dismissed the appeal for lack of jurisdiction, Mr. Justice Nelson saying: "The judgment creditors who have joined in this bill have separate and distinct interests, depending upon separate and distinct judgments. In no event could the sum in dispute of either party exceed the amount of their judgment, which is less than $2,000. The bill being dismissed, each fails in obtaining payment of his demands. If it had been sustained, and a decree rendered in their favor, it would only have been for the amount of the judgment of each." "It is true, the litigation involves a common fund, which exceeds the sum of $2,000, but neither of the judgment creditors has any interest in it exceeding the amount of his judgment. Hence, to sustain an appeal in this class of cases, where separate and distinct interests are in dispute, of an amount less than the statute requires, and where the joinder of parties is permitted by the mere indulgence of the court, for its convenience, and to save expense, would be giving a privilege to the parties not common to other litigants, and which is forbidden by law."

Seaver v. Bigelow explained.—"In that case, indeed, the whole amount of both debts did not exceed $2,000. But the opinion, as appears by the reasoning above quoted, and by the reference in it to Oliver *v.* Alexander, 6 Pet. 143, 8 L. Ed. 349, and Rich *v.* Lambert, 12 How. 347, 13 L. Ed. 1017, was evidently framed to cover two other cases, argued and decided contemporaneously with Seaver *v.* Bigelow, which do not appear in the official reports, except in this brief note: 'Similar decree made for the same reason in the case of Field *v.* Bigelow, and in one branch of Myers *v.* Fenn.' 5 Wall. 211, note." Gibson *v.* Shufeldt, 122 U. S. 27, 35, 30 L. Ed. 1083.

"The opinion of Mr. Justice Nelson in those two cases, remaining on file, and published in the edition of the Lawyers' Co-Operative Publishing Company (Bk. 18, p. 604), show the following facts: In Field *v.* Bigelow, the whole amount of debts sued for was more, although each debt was less, than $2,000, and Mr. Justice Nelson said, 'No one of the three separate and distinct classes of creditors held a judgment exceeding $2,000. Neither judgment creditor, therefore, is entitled to an appeal to this court within the statute, as decided in the case of Seaver *v.* Bigelow.' In Myers *v.* Fenn, the appeal was dismissed, on the authority of Seaver *v.* Bigelows, as to creditors whose claims were severally less, but not as to those whose claims were severally more,

codefendants nor coplaintiffs can unite their separate and distinct interests for

than that sum." Gibson *v.* Shufeldt, 122 U. S. 27, 35, 30 L. Ed. 1083.

In Gibson *v.* Shufeldt, 122 U. S. 27, 39, 30 L. Ed. 1083, it was said: "The true line of distinction, as applied to cases like that now before us, is sharply brought out by the recent decisions of Stewart *v.* Dunham, 115 U. S. 61, 29 L. Ed. 329, and Estes *v.* Gunter, 121 U. S. 183, 30 L. Ed. 884, in each of which a preferred creditor for more than $5,000 was on one side, and general creditors for less than $5,000 each were on the other. In Stewart *v.* Dunham, the suit being brought by the general creditors against the debtor and the preferred creditor to whom the debtor had made the conveyance alleged to be fraudulent, and the latter seeking no affirmative relief, the matter in dispute as between the defendants and each of the plaintiffs was the amount of the claim of that plaintiff; but in Estes *v.* Gunter, the suit being brought by the preferred creditor against the trustee in the deed of assignment by which he was preferred, and the general creditors being summoned in as defendants, and themselves asking no affirmative relief, the matter in dispute was the value of the debt preferred and of the property assigned to secure the preference."

Suits by several lessors.—Where the subject matter of the controversy consists in leasehold interests held by a corporation on coal lands belonging to several lessors, and these several parties are allowed to intervene in a suit for the appointment of the receiver, for the purpose of having their leases canceled, but there is no joint interest on the part of these several intervenors, the amount of the interest of each is the limit of this court's appellate jurisdiction. While the stipulations in the various leases respecting forfeiture are alike, the proceedings for forfeiture are different; and even if similar proceedings were taken in each case, that would not make the unity of interest in the various lessors. The forfeiture of each lease is an independent cause of action, in respect to which the receivers in the other leases have no interest. The failure of the one would not defeat the right of the other. Henderson *v.* Carbondale Coal, etc., Co., 140 U. S. 25, 35 L. Ed. 332, citing Gibson *v.* Shufeldt, 122 U. S. 27, 30 L. Ed. 1083.

Suit to enforce unpaid stock subscriptions.—Where a suit is brought to compel three stockholders in a corporation to pay their respective alleged unpaid subscriptions to the capital stock of a corporation, this court has no jurisdiction to review a judgment awarded severally and separately against each, unless the unpaid subscription due by each of the stockholders was above the amount necessary to give this court jurisdiction, because the several subscriptions could not be united to make up the amount. And although the defendants contend that the amount due from each on their several subscriptions had been paid by a conveyance of land which was owned by them jointly, this is immaterial, because the matter in dispute was the liability of each for $5,000, and the fact that their several subscriptions may have been paid with joint property will not make the question of the liability of each the question of the liability of all, and they did not seek a recovery over. Wilson *v.* Kiesel, 164 U. S. 248, 41 L. Ed. 422, citing Chapman *v.* Handley, 151 U. S. 443, 38 L. Ed. 277.

In a suit for the foreclosure of a mortgage on a railroad, it was held, that claims for back pay and supplies, cannot be joined together so as to make the amount in the aggregate sufficient to give this court jurisdiction, since the recovery by one claimant will not necessarily involve a recovery by another claimant. There is in the case as many separate and distinct controversies as there are claims and intervenors. "The several intervenors do not, as in The Connemara, 103 U. S. 754, 26 L. Ed. 322, claim under one and the same title, and it is material to the purchasers how much is allowed to each and every one, for the amount of the recovery is not determined by any fixed sum, but by the aggregate of all the separate sums allowed the several claimants individually. The amount of the recovery by one is not affected in any manner by what is allowed to another. Clearly, therefore, distinct causes of action in favor of distinct parties have been joined in the same suit, and distinct decrees rendered in favor of the distinct parties." Farmers' Loan, etc., Co. *v.* Waterman, 106 U. S. 265, 27 L. Ed. 115, cited and approved in Hassall *v.* Wilcox, 115 U. S. 598, 29 L. Ed. 504.

Suit for foreclosure by bondholders.—It has been held, that an appeal by half of the bondholders of a railroad to foreclose a mortgage executed by the railroad to secure its bonds must be dismissed, where the amount, at par value, held by each of the respective appellants owning them, is not sufficient to give this court jurisdiction to review the decree below, so far as it affects them. Because each claim is distinct and separate from the claims of all other appellants; and the right of each claimant to be regarded as a bona fide holder for value depends upon the special circumstances under which he took the bonds now held by him. McMaury *v.* Moran, 134 U. S. 150, 33 L. Ed. 814, following Gibson *v.* Shufeldt, 122 U. S. 27, 30 L. Ed. 1083; Jewell *v.* Knight, 123 U. S. 426, 427, 31 L. Ed. 190.

Purchasers under mortgage foreclosure.—In Wheeler *v.* Cloyd, 134 U. S. 537, 33

the purpose of making up the amount necessary to give this court jurisdiction

L. Ed. 1008, it appeared that the plaintiffs who derived title from a purchaser under the foreclosure of a mortgage executed by a county to secure its bonds, filed their bill against the defendants who had purchased from the county part of the land covered by the mortgage before foreclosure, and in this bill there was a prayer that defendants be compelled each to redeem the land so held by them in a given time; it was decreed after hearing on pleadings and proof that each defendant acting for himself or herself, and not for any other, should redeem the respective tracts of land, at date of service upon them of process or entry of appearance, held and owned the equity of redemption or residuary interest of the county. The persons affected by this decree took a joint appeal. It was held, that the appeal should be dismissed, because the amount adjudged against any one of them, in order that he might redeem his respective tract or tracts of land, does not in any case reach the amount necessary to give him jurisdiction to entertain the appeal, and this for the reason that the decree from which it is taken is not a joint decree, because the liability of each one of the defendants under the decree can be neither increased nor diminished by any action on the part of any of his codefendants. The right of every one of the defendants to appeal from the decree is separate and distinct from that of the other defendants. Citing Ex parte Phœnix Ins. Co., 117 U. S. 367, 29 L. Ed. 923; Gibson *v.* Shufeldt, 122 U. S. 27, 30 L. Ed. 1083.

Suit to enjoin collection of tax.—It has often been held, that the distinct and separate interests of complainants in a suit for relief against assessments, cannot be united for the purpose of making up the amount necessary to give this court or the circuit court jurisdiction. Ogden City *v.* Armstrong, 168 U. S. 224, 42 L. Ed. 444; Russell *v.* Stansell, 105 U. S. 303, 26 L. Ed. 989; Walter *v.* Northeastern R. Co., 147 U. S. 370, 37 L. Ed. 206; Wheless *v.* St. Louis, 180 U. S. 379, 382, 45 L. Ed. 583, reaffirmed in Stearns *v.* Todd, 204 U. S. 669, 51 L. Ed. 672; Brown *v.* Denver, 186 U. S. 480, 46 L. Ed. 1259.

In Russell *v.* Stansell, 105 U. S. 303, 26 L. Ed. 989, land within a particular district was assessed for taxation, each owner being liable only for the amount wherewith he was separately charged; a bill of complaint was filed by a number of them, praying for an injunction against the collection of the assessment, and from a decree dismissing the bill an appeal was taken to this court. It was held, that, while the complainants were permitted, for convenience and to save expense, to unite in a petition setting forth the grievances of which complaint was made, the object was to relieve each separate owner from the amount for which he personally, or his property, was found to be accountable, and that such distinct and separate interests could not be united for the purpose of making up the amount necessary to give this court jurisdiction on appeal. Ogden City *v.* Armstrong, 168 U. S. 224, 232, 42 L. Ed. 444.

A circuit court of the United States has no jurisdiction over a bill in equity to enjoin the collection of taxes from a railroad company, when distinct assessments, in separate counties, no one of which amounts to $2,000, and for which, in case of payment under protest, separate suits must be brought to recover back the amounts paid, are joined in the bill and make an aggregate of over $2,000. Northern Pac. R. Co. *v.* Walker, 148 U. S. 391, 37 L. Ed. 494, following Walter *v.* Northeastern R. Co., 147 U. S. 370, 37 L. Ed. 206.

In Walter *v.* Northeastern R. Co., 147 U. S. 370, 37 L. Ed. 206, we held that "a circuit court of the United States has no jurisdiction over a bill in equity to enjoin the collection of taxes from a railroad company, when distinct assessments in separate counties, no one of which amounts to two thousand dollars, and for which, in case of payment under protest, separate suits must be brought to recover back the amounts paid, are joined together in the bill, making an aggregate of over two thousand dollars." Fishback *v.* Western Union Tel. Co., 161 U. S. 96, 100; Fishback *v.* Pacific Express Co., 161 U. S. 101, 40 L. Ed. 630.

The general averment in a bill to enjoin the collection of separate county taxes by separate county officers that "the amount or value in controversy in this suit exceeds the sum of two thousand dollars, exclusive of interest and costs," was a mere conclusion, and it was nowhere shown that the amount of any of these distinct county assessments, the collection of which was entrusted to these tax collectors, exceeded that sum, while, on the contrary, the total valuation of the property of the telegraph company assessed as belonging to or operated by it in one county was such as to preclude the idea that the amount of the assessment in such county would approach two thousand dollars. "Although if these county assessments were aggregated they would considerably exceed two thousand dollars, yet the several county clerks or tax collectors cannot be joined in a single suit in a federal court and the jurisdiction sustained on the ground that the total amount involved exceeds the jurisdictional limitation, as already ruled in Walter's case, nor do we find any ground as we did in Northern Pac. R. Co. *v.* Walker, 148 U. S. 391, 37 L. Ed. 494, upon which an

upon writ of error or appeal.[23] In short, the rule applicable to several plaintiffs having separate claims, that each must represent an amount sufficient to give the court jurisdiction, is equally applicable to several liabilities of different de-

amendment could be permitted." Fishback *v.* Western Union Tel. Co., 161 U. S. 96, 100, 40 L. Ed. 630; Fishback *v.* Pacific Express Co., 161 U. S. 101, 40 L. Ed. 632.

In Citizens' Bank *v.* Cannon, 164 U. S. 319, 41 L. Ed. 451, a bill in equity was filed in the circuit court of the United States for the western district of Louisiana, against several defendants who were sheriffs respectively of a number of parishes in that district, seeking to enjoin the defendants from enforcing the payment of taxes alleged to be due from the bank on lands owned by it in the several parishes. But the bill contained no specific allegation as to the amount of the assessment or taxes for any one parish, but averred that the taxes so assessed exceeded, exclusive of interest and costs, the sum of two thousand dollars. The court, in dismissing the bill for want of jurisdiction, said: "This must be understood to mean that the aggregate amount of the taxes for the several parishes exceeded two thousand dollars, and the theory of that part of the bill evidently was that the amount involved, in order to confer jurisdiction on the circuit court, could be reached by adding together the taxes for the several parishes. But, for reasons given in the recent cases of Walter *v.* Northeastern R. Co., 147 U. S. 370, 37 L. Ed. 206, and Northern Pac. R. Co. *v.* Walker, 148 U. S. 391, 37 L. Ed. 494, jurisdiction cannot be conferred on the circuit court by joining in one bill against distinct defendants claims no one of which reached the jurisdictional amount."

In accordance with the well-settled rule of this court that, in a suit in equity brought by two or more persons on several and distinct demands, the defendant can appeal to this court as to those plaintiffs only to each of whom more than $5,000 was decreed, it is held, that in a suit by several separate property owners to restrain the collection of taxes assessed upon separate lots, it is not competent to make up the sum necessary to give this court jurisdiction by uniting the several sums for which each taxpayer is liable. Ogden City *v.* Armstrong, 168 U. S. 224, 42 L. Ed. 444, following Russell *v.* Stansell, 105 U. S. 303, 26 L. Ed. 989; Gibson *v.* Shufeldt, 122 U. S. 27, 30 L. Ed. 1083.

Where a writ of mandamus was issued to compel a county clerk to extend upon a tax collector's books a sum sufficient to pay several distinct judgments held by different persons, it was held, that the case was like Seaver *v.* Bigelow, 5 Wall. 208, 18 L. Ed. 595, and Schwed *v.* Smith, 106 U. S. 188, 27 L. Ed. 156, and the defendant's right of appeal was determined by the amount of each judgment. Hawley *v.* Fairbanks, 108 U. S. 543, 27 L. Ed. 820.

Application for distribution of estate.—Under the statutes of Utah providing for the distribution of personal property amoung the persons by law entitled thereto, upon the final settlement of the accounts of an executor or administrator, the claims of distributees are several and not joint, and a joint application for distribution can only result in judgments in severalty. And accordingly this court has no jurisdiction unless the distributive share of each reaches the sum necessary to give this court jurisdiction. Chapman *v.* Handley, 151 U. S. 443, 38 L. Ed. 277, citing Gibson *v.* Shufeldt, 122 U. S. 27, 30 L. Ed. 1083; Miller *v.* Clark, 138 U. S. 223, 34 L. Ed. 966; Henderson *v.* Carbondale Coal, etc., Co., 140 U. S. 25, 35 L. Ed. 332; New Orleans Pac. R. Co. *v.* Parker, 143 U. S. 42, 36 L. Ed. 66.

23. Several liabilities of different defendants.—Rich *v.* Lambert, 12 How. 347, 13 L. Ed. 1017; Seaver *v.* Bigelow, 5 Wall. 208, 18 L. Ed. 595; Paving Co. *v.* Mulford, 100 U. S. 147, 25 L. Ed. 591; Russell *v.* Stansell, 105 U. S. 303, 26 L. Ed. 989; Ex parte Baltimore, etc., R. Co., 106 U. S. 5, 27 L. Ed. 78; Farmers' Loan, etc., Co. *v.* Waterman, 106 U. S. 265, 27 L. Ed. 115; Adams *v.* Crittenden, 106 U. S. 576, 27 L. Ed. 99; Hawley *v.* Fairbanks, 108 U. S. 543, 27 L. Ed. 820; New Jersey Zinc Co. *v.* Trotter, 108 U. S. 543, 564, 27 L. Ed. 820; Tupper *v.* Wise, 110 U. S. 398, 28 L. Ed. 189; Fourth Nat. Bank *v.* Stout, 113 U. S. 684, 28 L. Ed. 1152; Henderson *v.* Wadsworth, 115 U. S. 264, 276, 29 L. Ed. 377; Chamberlin *v.* Browning, 177 U. S. 605, 608, 44 L. Ed. 906.

"It is well settled that neither codefendants nor co-complainants can unite their separate and distinct interests for the purpose of making up the amount necessary to give us jurisdiction on an appeal. Seaver *v.* Bigelow, 5 Wall. 208, 18 L. Ed. 595; Rich *v.* Lambert, 12 How. 347, 13 L. Ed. 1017; Oliver *v.* Alexander, 6 Pet. 143, 8 L. Ed. 349; Stratton *v.* Jarvis, 8 Pet. 4, 8 L. Ed. 846. In such cases, the appeal of each separate defendant or complainant must stand or fall according as his own interest in the controversy exceeds or falls short of our jurisdictional amount. The same principle applies here. For the purposes of an appeal, each separate controversy must be treated as a separate suit. Under this appeal, two separate controversies have been brought here, and in neither is the amount involved sufficient to give us jurisdiction." Paving Co. *v.* Mulford, 100 U. S. 147, 148, 25 L. Ed. 591.

fendants to the same plaintiff.[24]

c. *Bill by Single Plaintiff to Enforce Distinct Liabilities.*—Upon the same principle, neither party can appeal from a decree upon a bill by a single plaintiff to enforce separate and distinct liabilities against several defendants, if the sum for which each is alleged or found to be liable is less than the jurisdictional amount.[25]

d. *Decree against Appellant for Several Distinct Claims.*—The same rule has been applied in many recent cases where the appeal has been taken by the party who had been ordered by the decree below to pay several distinct claims amounting together to more than $5,000.[26]

24. Walter *v.* Northeastern R. Co., 147 U. S. 370, 374, 37 L. Ed. 206.

As illustrative of the rule as applied to cases of joint defendants, it was held in Stratton *v.* Jarvis, 8 Pet. 4, 8 L. Ed. 846, that, where a libel for salvage was filed against several packages of merchandise, and a decree was rendered against each consignment for an amount not sufficient in itself to authorize an appeal by any one claimant, the appeal of each claimant must be treated as a separate one, and, the amount in each case being insufficient, this court had no jurisdiction of the appeal of any claimant. A similar ruling was made in Spear *v.* Henry Place, 11 How. 522, 13 L. Ed. 796.

In Paving Co. *v.* Mulford, 100 U. S. 147, 25 L. Ed. 591, a bill, filed against two defendants, alleging that each held certificates of indebtedness belonging to the plaintiff, was dismissed on final hearing, and plaintiff appealed, and it was held, that, as the recovery, if any, must be against the defendant severally, and as the amount claimed from each did not exceed the requisite sum, this court had no jurisdiction.

In Schwed *v.* Smith, 106 U. S. 188, 190, 27 L. Ed. 156, certain creditors recovered separate judgments against a debtor amounting in the aggregate to more than $5,000, but none of which exceeded that sum, and filed a bill against him and a preferred creditor to subject to the payment of their judgment goods which had been seized upon a prior judgment, in which they succeeded, and defendant appealed. The appeal was dismissed, the court holding that if the decree were several as to the creditors, it was equally so as to their adversaries. "The theory is, that, although the proceeding is in form but one suit, its legal effect is the same as though separate suits had been begun on each of the separate causes of action."

So in Henderson *v.* Wadsworth, 115 U. S. 264, 29 L. Ed. 377, it was held, that where a suit was brought against several heirs to enforce their liability for the payment of a note on which their ancestor was bound, and separate judgments were rendered against each for his proportionate share, this court had jurisdiction in error only over such judgments as exceeded $5,000.

And, again, in Ex parte Phœnix Ins. Co., 117 U. S. 367, 29 L. Ed. 923, that distinct decrees against different parties on a single cause of action in which there were distinct liabilities, could not be joined to give this court jurisdiction on appeal. In that case the suit was brought upon a single policy of insurance written by four different companies, and the decree was against each company severally for its separate obligation.

25. Bill by single plaintiff to enforce distinct liabilities.—Gibson *v.* Shufeldt, 122 U. S. 27, 37, 30 L. Ed. 1083.

For instance, it was decided in Paving Co. *v.* Mulford, 100 U. S. 147, 25 L. Ed. 591, that the plaintiff could not appeal from the dismissal of a bill to assert a right against two defendants in two distinct certificates of indebtedness, held by them severally, for sums severally less, though together more, than that amount.

And in Ex parte Phœnix Ins. Co., 117 U. S. 367, 29 L. Ed. 923, that four insurance companies could not appeal from a decree that each of them should pay $3,000 to the plaintiff.

26. Decree against appellant for several distinct claims.—Gibson *v.* Shufeldt, 122 U. S. 27, 36, 30 L. Ed. 1083.

In Schwed *v.* Smith, 106 U. S. 188, 27 L. Ed. 156, property worth more than $5,000 having been taken on execution upon a judgment confessed by the owners in favor of one Heller for more than $5,000, subsequent attaching creditors, whose claims were jointly more, but severally less, than that sum, filed a bill in equity against the debtors, Heller and the sheriff, and obtained a decree declaring Heller's judgment void as against the plaintiffs. An appeal by the defendants was dismissed on motion for want of jurisdiction, the chief justice saying: It is impossible to distinguish this case in principle from Seaver *v.* Bigelow, 5 Wall. 208, 18 L. Ed. 595. "If the decree is several as to the creditors, it is difficult to see why it is not as to their adversaries. The theory is, that, although the proceeding is in form but one suit, its legal effect is the same as though separate suits had been begun on each of the separate causes of action." "Although the effect of the

e. *Distinct Judgments and Decrees against Distinct Parties on Distinct Causes.* —The rule is well settled that distinct decrees against distinct parties on distinct causes of action, or on a single cause of action in which there are distinct liabilities, cannot be joined to give this court jurisdiction on appeal.[27]

decree is to deprive Heller in the aggregate of more than $5,000, it has been done at the suit of several parties on several claims, who might have sued separately, but whose suits have been joined in one for convenience and to save expense."

In Farmers' Loan & Trust Co. *v.* Waterman, 106 U. S. 265, 27 L. Ed. 115, the purchasers of a railroad subject to the debts of intervening petitioners appealed from a decree ordering them to pay various sums to the petitioners respectively, amounting in all to more than $5,000, and the appeal was dismissed as to those petitioners whose debts were severally less than that sum.

And in Hassall *v.* Wilcox, 115 U. S. 598, 29 L. Ed. 504, a similar decision was made upon an appeal by the trustee in a railroad mortgage from a decree in favor of several creditors claiming prior liens.

In Fourth Nat. Bank *v.* Stout, 113 U. S. 684, 28 L. Ed. 1152, the court dismissed the appeal of a bank from a decree adjudging that it held property of another corporation in trust for the creditors of the latter (one of whom had filed the bill, and the others had intervened by leave of court pending the suit), and directing the bank to pay to the creditors severally sums of less than $5,000, amounting in all to more than $5,000. Gibson *v.* Shufeldt, 122 U. S. 27, 37, 30 L. Ed. 1083.

In Stewart *v.* Dunham, 115 U. S. 61, 29 L. Ed. 329, upon a bill in equity in behalf of judgment creditors (including some who came in pending the suit), against their debtor and one to whom he had made a conveyance of property alleged to be fraudulent and void as against his creditors, by the decree below the conveyance was adjudged to have been made to hinder, delay and defraud creditors, with the knowledge and connivance of the grantee, and was canceled, set aside, and declared to be null and void, and the defendants were ordered to pay out of the property to the plaintiffs respectively various sums, one of which was more and the others less than $5,000; and the defendants took an appeal, which was dismissed as to all the creditors except the one to whom more than $5,000 had been awarded. Expressly approved in Gibson *v.* Shufeldt, 122 U. S. 27, 37, 30 L. Ed. 1083.

27. Distinct judgments and decrees against distinct parties on distinct causes. —Seaver *v.* Bigelow, 5 Wall. 208, 18 L. Ed. 595; Ex parte Baltimore, etc., R. Co., 106 U. S. 5, 27 L. Ed. 78; Schwed *v.* Smith, 106 U. S. 188, 27 L. Ed. 156; Farmers' Loan & Trust Co. *v.* Waterman, 106 U. S. 265, 270, 27 L. Ed. 115; Adams *v.* Crittenden, 106 U. S. 576, 27 L. Ed. 99; Hawley *v.* Fairbanks, 108 U. S. 543, 27 L. Ed. 820; Fourth Nat. Bank *v.* Stout, 113 U. S. 684, 28 L. Ed. 1152; Stewart *v.* Dunham, 115 U. S. 61, 64, 29 L. Ed. 329; Ex parte Phœnix Ins. Co., 117 U. S. 367, 369, 29 L. Ed. 923; Farmers' Loan & Trust Co. *v.* Waterman, 106 U. S. 265, 27 L. Ed. 115; Clay *v.* Field, 138 U. S. 464, 479, 34 L. Ed. 1044; Tupper *v.* Wise, 110 U. S. 398, 399, 28 L. Ed. 189, reaffirmed in Lynch *v.* Bailey, 110 U. S. 400, 28 L. Ed. 190.

"In all of these cases the procedure is, in truth, a joinder of separate and distinct causes of action, the decrees in which, where several in their nature, should be treated as several in their operation even though joint in form." See, also, Hanrick *v.* Patrick, 119 U. S. 156, 30 L. Ed. 396; Russell *v.* Stansell, 105 U. S. 303, 26 L. Ed. 989, citing Paving Co. *v.* Mulford, 100 U. S. 147, 25 L. Ed. 591; Seaver *v.* Bigelow, 5 Wall. 208, 18 L. Ed. 595; Rich *v.* Lambert, 12 How. 347, 13 L. Ed. 1017; Stratton *v.* Jarvis, 8 Pet. 4, 8 L. Ed. 846; Oliver *v.* Alexander, 6 Pet. 143, 8 L. Ed. 349.

In Henderson *v.* Wadsworth, 115 U. S. 264, 276, 29 L. Ed. 377, where in an action against heirs upon a debt of their ancestor, separate judgments were rendered against them for their proportionate shares, it was held, that no one who had been thus charged with less than $5,000 could appeal; and Mr. Justice Woods, in delivering judgment, declared it to be well settled that "where a judgment or decree against a defendant, who pleads no counterclaim or set-off, and asks no affirmative relief, is brought by him to this court by writ of error or appeal, the amount in dispute on which the jurisdiction depends is the amount of the judgment or decree which is sought to be reversed," and that "neither codefendants nor coplaintiffs can unite their separate and distinct interests for the purpose of making up the amount necessary to give this court jurisdiction upon writ of error or appeal."

In Adams *v.* Crittenden, 106 U. S. 576, 27 L. Ed. 99, a suit was begun in equity by an assignee in bankruptcy and a purchaser of certain lands sold under an order of the bankrupt court, to restrain one defendant from enforcing a decree in his favor against the property for $1,828, and another defendant from enforcing a decree in his favor for $2,348. The decrees to be enjoined were entirely separate and distinct from each other, having been rendered in different suits. The two suits presented substantially the same questions for adjudication, but they were in all other respects distinct. The court held that

f. *Appeals in Admiralty.*—It has been held, that when in admiralty distinct causes of action in favor of distinct parties, growing out of the same transaction, are united in one suit, according to the practice of the courts of that jurisdiction, distinct decrees in favor of or against distinct parties cannot be joined to give this court jurisdiction on appeal.[28]

although the aggregate of the two decrees, with interest added to the date of the dismissal of the bill, did not exceed $5,000, nevertheless this court did not have jurisdiction, under the rule that distinct decrees in favor of or against distinct parties cannot be joined to give this court jurisdiction.

28. Appeals in admiralty.—Oliver *v.* Alexander, 6 Pet. 143, 8 L. Ed. 349; Stratton *v.* Jarvis, 8 Pet. 4, 8 L. Ed. 846; Spear *v.* Henry Place, 11 How. 522, 13 L. Ed. 796; Rich *v.* Lambert, 12 How. 347, 13 L. Ed. 1017; Ex parte Baltimore, etc., R. Co., 106 U. S. 5, 27 L. Ed. 78.

In equity, as in admiralty, when several persons join in one suit to assert several and distinct interests, and those interests alone are in dispute, the amount of the interest of each is the limit of the appellate jurisdiction. Gibson *v.* Shufeldt, 122 U. S. 27, 34, 30 L. Ed. 1083.

When separate claims are interposed, although the libel is joint against the whole property, each claim is treated as a distinct and independent proceeding in the nature of a several suit, upon which there may be a several independent hearing, decree and appeal. Stratton *v.* Jarvis, 8 Pet. 4, 8 L. Ed. 846.

Where several owners of a cargo filed libels in rem against the vessel for damages done to the goods, and these libels were consolidated by order of the court, which afterwards decreed damages in favor of the libelants, in some cases to more and in some to less than $2,000, those cases where the damages are less than that sum must be dismissed, on an appeal to this court, for want of jurisdiction. Rich *v.* Lambert, 12 How. 347, 13 L. Ed. 1017.

Where a libel was filed to recover freight on cotton, and a decree rendered, in favor of the libelant, for the amount of the freight, $2,338.06, and that B. pay to the libelant $583.84 thereof, and that S. pay $1,754.22 thereof, and S. appealed from the decree to this court, the court dismissed the appeal, on the ground that the decree against S. is less than $2,000. The freight was separately awarded against the claimants, in proportion to the cotton shipped by each one, and the rights of each were distinct and independent. But if it were otherwise, and the whole of the freight was jointly decreed against the claimants, the appeal must still be dismissed, as then both the claimants should have joined in it. Sheldon *v.* Clifton, 23 How. 481, 16 L. Ed. 429.

Where in a suit for collision, distinct causes of action in favor of distinct parties are united in one suit, and distinct decrees in favor of the parties are entered against the vessel, unless the sum decreed to each exceeds $5,000, an appeal will not lie to this court. Ex parte Baltimore, etc., R. Co., 106 U. S. 5, 27 L. Ed. 78, distinguishing Shields *v.* Thomas, 17 How. 3, 15 L. Ed. 93; Market Co. *v.* Hoffman, 101 U. S. 112, 25 L. Ed. 782; The Connemara, 103 U. S. 754, 26 L. Ed. 322, on the ground that the controversies in those cases were about matters in which the several claimants were interested collectively under a common title. They each had an undivided interest in the claim, and it was perfectly immaterial to their adversaries how the recovery was shared among them. If a dispute arose about the division, it would be between the claimants themselves, and not those with whom the claim was made. The distinction between the two classes of cases was clearly stated by Chief Justice Taney in Shields *v.* Thomas, 17 How. 3, 15 L. Ed. 93. It may not always be necessary to determine the class to which a particular case belongs, but the rule recognizing the existence of the two classes has long been established.

But in The Propeller Burlington, 137 U. S. 386, 34 L. Ed. 731, the libelant filed his libel in the district court to recover damages for the loss of a barge while being towed because of the negligent and careless management of the tow. And the district court entered final decree fixing the damages for the loss of the cargo at $3,361.93, and for the loss of the barge and freight at the sum of $2,829.83, in all, $6,191.76; and it further appearing to the court that the propeller had been duly appraised at the sum of $5,300, and that a stipulation with sureties had been filed in that amount to secure the judgment of the court, it was ordered that the said sum of $5,300 be apportioned and distributed as follows: $2,422.28 to libelant for his damages by reason of the loss of the barge and freight, and $2,877.72 to libelant as trustee for the owners of the cargo. The claimants appealed to the circuit court, and the appeal having been heard, that court entered a decree valuing the vessel at $7,000 and distributing this amount to the libelant and other parties interested. In this subsequent proceeding the court holding that the proportion due the libelant was only $4,658 and not $5,300 as adjudged by the district court. It was held, that this court had jurisdiction although the libelant recovered for himself as owner only the sum of $2,544.61, and for the owner of the cargo only the sum of

g. *Suit to Recover Possession of Land.*—In ejectment against two defendants for two parcels of land, if each defendant claims only one parcel, the value of

$3,023.04. For in both of these cases the owners of the vessel and the owners of the cargo were parties to the proceedings and recovered the amounts due them respectively. The libelant here is to be treated in all respects as the sole libelant, and the decree is for a sum in excess of the jurisdictional amount, and it is immaterial that this amount was subsequently apportioned so as to show the allowance for the loss of the barge and that for the loss of the cargo separately, because the decree for the recovery of the aggregate remained the same and the execution ordered against the claimants and their sureties on appeal would issue for the single amount. Nor does the fact that upon the subsequent proceedings for limitation of liability, it appeared that the libelant could not collect more than $4,468, his pro rata share of the limit decreed, affect the question. Distinguishing Ex parte Baltimore, etc., R. Co., 106 U. S. 5, 27 L. Ed. 78; The Nevada, 106 U. S. 154, 27 L. Ed. 149.

Cases of salvage.—The decisions in cases of salvage illustrate the application of the rule to different states of facts. From a decree on a libel for salvage of a ship and cargo, or of several parcels of goods, belonging to different owners, when the salvage demanded against the whole exceeds the jurisdictional limit, but the amount chargeable on the property of each owner is within it, no appeal lies, either by the salvors or by the owners. Stratton *v.* Jarvis, 8 Pet. 4, 8 L. Ed. 846; Spear *v.* Henry Place, 11 How. 522, 13 L. Ed. 796.

The reasons for this were summed up by Chief Justice Taney, as follows: "The salvage service is entire; but the goods of each owner are liable only for the salvage with which they are charged, and have no common liability for the amounts due from the ship or other portions of the cargo. It is a separate and distinct controversy between himself and the salvors, and not a common and undivided one, for which the property is jointly liable." Shields *v.* Thomas, 17 How. 3, 6, 15 L. Ed. 93.

Because the salvage service is entire, and is the common service of all the salvors acting together, and the salvage awarded is for that service, and the matter in dispute is the amount due the salvors collectively, and it is of no consequence to the owner of the property saved how the money recovered is apportioned among those who have earned it, this court has since decided that the owner of a ship may appeal from a decree against the ship for salvage which exceeds the sum of $5,000, although the amount awarded to each salvor is less than that sum. The Connemara, 103 U. S. 754, 26 L. Ed. 322.

In the appeal here, as in that from the district court, the case of each claimant having a separate interest must be treated as a separate appeal, pro interesse suo, from the decree, so far as it regards that interest; and the salvage chargeable on him constitutes the whole matter in dispute between him and the libelants; with the fate of the other claims, however disposed of, he has and can have nothing to do. It is true that the salvage service was in one sense entire; but it certainly cannot be deemed entire for the purpose of founding a right against all the claimants jointly, so as to make them all jointly responsible for the whole salvage. On the contrary, each claimant is responsible only for the salvage properly due and chargeable on the gross proceeds or sales of his own property, pro rata. It would otherwise follow that the property of one claimant might be made chargeable with the payment of the whole salvage, which would be against the clearest principles of law on this subject. The district and circuit courts manifestly acted upon this view of the matter, and their decrees would be utterly unintelligible upon any other. Their decrees, respectively, in giving a certain proportion of the gross sales must necessarily apportion that amount pro rata upon the whole proceeds, according to the distinct interests of each claimant. This court has no jurisdiction to entertain the present appeal in regard to any of the claimants, and the cause must for this reason be dismissed. Stratton *v.* Jarvis, 8 Pet. 4, 8 L. Ed. 846.

Where the admiralty court decreed that a vessel should pay salvage to the amount of one-fifth of her value, and that value was shown to be $2,600, an appeal to this court would not lie, for want of jurisdiction. It is the amount of salvage, and not of the vessel, which tests the jurisdiction; the salvage only being in controversy. The master could not properly represent (without special authority) the consignees of the cargo who had received their respective consignments before the filing of the libel. They lived in the place where the court was held, and ought to have represented their own interests. The master, therefore, cannot appear for them all conjointly, and in this case the amount of salvage to be paid by the largest consignee would be only $1,136.80. Neither the salvage upon the vessel nor cargo, therefore, is sufficient in amount to bring the case within the jurisdiction of this court. Spear *v.* Henry Place, 11 How. 522, 13 L. Ed. 796, citing Wilson *v.* Daniel, 3 Dall. 401, 1 L. Ed. 655; Cli-

each parcel is the limit of appellate jurisdiction.[29] But if both defendants jointly claim both parcels, the value of both is the test.[30]

h. *Hearing Causes Together.*—Where it is agreed between the parties that two cases involving the same questions should be heard together, but the record contains no evidence of such agreement, nor does it appear that any attempt was made to consolidate them or to discontinue one and transfer it into the court where the other was pending, but, on the contrary, though they were both heard at the same time, it appears that separate decrees were entered, each in the respective court where the suit was commenced, and that separate appeals were also taken by the losing party in the court where the decree was entered,

ver *v.* Alexander, 6 Pet. 143, 8 L. Ed. 349; Stratton *v.* Jarvis, 8 Pet. 4, 11, 8 L. Ed. 846. The court said: "There does not appear to have been any joint interest among them; and though the decree below is inartificial, yet each should pay and be ordered to pay the salvage on his own goods, and no others, as much as if each had in person put in a separate claim."

Claims by seamen for their wages.—In the leading case of Oliver *v.* Alexander, 6 Pet. 143, 8 L. Ed. 349, upon a libel in admiralty against the owners of a vessel to recover seamen's wages, and an attachment of the proceeds of the vessel in the hands of assignees, the libelants obtained a decree for the payment out of those proceeds to them respectively of sums less than $1,000, but amounting in all to more than $2,000, and the assignees appealed. This court, at January term 1832, in a judgment delivered by Mr. Justice Story, dismissed the appeal, for the reasons that the shipping articles constituted a several contract with each seaman to all intents and purposes; that, although the libel was in form joint, the contract with each libelant, as well as the decree in his favor, was in truth several, and none of the others had any interest in that contract, or could be aggrieved by that decree; that the matter in dispute between each seaman and the owners, or other respondents, was the sum or value of his own demand, without any reference to the demands of others; that it was very clear, therefore, that no seaman could appeal from the circuit court to this court, unless his claim exceeded $2,000; "and the same rule applies to the owners or other respondents, who are not at liberty to consolidate the distinct demands of each seaman into an aggregate, thus making the claims of the whole the matter in dispute; but they can appeal only in regard to the demand of a seaman which exceeds the sum required by law for that purpose, as a distinct matter in dispute." Gibson *v.* Shufeldt, 122 U. S. 27, 30, 30 L. Ed. 1083.

In the case of the seaman, though the contract is separate and not joint, all may join in the libel and carry on the proceedings, in form, jointly, to the decree, which assigns to each severally the amount due. If the sum thus assigned is under $2,000, neither party can appeal. Oliver *v.* Alexander, 6 Pet. 143, 8 L. Ed. 349. So in respect to the case of salvage, where the amount charged upon the goods of each of the several claimants is less than this sum. United States *v.* Carr, 8 How. 1, 9, 12 L. Ed. 963; Spear *v.* Henry Place, 11 How. 522, 13 L. Ed. 796; Seaver *v.* Bigelow, 5 Wall. 208, 210, 18 L. Ed. 595.

Form of motion to dismiss.—In the intermediate case of The Rio Grande, 19 Wall. 178, 22 L. Ed. 60, in which materialmen joining in a libel in rem had severally recovered in the circuit court various sums, a motion by them to dismiss the appeal of the owners of the vessel was not sustained, because the motion was "to dismiss the appeal" generally, and not as to those only who had recovered sums insufficient to give this court jurisdiction.

29. Suit to recover possession of land.—Tupper *v.* Wise, 110 U. S. 398, 28 L. Ed. 189; Lynch *v.* Bailey, 110 U. S. 400, 28 L. Ed. 190.

Where in a suit to recover the possession of land of which there was no joint ownership or joint possession, and in which each defendant claimed a separate and distinct interest in a separate part of the land, and the jury finds separate and distinct judgments, such judgments cannot be joined to give this court jurisdiction, and unless each one of such judgments exceeds the jurisdictional amount the writ of error will be dismissed. Tupper *v.* Wise, 110 U. S. 398, 28 L. Ed. 189, reaffirmed in Lynch *v.* Bailey, 110 U. S. 400, 28 L. Ed. 190.

30. Friend *v.* Wise, 111 U. S. 797, 28 L. Ed. 602.

Where the value of the two sections of land which are in dispute in ejectment is conceded to be more than $5,000, and the complaint alleges a joint entry and ouster, and the answer does not set up separate claims to distinct parcels of the land by the several defendants, the judgment for the recovery of the possession is against all the defendants jointly, and this court has jurisdiction. Friend *v.* Wise, 111 U. S. 797, 798, 28 L. Ed. 602, distinguishing Tupper *v.* Wise, 110 U. S. 398, 28 L. Ed. 198; Lynch *v.* Bailey, 110 U. S. 400, 28 L. Ed. 190.

and that the two appeals were separately entered on the calendar of this court, we have no jurisdiction.[31]

i. *Qualifications of General Rule*—(1) *Persons Having Common and Undivided Interest.*—**In General.**—The general principle is that if several persons be joined in a suit in equity or admiralty, and have a common and undivided interest, though separable as between themselves, the amount of their joint claim or liability will be the test of jurisdiction.[32] In other words, where the

31. Hearing causes together.—Merrill *v.* Petty, 16 Wall. 338, 21 L. Ed. 499.

32. Persons having common and undivided interest.—Shields *v.* Thomas, 17 How. 3, 15 L. Ed. 93; Market Co. *v.* Hoffman, 101 U. S. 112, 25 L. Ed. 782; The Connemara, 103 U. S. 754, 26 L. Ed. 322; The Mamie, 105 U. S. 773, 26 L. Ed. 937; Davies *v.* Corbin, 112 U. S. 36, 28 L. Ed. 627; Estes *v.* Gunter, 121 U. S. 183, 30 L. Ed. 884; Handley *v.* Stutz, 137 U. S. 366, 34 L. Ed. 706; Clay *v.* Field, 138 U. S. 464, 34 L. Ed. 1044; The Propeller Burlington, 137 U. S. 386, 34 L. Ed. 731; Gibson *v.* Shufeldt, 122 U. S. 27, 30 L. Ed. 1083; Texas, etc., R. Co. *v.* Gentry, 163 U. S. 353, 41 L. Ed. 186; Overby *v.* Gordon, 177 U. S. 214, 44 L. Ed. 741; McDaniel *v.* Taylor, 196 U. S. 415, 428, 49 L. Ed. 533. See Illinois Central R. Co. *v.* Adams, 180 U. S. 28, 40, 45 L. Ed. 410.

Cases reviewed and reconciled.—"In all the cases where we have held that several sums decreed in favor of or against different persons could not be united to give us jurisdiction on appeal, it will be found that the matters in dispute were entirely separate and distinct, and were joined in one suit for convenience and to save expense. Thus, in Seaver *v.* Bigelow, 5 Wall. 208, 18 L. Ed. 595, separate judgment creditors joined to set aside a fraudulent conveyance of their debtor, and the appeal was from a decree dismissing their bill; in Rich *v.* Lambert, 12 How. 347, 13 L. Ed. 1017, several owners of a cargo, who had distinct interests, united in a libel against the ship to recover for damages done to the goods, and the appeal was from a decree in favor of each owner for his separate loss; in Oliver *v.* Alexander, 6 Pet. 143, 8 L. Ed. 349, the libel was by seamen to recover their wages, and the decree was in favor of each man separately for the amount due him individually; and in Stratton *v.* Jarvis, 8 Pet. 4, 8 L. Ed. 846, the decree was against each claimant of the goods saved by salvage service for his separate and distinct share of the salvage. The cases were heard, so far as the merits were concerned, precisely the same as if separate libels had been filed for each cause of action, and the decrees as entered were as in case of separate suits. Rich *v.* Lambert, supra. Here, however, the matter in controversy was the amount due the salvors collectively, and not the particular sum to which each was entitled when the amount due was distributed among them. As in Shields *v.* Thomas, 17 How. 3, 15 L. Ed. 93, 'they all claimed under one and the same title. They had a common and undivided interest in the claim, and it was perfectly immaterial to the appellants how it was to be shared among them. If there was any difficulty as to the proportions, * * * the dispute was among themselves.'" The Connemara, 103 U. S. 754, 755, 26 L. Ed. 322.

The earliest case of this class is Shields *v.* Thomas, 17 How. 3, 15 L. Ed. 93, in which this court held, that an appeal would lie from a decree in equity, ordering a defendant, who had converted to his own use property of an intestate, to pay to the plaintiffs, distributees of the estate, a sum of money exceeding $2,000, and apportioning it among them in shares less than that sum. The case was distinguished from those of Oliver *v.* Alexander, 6 Pet. 143, 8 L. Ed. 349, and Rich *v.* Lambert, 12 How. 347, 13 L. Ed. 1017, upon the following grounds: "The matter in controversy," said Chief Justice Taney, "was the sum due to the representatives of the deceased collectively; and not the particular sum to which each was entitled, when the amount due was distributed among them, according to the laws of the state. They all claimed under one and the same title. They had a common and undivided interest in the claim; and it was perfectly immaterial to the appellant how it was to be shared among them. He had no controversy with either of them on that point; and if there was any difficulty as to the proportions in which they were to share, the dispute was among themselves, and not with him. It is like a contract with several to pay a sum of money. It may be that the money, when recovered, is to be divided between them in equal or unequal proportions. Yet, if a controversy arises on the contract, and the sum in dispute upon it exceeds two thousand dollars, an appeal would clearly lie to this court, although the interest of each individual was less than that sum."

The doctrines of Shields *v.* Thomas have been frequently recognized by this court. In the recent case of Overby *v.* Gordon, 177 U. S. 214, 218, 44 L. Ed. 741, 743, the court, interpreting the decision in that case, said: "It was held, that, where the representatives of a deceased intestate recovered a judgment against an administrator for an amount in excess of the sum necessary to confer jurisdiction to review, and such recovery was had under the same title and for a common

defendants are jointly interested in the question, and it is not the case

and undivided interest, this court had jurisdiction, although the amount decreed to be distributed to each representative was less than the jurisdictional sum." See, also, The Connemara, 103 U. S. 754, 756, 26 L. Ed. 322; Handley *v.* Stutz, 137 U. S. 366, 369, 34 L. Ed. 706, 708; New Orleans Pac. R. Co. *v.* Parker, 143 U. S. 42, 51, 36 L. Ed. 66, 68; Texas, etc., R. Co. *v.* Gentry, 163 U. S. 353, 361, 41 L. Ed. 186; Davis *v.* Schwartz, 155 U. S. 631, 647, 39 L. Ed. 289, 296; McDaniel *v.* Traylor, 196 U. S. 415, 49 L. Ed. 533.

To the same class belongs Freeman *v.* Dawson, 110 U. S. 264, 28 L. Ed. 141, in which the only matter in dispute was the legal title to the whole of a fund of more than $5,000, as between a judgment creditor and the grantee in a deed of trust, no question arose of payment to or distribution among the cestui que trust, and this court therefore took jurisdiction of an appeal by the trustee from a decree in favor of the judgment creditor. Citing Ex parte Baltimore, etc., R. Co., 106 U. S. 5, 27 L. Ed. 78.

Tax levied for joint benefit of relators in mandamus.—Where a writ of mandamus commanded a collector to collect a tax of one per cent. upon the property of a county, which had already been levied for the joint benefit of all the relators, it was held, that the case was like Shields *v.* Thomas and The Connemara, and that the right of appeal depended upon the whole amount of the tax. Davies *v.* Corbin, 112 U. S. 36, 28 L. Ed. 627.

Suit to enjoin sale under attachment.—G., being embarrassed, assigned his property, amounting in value to more than $5,000, to S. for the benefit of his creditors, with preferences in favor of E. to the amount of $10,000. B., an unpreferred creditor, sued out a writ of attachment for $3,000, which was followed by similar writs on behalf of other creditors. E. filed a bill in equity against G. and S. and B., and other attaching creditors, to enjoin a sale under the attachments and to have the assignment declared valid; but during the progress of the suit, dismissed the suit as to the other attaching creditors. The bill was dismissed on the ground that the assignment was made to hinder and delay creditors. E. appealed to this court. On a motion to dismiss on the ground that the claim of B. was not sufficient to give this court jurisdiction, held, that the court had jurisdiction, the suit being brought not simply to defeat B.'s attachment, but to establish the assignment and make it available for E.'s benefit. Estes *v.* Gunter, 121 U. S. 183, 30 L. Ed. 884, following Shields *v.* Thomas, 17 How. 3, 15 L. Ed. 93; Market Co. *v.* Hoffman, 101 U. S. 112, 25 L. Ed. 782; The Connemara, 103 U. S. 754, 26 L. Ed. 322; The Mamie, 105 U. S. 773, 26 L. Ed. 937; Davies *v.* Corbin, 112 U. S. 36, 28 L. Ed. 627.

Where a bill was filed by several distributees of an estate, to compel the payment of money alleged to be due to them, and a decree was rendered in their favor, this court has jurisdiction over an appeal, although the amount payable to each individual claimant was less than two thousand dollars. McDaniel *v.* Traylor, 196 U. S. 415, 428, 49 L. Ed. 533, following Shields *v.* Thomas, 17 How. 3, 15 L. Ed. 93.

Judgment in action for wrongful death.—Although there is in form a separate judgment in favor of each of the persons for whose benefit an action is brought under the Texas statute, providing for an action for wrongful death, which shall be for the exclusive benefit of the surviving husband, wife, children and parents, and authorizing the action to be brought by all the parties interested, or by any one or more of them for the benefit of all, and requiring the jury to divide the amount recovered among the persons entitled to the benefit of the action, the Texas statute creates a single liability on the part of the defendant, and contemplates but one action for the sole and exclusive benefit of the surviving husband, wife, children and parents, of the person whose death was caused in any of the specified modes. Accordingly, the matter in controversy within the meaning of the 6th section of the act of March 3, 1891, c. 517, which declares that in all cases not by that section made final "there shall be of right an appeal or writ of error or review of the case by the supreme court of the United States where the matter in controversy shall exceed one thousand dollars besides costs," is the liability of the defendant company in that amount by reason of the single injury complained of. If the defendant was liable in that sum, and such liability is fixed upon it by the verdict and final judgment thereon, it is of no concern to it how that amount was divided among the parties entitled to sue on account of the single injury alleged to have been committed. Texas, etc., R. Co. *v.* Gentry, 163 U. S. 353, 41 L. Ed. 186, citing Shields *v.* Thomas, 17 How. 3, 15 L. Ed. 93; Ex parte Baltimore, etc., R. Co., 106 U. S. 5, 27 L. Ed. 78; Market Co. *v.* Hoffman, 101 U. S. 112, 25 L. Ed. 782; The Connemara, 103 U. S. 754, 26 L. Ed. 322; Estes *v.* Gunter, 121 U. S. 183, 30 L. Ed. 884; Gibson *v.* Shufeldt, 122 U. S. 27, 30 L. Ed. 1083; Clay *v.* Field, 138 U. S. 464, 34 L. Ed. 1044; New Orleans Pac. R. Co. *v.* Parker, 143 U. S. 42, 36 L. Ed. 66.

Claimants of fund paid into registry in admiralty.—In Rodd *v.* Heartt, 17 [illegible] 354, 21 L. Ed. 627, which was in admiralty, a fund exceeding the jurisdictional

of a fund amounting to more than the requisite sum which is to be paid

amount paid into the registry of the court was claimed on the one hand by several creditors secured by one mortgage, and on the other by a number of mariners and materialmen. A decree having been made adverse to the mortgagees, an appeal was taken by them to this court, and it was held, that although no one of the claims under the mortgage equalled the jurisdictional amount, yet as the claim of the appellants, which was disallowed, exceeded that sum, an appeal would lie.

In The Connemara, 103 U. S. 754, 26 L. Ed. 322, it was held, that where salvors united in a claim for a single salvage service, jointly rendered by them, the owner of the property was entitled to an appeal where the sum decreed exceeded $5,000, though in the division among the several parties sharing in the recovery, several were awarded less than $5,000. Distinguishing Seaver *v.* Bigelow, 5 Wall. 208, 18 L. Ed. 595; Rich *v.* Lambert, 12 How. 34, 13 L. Ed. 1017; Oliver *v.* Alexander, 6 Pet. 143, 8 L. Ed. 349; Stratton *v.* Jarvis, 8 Pet. 4, 8 L. Ed. 840. In line with these cases are those of Davies *v.* Corbin, 112 U. S. 36, 28 L. Ed. 627, and Handley *v.* Stutz, 137 U. S. 366, 34 L. Ed. 706.

Act limiting liability of ship owners.—It was held, in the case of The Mamie, 105 U. S. 773, 26 L. Ed. 937, that from a decree dismissing a petition to obtain the benefit of the act of congress limiting the liability of ship owners, the owner of the vessel might appeal, even if the value of the thing surrendered was less than $5,000, when the claims against it were for much more than twice that sum in the aggregate, though for only $5,000 each; because, as explained in Ex parte Baltimore, etc., R., 106 U. S. 5, 27 L. Ed. 78, the matter in dispute was the owner's right to surrender the vessel, and to be discharged from all further liability, and if that right was established, he had nothing to do with the division of the fund thus created among those having claims against it.

Creditors secured by one mortgage.—To the same class may perhaps be assigned Rodd *v.* Heartt, 17 Wall. 354, 21 L. Ed. 627, where the appeal, which the court declined to dismiss, was by many creditors, secured by one mortgage for more than $5,000, from a decree in rem, postponing that mortgage to claims of materialmen upon the vessel; but the report, both of the facts and the opinion, is so brief, that it is difficult to ascertain exactly upon what ground the court proceeded.

Injunction by various occupiers of stalls in a market.—In Market Co. *v.* Hoffman, 101 U. S. 112, 25 L. Ed. 782, in which, upon the bill of a number of occupiers of stalls in a market, a perpetual injunction was granted to restrain the market company from selling the stalls by auction, the reason assigned by this court for entertaining the appeal of the company was that "the case is one of two hundred and six complainants suing jointly, the decree is a single one in favor of them all, and in denial of the right claimed by the company, which is of far greater value than the sum which, by the act of congress, is the limit below which an appeal is now allowable."

Suits by taxpayers.—Where the grievance complained of is common to all the plaintiffs and to all whom they represent, as where a number of taxpayers file a bill to restrain a levy of a tax to pay for railroad aid bonds, the rule as to each claiming a separate and distinct right and in respect to a separate and distinct liability is not applicable. Therefore, if its aggregate amount exceed the jurisdictional limits, this court has jurisdiction. Brown *v.* Trousdale, 138 U. S. 389, 34 L. Ed. 987.

In Brown *v.* Trousdale, 138 U. S. 389, 394, 34 L. Ed. 987, several hundred taxpayers of a county in Kentucky, for themselves and others associated with them, numbering twelve hundred, and for and on behalf of all other taxpayers in the county, "and for the benefit likewise of said county," filed their bill of complaint against the county authorities and certain funding officers, and all the holders of the bonds, seeking a decree adjudging the invalidity of two series of bonds aggregating many hundred thousand dollars, and perpetually enjoining their collection; and an injunction was also asked as incidental to the principal relief against the collection of a particular tax levied to meet the interest on the bonds. The leading question here was whether the case had been properly removed from the state court, and no consideration was given to the case upon the merits. As to the jurisdiction of this court, we said: "The main question at issue was the validity of the bonds, and that involved the levy and collection of taxes for a series of years to pay interest thereon, and finally the principal thereof, and not the mere restraining of the tax for a single year. The grievance complained of was common to all the plaintiffs and to all whom they professed to represent. The relief sought could not be legally injurious to any of the taxpayers of the county, as such, and the interest of those who did not join in or authorize the suit was identical with the interest of the plaintiffs. The rule applicable to plaintiffs, each claiming under a separate and distinct liability and that contested by the adverse party, is not applicable here. For although as to the tax for the particular year, the injunction sought might restrain only the amount levied against each, that

to different parties in sums less than the jurisdictional amount, this court

order was but preliminary, and was not the main purpose of the bill, but only incidental. The amount in dispute, in view of the main controversy, far exceeded the limit upon our jurisdiction, and disposes of the objection of appellees in that regard." Distinguished from Colvin *v.* Jacksonville, 158 U. S. 456, 460, 39 L. Ed. 1053, reaffirmed in Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209.

Mandamus to compel collection of single tax.—This court has jurisdiction to review a judgment in a mandamus proceeding compelling a tax collector to collect a single tax which has been levied for the joint benefit of all the relators, and in which they have an undivided interest, where the amount of the tax is more than $5,000, because the value of the matter in dispute is measured by the whole amount of the tax, and not by the separate parts into which it is to be divided when collected. Davies *v.* Corbin, 112 U. S. 36, 28 L. Ed. 627, distinguishing Hawley *v.* Fairbanks, 108 U. S. 543, 27 L. Ed. 820, and following Shields *v.* Thomas, 17 How. 3, 15 L. Ed. 93; The Connemara, 103 U. S. 754, 26 L. Ed. 322.

The suit is to remove a cloud on the title to certain lands of the value of $16,000. The plaintiffs, being three of the six heirs at law of the intestate, jointly own an undivided interest of one-half of those lands, but no interest in any particular part of them. If the value of their joint, undivided interest ($8,000), or the value of the undivided interest of each (one third of $8,000), is to be taken as the value of the matter in dispute, then the circuit court had jurisdiction. But we are of the opinion that, within the meaning of the judiciary act of 1887-88, the jurisdiction of the circuit court, in this case depended upon the value in dispute measured by the aggregate amount of the claims of the defendants. McDaniel *v.* Traylor, 196 U. S. 415, 49 L. Ed. 533.

Suit in admiralty for wrongful death.—In a suit in admiralty, in rem, in a district court, against a British steamship, brought by the widows of five persons, to recover $5,000 each, for the loss of their lives, on board of a pilot boat, by a collision which occurred on the high seas between the two vessels, through the negligence of the steamship, a stipulation for value was given by the claimant of the steamship, in the sum of $25,000, to obtain her release. The district court dismissed the libel. It was amended by claiming $10,000 for the loss of each life, and then the libelants appealed to the circuit court, which made the same decree. The libelants having appealed to this court, the appellee made a motion, under subdivision 5 of Rule 6, to dismiss the appeal for want of jurisdiction, and united with it a motion to affirm, held, that the amount involved, if not the entire sum of $25,000, was, at least, the sum of $10,000 in each case, and that the motion to dismiss must be denied. "The fund of $25,000 is a common fund for the benefit of the five parties; and, on the facts of this case, the amount involved, on the question of jurisdiction, if not the entire sum of $25,000, is, at least, the sum of $10,000 in each case. Gibson *v.* Shufeldt, 122 U. S. 27, 31, 30 L. Ed. 1083, and cases cited." The Alaska, 130 U. S. 201, 208, 32 L. Ed. 923.

Order for payment of money.—Where a decree was made by the circuit court, sitting in admiralty, that two persons should pay freight, one in the sum of $583.84, and the other in the sum of $1,754.22, and the latter only appealed to this court, the appeal must be dismissed, as the amount in controversy is less than $2,000. Clifton *v.* Shelton, 23 How. 481, 16 L. Ed. 429.

The rights of the two were distinct and independent; but if the freight be considered a joint matter, both should have joined in the appeal. Clifton *v.* Sheldon, 23 How. 481, 16 L. Ed. 429.

Creditor's suit to compel payment of unpaid subscriptions to stock.—In Handley *v.* Stutz, 137 U. S. 366, 370, 34 L. Ed. 706, a bill in equity was filed by some, in behalf of all, of the creditors of a corporation, against the corporation and holders of stock therein. The bill was not founded upon any direct liability of the stockholders to the plaintiffs; but upon the theory that, the corporation being insolvent and having no other assets, the sum due to it from the stockholders on their unpaid subscriptions to stock ought to be paid by them to the corporation as a trust fund to be distributed among the plaintiffs and all other creditors of the corporation, so far as required to satisfy their just claims, and that, the corporation having neglected to collect these sums or to administer the trust, and the plaintiffs and defendants being citizens of different states, the circuit court, sitting in equity, should compel those sums to be paid in by the stockholders, to be administered as a trust fund and to be distributed among all creditors who should come in. Each of the appellants has been charged by the decree below with a sum of more than $5,000; and it is undisputed that each of them, if the others should prove insolvent, would be obliged to pay the whole sum charged against him, and that each, therefore, has more than $5,000 at stake. Held, the trust fund so administered and ordered to be distributed by the circuit court amounting to much more than $5,000, the appellate jurisdiction of this court is not affected by the fact that the amounts decreed to some of the creditors are less than that sum.

has judisriction.[33]

(2) *Claimants under a Common Title.*—As we have shown, if distinct causes of action in favor of distinct parties, though growing out of the same transaction, are joined in one suit, and distinct decrees are rendered in favor of the several parties, these decrees cannot be joined to give us jurisdiction; but if the controversy is about a matter in which several parties are interested collectively under a common title, and in the decree, after establishing the common right, a division is made among the claimants according to their respective interests, this separation of the decree into parts will not prevent an appeal.[34]

It was immaterial to the appellants how the sums decreed to be paid by them should be distributed, and (which is more decisive) such a bill as this could not have been filed by one creditor in his own behalf only, and the case does not fall under that class in which creditors, who might have sued severally, join in one bill for convenience and to save expense. This court, therefore, has jurisdiction of the whole appeal, according to the rule affirmed in Gibson *v.* Shufeldt, 122 U. S. 27, 30 L. Ed. 1083, and the cases there collected.

33. United States *v.* Freight Ass'n, 166 U. S. 290, 311, 41 L. Ed. 1007, distinguishing Gibson *v.* Shufeldt, 122 U. S. 27, 30 L. Ed. 1083.

In equity, as in admiralty, when the sum sued for is one in which the plaintiffs have a joint and common interest, and the defendant has nothing to do with its distribution among them, the whole sum sued for is the test of the jurisdiction. Gibson *v.* Shufeldt, 122 U. S. 27, 33, 30 L. Ed. 1083.

34. Claimants under a common title.—Farmers' Loan & Trust Co. *v.* Waterman, 106 U. S. 265, 270, 27 L. Ed. 115, cited in Elgin *v.* Marshall, 106 U. S. 578, 582, 27 L. Ed. 249; Hawley *v.* Fairbanks, 108 U. S. 543, 548, 27 L. Ed. 820; Tupper *v.* Wise, 110 U. S. 398, 399, 28 L. Ed. 189; Stewart *v.* Dunham, 115 U. S. 61, 65, 29 L. Ed. 329; Henderson *v.* Wadsworth, 115 U. S. 264, 276, 29 L. Ed. 377; Hassall *v.* Wilcox, 115 U. S. 598, 599, 29 L. Ed. 504; Ex parte Phœnix Ins. Co., 117 U. S. 367, 369, 29 L. Ed. 923; Gibson *v.* Shufeldt, 122 U. S. 27, 37, 30 L. Ed. 1083; Walter *v.* Northeastern R. Co., 147 U. S. 370, 373, 37 L. Ed. 206.

The rulings of this court are uniform and consistent to the effect that, where several plaintiffs claim under the same title, and the determination of the cause necessarily involves the validity of that title, this court has jurisdiction, though the individual claims do none of them exceed the requisite amount, but when the matters in dispute are separate and distinct, and are joined in one suit for convenience or economy, the case will be dismissed as to claims not exceeding $5,000. Schwed *v.* Smith, 106 U. S. 188, 27 L. Ed. 156; Hawley *v.* Fairbanks, 108 U. S. 543, 27 L. Ed. 820; Stewart *v.* Dunham, 115 U. S. 61, 29 L. Ed. 329; Estes *v.* Gunter, 121 U. S. 183, 30 L. Ed. 884; Gibson *v.* Shufeldt, 122 U. S. 27, 30 L. Ed. 1083; Henderson *v.* Carbondale Coal, etc., Co., 140 U. S. 25, 35 L. Ed. 332; New Orleans Pac. R. Co. *v.* Parker, 143 U. S. 42, 36 L. Ed. 66; Chapman *v.* Handley, 151 U. S. 443, 38 L. Ed. 277; Davis *v.* Schwartz, 155 U. S. 631, 647, 39 L. Ed. 289.

Where several plaintiffs claim under the same title, and the determination of the cause necessarily involves the validity of that title, and the aggregate exceeds $5,000, this court has jurisdiction as to all such plaintiffs, though the individual claims of none of them exceed five thousand dollars. New Orleans Pac. R. Co. *v.* Parker, 143 U. S. 42, 51, 36 L. Ed. 66.

The true distinction is between cases in which there are several plaintiffs interested collectively under a common title, and those wherein the matters in dispute are separate and distinct, and are joined in one suit for convenience or economy. New Orleans Pac. R. Co. *v.* Parker, 143 U. S. 42, 52, 36 L. Ed. 66.

In a proceeding to assert the validity of an alleged will where the controversy was whether an estate valued at more than $9,000 should pass in the mode provided in the alleged will, or in the mode provided by the law of the domicil of the decedent for the transmission of an intestate estate, the matter in dispute is the value of the estate effected by that instrument. The matter in dispute must necessarily be the same as to those interested in upholding the validity of the alleged will and as to the unsuccessful next of kin who were prosecuting the writ of error, and the amount of whose several interests in the estate of the decedent was not a question litigated below. The next of kin sought not an allotment to them of their interests, if any, in the estate, but an adjudication that the alleged last will and testament possessed no validity, and that contention was advanced by virtue of a claim of common title in the next of kin of the decedent to the corpus of the estate, such title, if any, being derived from the law of the alleged domicil of the deceased. In this aspect, the amount of the estate was the matter in dispute. Overby *v.* Gordon, 177 U. S. 214, 218, 44 L. Ed. 741, citing New Orleans Pac. R. Co. *v.* Parker, 143 U. S. 42, 51, 52, 36 L. Ed. 66; Shields *v.* Thomas, 17 How. 3, 15 L. Ed. 93.

(3) *Aggregation to Avoid Multiplicity of Suits.*—Where a suit in equity is brought to annul several judgments against the plaintiff, all of which are held in the same right, and the validity of which depends upon the same facts, the defendant, in order to avoid a multiplicity of actions, and to protect itself against the vexation and costs that would come from numerous executions and levies, is entitled to bring one suit for a decree finally determining the matter in dispute in all cases.[35]

j. *Practice.*—Where distinct causes of action in favor of distinct parties are united for convenience and to save expense in one suit and distinct orders are made, the writ of error will be dismissed as to those in which the jurisdictional amount is insufficient, and the cause will be retained for adjudication as to those on which the amount is sufficient.[36]

Mandate.—Where separate claims of different defendants have been joined in one suit, the circuit court is without jurisdiction (act of March 3, 1887, 24 Stat. 552, c. 373; Act of August 13, 1888, 25 Stat. 433, c. 866), but as perhaps by amendment the bill might be retained as to some one of the defendants, this court will not direct its dismissal. In pursuance of § 10 of the judiciary act March 3, 1891, 26 Stat. 829, c. 517, the decree of the circuit court will be reversed at the costs of the appellant, and the cause remanded to that court with a direction for further proceedings in conformity with the opinion.[37]

14. Set-Off and Counterclaim.—Counterclaims and set-offs introduced by the defendant are as to him to be considered a part of the amount in controversy. In short, the amount in controversy is the sum shown by the whole record, including counterclaims and set-offs and not by the claims set up by the plaintiff only.[38]

35. Aggregation to avoid multiplicity of suits.—Marshall *v.* Holmes, 141 U. S. 589, 595, 35 L. Ed. 870.

36. Practice.—Hawley *v.* Fairbanks, 108 U. S. 543, 27 L. Ed. 820, following Farmers' Loan & Trust Co. *v.* Waterman, 106 U. S. 265, 27 L. Ed. 115.

37. Northern Pac. R. Co. *v.* Walker, 148 U. S. 391, 392, 37 L. Ed. 494.

38. Set-off and counterclaim.—Bradstreet Co. *v.* Higgins, 112 U. S. 227, 28 L. Ed. 715; Lamar *v.* Micou, 104 U. S. 465, 26 L. Ed. 774; Thompson *v.* Butler, 95 U. S. 694, 24 L. Ed. 540; Sampson *v.* Welch, 24 How. 207, 16 L. Ed. 632; Simms *v.* Simms, 175 U. S. 162, 169, 44 L. Ed. 115.

In considering the amount necessary for the jurisdiction of this court on a writ of error, not only is the amount of the judgment against the plaintiff in error to be regarded, but, in addition, the amount of a counterclaim which he would have recovered, if his contention setting it up had been sustained. Clark *v.* Sidway, 142 U. S. 682, 35 L. Ed. 1157.

As said in Hilton *v.* Dickinson, 108 U. S. 165, 175, 27 L. Ed. 688, this court has jurisdiction "of a writ of error or appeal by a defendant when the recovery against him is as much in amount or value as is required to bring a case here, and when, having pleaded a set-off or counterclaim for enough to give us jurisdiction, he is defeated upon his plea altogether, or recovers only an amount or value which, being deducted from his claim as pleaded, leaves enough to give us jurisdiction, which has not been allowed."

Where in an action of assumpsit to recover $813 for goods sold and delivered, the record shows that the defendants set up a counterclaim seeking to recover the sum of $7,000 in excess of the plaintiff's claim, this is the sum in dispute, and therefore the plaintiff's motion to dismiss the writ of error, for want of a sufficient amount in dispute to give this court jurisdiction, cannot be sustained. Dushane *v.* Benedict, 120 U. S. 630, 30 L. Ed. 810, citing Ryan *v.* Bindley, 1 Wall. 66, 17 L. Ed. 559; Act of Congress of February 16, 1875, c. 77, § 3, 18 Stat. 316.

Where in a case to recover damages for a breach of a contract, the plaintiff lays his damages to the amount of $6,750 and the interest thereon, no part of which as he alleges has been paid, except the sum of $1,900 on account, and the additional claim of $2,500 as special damages, and the answer of the defendant sets up a general denial, except that he admits that he has paid $1,900, and also sets up a counterclaim for $6,000 damages for the failure of the plaintiff to perform the contract, a motion to dismiss for want of jurisdiction will be denied. In as much as the defendant loses by the judgment $2,485, exclusive of interest and costs and in addition to that does not recover anything on account of his counterclaim of $6,000, the aggregate amount is sufficient to give this court jurisdiction. Sire *v.* Elithorpe Air Brake Co., 137 U. S. 579, 34 L. Ed. 801.

Where the plaintiff sues for an amount in excess of the sum necessary to give us

Set-Off.—Where a declaration claims a sum not sufficiently large to warrant error to this court, but where the plea pleads a set-off of a sum so considerable that the excess between the sum claimed and that pleaded as a set-off would do so, the amount in controversy is not the sum claimed but the sum in excess, in those circuits where by the law of the state adopted in the circuit court, judgment may be given for the excess as aforesaid.[39] Where the defendants in an action to recover on a money demand, not only dispute the whole of the plaintiff's demand, but claim judgment over against him for the amount of their counterclaim, this court has jurisdiction of an appeal by the defendant. In other words the disallowance altogether of the defendants' counterclaim entitles him to a writ of error that will bring up the whole case, the original cause of action as well as the defense and counterclaim.[40] In the absence of anything to the contrary, the prayer for judgment by the defendant in his counterclaim or set-off, will be taken as indicating the amount in dispute, unless the actual amount in dispute otherwise appears in the record.[41]

15. Interest and Costs—a. *In General.*—In determining the jurisdictional sum or amount, it is obvious that neither interest on the judgment nor costs of suit can enter into the computation, for costs form no part of the matter in dispute, and interest on the judgment can only arise after rendition, while the jurisdictional amount, if determined by the judgment, is fixed at rendition.[42] The general rule is well settled that in cases brought here on a writ of error for the re-examination of judgments of affirmance in the supreme court of the District of Columbia, the value of the matter in dispute is determined by the judgment affirmed, without adding interest or costs.[43]

b. *Interest.*—**In General.**—The amount required is to be ascertained and de-

jurisdiction, but the defendants deny their liability in any sum, and by way of counterclaim ask for judgment in the sum of ten thousand dollars, the matter in dispute in this court, where the writ of error is sued out by the defendant, is the amount of the counterclaim, and this court has jurisdiction although the verdict and judgment were in favor of the plaintiff for less than five thousand dollars. Buckstaff *v.* Russell & Co., 151 U. S. 626, 38 L. Ed. 292.

39. For example: A declaration in assumpsit claimed one thousand dollars damages—a sum insufficient to give the supreme court jurisdiction, more than two thousand being required for that purpose. The plea pleaded a set-off of four thousand, and by the laws of Ohio, adopted in the federal courts sitting in that state, judgment might be given for the three thousand in excess, if the set-off was proved. Held, that three thousand, and not one thousand, was the amount in dispute; and, accordingly, that the jurisdiction of the supreme court attached. Ryan *v.* Bindley, 1 Wall. 66, 17 L. Ed. 559, cited with approval in Dushane *v.* Benedict, 120 U. S. 630, 636, 30 L. Ed. 810.

40. Block *v.* Darling, 140 U. S. 234, 35 L. Ed. 476, following Hilton *v.* Dickinson, 108 U. S. 165, 27 L. Ed. 688; Bradstreet Co. *v.* Higgins, 112 U. S. 227, 28 L. Ed. 715.

41. Gray *v.* Blanchard, 97 U. S. 564, 24 L. Ed. 1108.

42. In general.—Knapp *v.* Banks, 2 How. 73, 11 L. Ed. 184; Walker *v.* United States, 4 Wall. 163, 164, 18 L. Ed. 319; Railroad Co. *v.* Trook, 100 U. S. 112, 25 L. Ed. 571; Western Union Tel. Co. *v.* Rogers, 93 U. S. 565, 23 L. Ed. 977; Walker *v.* United States, 4 Wall. 163, 18 L. Ed. 319; New York Elevated R. Co. *v.* Fifth Nat. Bank, 118 U. S. 608, 30 L. Ed. 259; Ortega *v.* Lara, 202 U. S. 339, 342, 50 L. Ed. 1055.

Before the act of Feb. 16, 1875 (18 Stat. 316), increasing the sum or value of the matter in dispute, necessary to give this court jurisdiction, from $2,000 to $5,000, after May 1, 1875, it was held, that we had no jurisdiction in cases where the matter in dispute was $2,000, and no more, and that in determining the jurisdictional amount "neither interest on the judgment nor costs of suit can enter into the computation." Walker *v.* United States, 4 Wall. 163, 164, 18 L. Ed. 319; Knapp *v.* Banks, 2 How. 73, 11 L. Ed. 184; Western Union Tel. Co. *v.* Rogers, 93 U. S. 565, 566, 23 L. Ed. 977.

43. District of Columbia *v.* Gannon, 130 U. S. 227, 32 L. Ed. 922.

Where a judgment for the recovery of money, affirmed in the supreme court of the District of Columbia, is brought here for re-examination, the amount thereof, without adding interest or costs, determines the value of "the matter in dispute," under the act of Feb. 25, 1879 (20 Stat. 320), and, if it does not exceed $2,500, this court has no jurisdiction. Railroad Co. *v.* Trook, 100 U. S. 112, 25 L. Ed. 571, citing Railroad Co. *v.* Grant, 98 U. S. 398, 25 L. Ed. 231.

termined by the sum in controversy at the time of the judgment in the circuit court, and not by any subsequent additions thereto, such as interest.[44]

Libel in Admiralty.—Where the claim is founded on dollars and cents, whether it be a libel, a bill in chancery, or an action at law, the damages must appear, to give jurisdiction, on the face of the pleading on which the claim is made. No computation of interest will be made to give jurisdiction, unless it be specially claimed in the libel. If not intended to be included in the claim of damages, it should be specially stated. This would certainly be the case in an action at law, and no reason is perceived why the rule should be relaxed in a case of libel.[45]

44. Interest.—Merrill *v.* Petty, 16 Wall. 338, 345, 21 L. Ed. 499, citing Gordon *v.* Ogden, 3 Pet. 33, 7 L. Ed. 592; Wise *v.* Columbian Turnpike Co., 7 Cranch 276, 3 L. Ed. 341; Knapp *v.* Banks, 2 How. 73, 11 L. Ed. 184; Walker *v.* United States, 4 Wall. 163, 18 L. Ed. 319; Western Union Tel. Co. *v.* Rogers, 93 U. S. 565, 23 L. Ed. 977.

Where the defendant in error recovered judgment in the supreme court of the District of Columbia, against the district, for $5,000, in an action on the case for personal injuries, which judgment, as rendered at a special term, was affirmed with costs, but not with interest; the general term thereby simply declaring that it was satisfied to let the former judgment stand, a motion to dismiss for want of jurisdiction will be granted. It would have been otherwise if, by the judgment of affirmance, interest had been directed to be paid to the judgment at special term. District of Columbia *v.* Gannon, 130 U. S. 227, 32 L. Ed. 922, following Railroad Co. *v.* Trook, 100 U. S. 112, 25 L. Ed. 571.

The act of congress provides that appeals shall be allowed to the supreme court from the final decrees rendered in the circuit courts, in cases of equity jurisdiction, where the matter in dispute, exclusive of costs, shall exceed the sum or value of two thousand dollars. The expression, sum or value of the matter in dispute has reference to the date of the decree below, alike in case of appeals in equity, and writs of error at law; they are each grounded on the original process of this court operating on the final decree or judgment, and are limited to the sum or value then in controversy, and of which the decree or judgment furnishes the better evidence, should it furnish any. The matter in dispute in the circuit court, was a claim to have deducted from the judgment at law, one thousand dollars, with interest thereon, after the rate of six per centum, from the 8th day of July, 1819, up to the date of the decree, in November, 1836; being upwards of seventeen years; and the circuit court decreed the reformation to be made of the judgment at law, by expunging therefrom, and as of its date, the one thousand dollars, with the interest. The effect was to cut off the interest that had accrued on the one thousand dollars from the date of the judgment in 1827 to that of the decree in 1836, interest on the principal sum recovered, being an incident of the contract by the laws of Kentucky, as well after judgment as before. The practical consequence of the decree will immediately be manifest when the bill is dismissed by the order of this court; the appellants will then issue their execution at law, and enforce the one thousand dollars, with the accruing interest, from the 8th of July, 1819, until payment is made. It follows that, upon the most favorable basis of calculation, and disregarding the statute of Kentucky of 1789, giving ten per cent. damages in addition to legal interest on the sum enjoined, the amount to which the decree below relieved the appellees, and deprived the bank of the right of recovery, was two thousand and forty dollars; that is, one thousand dollars principal, with seventeen years and four months of interest; this being the aggregate amount in dispute, and enjoined by the decree, of course, the supreme court has jurisdiction of the writ of error. United States Bank *v.* Daniel, 12 Pet. 32, 9 L. Ed. 989.

Where a verdict and judgment for $5,000 was entered for the plaintiff in the court below, but on an ex parte motion of the defendant, the judgment was amended to include interest on the verdict, it was held that as the judgment originally rendered did not exceed the sum or value of $5,000, it could not be amended on motion of the defendant by the addition of an amount not claimed by the plaintiff, so as to bring the case within our jurisdiction. "Since the defendant confessedly made its motion with the sole object of obtaining a writ of error not otherwise allowable, and, in doing so, conceded that the amount sought to be added was not in dispute, we decline to permit what was done to be efficacious in the accomplishment of the purpose designed." Northern Pacific R. Co. *v.* Booth, 152 U. S. 671, 672 38 L. Ed. 591.

45. Udall *v.* Steamship Ohio, 17 How. 17, 15 L. Ed. 42.

Where the amount claimed in a libel does not exceed $2,000, this court has no jurisdiction, and the appeal will be dismissed, although if proper interest to time

Effect of Local Rules of Practice.—But when the judgment actually rendered in the court below was for an amount giving this court jurisdiction, which amount was reached by adding to a verdict for $5,000, interest from the time of the verdict to the time of the entry of the judgment in a district where the local state law does not permit that to be done, and the plaintiff below, although excepting to the allowance of interest, and to the refusal of the court below to permit a remittitur, brings no writ of error to correct the alleged error, this court cannot dismiss a writ of error brought by the defendant to review other rulings in the case.[46]

c. *Costs.*—In determining the jurisdictional sum or amount, costs cannot enter into the computation, for costs form no part of the matter in dispute.[47] Hence, an appeal cannot be taken to this court from a decree of the court below that the plaintiff pay into court the costs of the suit and $1,000, where it does not involve an amount sufficient to give this court jurisdiction.[48]

d. *Limitations of General Rule.*—**In General.**—Where interest antecedent to the judgment appealed from is included in such judgment, and the amount, with the added interest, exceeds the necessary amount, jurisdiction will attach.[49] So,

of the trial be added, it will exceed $2,000. Udall *v.* Steamship Ohio, 17 How. 17, 15 L. Ed. 42.

In Olney *v.* Steamship Falcon, 17 How. 19, 15 L. Ed. 43, the appellant claimed in his libel that he was entitled to recover of said vessels the damages by him sustained, "which amount to the sum of $800 and upwards." This court, in dismissing the case for want of jurisdiction on the ground that the sum was not sufficient to bring it within the jurisdiction of this court, said: "The words, 'and upwards,' it is said, were intended to embrace the interest, and that, if this be calculated from the time of filing the libel up to the time of the trial, the sum would exceed two thousand dollars. The interest, in an action of this kind, if taken into view, is considered as a part of the damages, being merged in that claim, and is not estimated as a distinct item. The claim of more than eighteen hundred dollars, is too indefinite to give jurisdiction under the act of congress; and the interest not being specially claimed, for the reason stated, cannot be computed. The appeal is, therefore, dismissed, for want of jurisdiction. Gordon *v.* Ogden, 3 Pet. 33, 34, 7 L. Ed. 592; Scott *v.* Lunt, 6 Pet. 349, 8 L. Ed. 423."

46. Baltimore, etc., R. Co. *v.* Griffith, 159 U. S. 603, 605, 39 L. Ed. 274, citing Pacific Postal, etc., Co. *v.* O'Connor, 128 U. S. 394, 32 L. Ed. 488; Massachusetts Benefit Ass'n *v.* Miles, 137 U. S. 689, 34 L. Ed. 834.

47. Costs.—Knapp *v.* Banks, 2 How. 73, 11 L. Ed. 184; Walker *v.* United States, 4 Wall. 163, 18 L. Ed. 319.

Where a judgment in a patent case was affirmed by this court with a blank in the record for costs, and the circuit court afterwards taxed these costs at a sum less than two thousand dollars, and allowed a writ of error to this court, this writ must be dismissed on motion. Sizer *v.* Many, 16 How. 98, 14 L. Ed. 861.

48. Johnson *v.* St. Louis, etc., R. Co., 141 U. S. 602, 35 L. Ed. 875.

49. Limitations of general rule.—The Patapsco, 12 Wall. 451, 20 L. Ed. 457; The Rio Grande, 19 Wall. 178, 22 L. Ed. 60; Zeckendorf *v.* Johnson, 123 U. S. 617, 31 L. Ed. 277; District of Columbia *v.* Gannon, 130 U. S. 227, 32 L. Ed. 922; New York Elevated R. Co. *v.* Fifth Nat. Bank, 118 U. S. 608, 30 L. Ed. 259; Keller *v.* Ashford, 133 U. S. 610, 33 L. Ed. 667; Massachusetts Benefit Ass'n *v.* Miles, 137 U. S. 689, 34 L. Ed. 834; Woodward *v.* Jewell, 140 U. S. 247, 35 L. Ed. 478; Guthrie Nat. Bank *v.* Guthrie, 173 U. S. 528, 533, 43 L. Ed. 796.

In order to give this court appellate jurisdiction, interest to the date of judgment may be included. The Patapsco, 12 Wall. 451, 20 L. Ed. 457, followed in The Rio Grande, 19 Wall. 178, 22 L. Ed. 60.

Upon a decree in the circuit court for a sum less than $2,000, "with interest from a date named," an appeal lies here under the statute which gives an appeal "where the sum in dispute * * * exceeds $2,000," provided that the sum for which the decree is given and the interest added to it together exceed $2,000. The Patapsco, 12 Wall. 451, 20 L. Ed. 457.

Where the verdict was for $5,000, and the judgment was for that amount, and $306 interest for the time between verdict and judgment, and for $60.25 costs, held, that the matter in dispute exceeded the sum or value of $5,000, exclusive of costs, within the act of February 16, 1875, c. 77, § 3, 18 Stat. 316, even though, without the interest included in the judgment, the amount, exclusive of costs, would not be over $5,000. Quebec Steamship Co. *v.* Merchant, 133 U. S. 375, 33 L. Ed. 656, citing New York Elevated R. Co. *v.* Fifth Nat. Bank, 118 U. S. 608, 30 L. Ed. 259.

In Zeckendorf *v.* Johnson, 123 U. S. 617, 31 L. Ed. 277, a judgment was rendered September 28, 1885, by the district court of Arizona, in and for the county of Pima,

also, where interest, instead of accompanying the judgment or decree as damages for the detention of a specific amount adjudged or decreed, is part of the claim litigated, and the judgment or decree is so framed as to provide for it to run from a period antecedent to the rendition of such judgment or decree, or, in

against L. Zeckendorf & Co., the appellants, and in favor of Johnson, the appellee, for $4,304.93, "with interest on $2,800 on said sum, at the rate of two per cent. per month from the date hereof until paid, and interest on $1,504.33, at the rate of ten per cent. per annum from the date hereof until paid." This judgment was affirmed by the supreme court of the territory, on appeal, November 8, 1886. From that judgment of affirmance this appeal was taken, which the appellee moves to dismiss on the ground that the value of the matter in dispute does not exceed $5,000, as now required by law. Act of March 3, 1885, c. 355, 23 Stat. 443. The court said "The value of the matter in dispute is to be determined by the amount due at the time of the judgment brought here for review, to wit, the judgment of the supreme court of the territory, and not at the time of the judgment of the district court. Adding the interest to the judgment of the district court until the date of the supreme court, as we must for the purpose of determining our jurisdiction, The Patapsco, 12 Wall. 451, 20 L. Ed. 457; New York Elevated R. Co. *v.* Fifth Nat. Bank, 118 U. S. 608, 30 L. Ed. 259, we find that the amount due at the time of the judgment of the supreme court was considerably more than $5,000. The motion to dismiss is, therefore, denied."

In a suit founded upon a contract, the sum in dispute at the time of the judgment or decree appealed from, including any interest then accrued, is the test of appellate jurisdiction. Keller *v.* Ashford, 133 U. S. 610, 617, 33 L. Ed. 667, citing United States Bank *v.* Daniel, 12 Pet. 32, 52, 9 L. Ed. 989; The Patapsco, 12 Wall. 451, 20 L. Ed. 457; New York Elevated R. Co. *v.* Fifth Nat. Bank, 118 U. S. 608, 30 L. Ed. 259; Keckendorf *v.* Johnson, 123 U. S. 617, 31 L. Ed. 277, and distinguishing Railroad *v.* Trook, 100 U. S. 112, 25 L. Ed. 571; District of Columbia *v.* Gannon, 130 U. S. 227, 32 L. Ed. 922, on the ground that the judgment in special term was for damages in an action sounding in tort, which bore no interest, either by the general law, or by the judgment of affirmance in general term.

Where under the peculiar practice obtaining in Pennsylvania, a judgment in a federal court for $5,000 is entered up generally "in favor of the plaintiff and against the defendant on the verdict," and an act of the legislautre of that state gives interest upon such sum from the date of verdict, this court has jurisdiction, the Revised Statutes of the United States to the contrary notwithstanding, because both in Holden *v.* Trust Co., 100 U. S. 72, 25 L. Ed. 567, and in Ohio *v.* Frank, 103 U. S. 697, 26 L. Ed. 531, it was held, that the question of interest is always one of local law. Massachusetts Benefit Ass'n *v.* Miles, 137 U. S. 689, 34 L. Ed. 834.

Appeals in admiralty.—Five libelants, on separate libels in rem, got a decree in the circuit court of one circuit against a vessel for sums each one under $2,000, and so without right of appeal here, and costs. Before they could get satisfaction from the vessel, she was taken out to sea. The vessel happening to be subsequently in another district the same five libelants now sent and libelled her there; not filing five separate libels as in the former district, but all five persons joining in one libel, claiming for each the old sums, with interest from a day named, and claiming in one sum, and without any specification of what portion of it was for which libelant, the sum of $1,767.62, costs of the courts of the first district, "and also all costs in this behalf expended." The circuit court decreed in favor of the libelants the amount claimed by each with 8 per cent. interest from a day named, to the date of the circuit court's decree; and "the further sum of $1,767.62 costs in the district and circuit courts" of the former district, and all costs in the district and circuit courts where the libels had last been filed. With the interest thus allowed the claims of two of the five libelants exceeded the sum of $2,000, but even with it added the claims of the remaining three did not do so. The owners of the vessel having taken an appeal to this court, a motion "to dismiss the appeal," for want of jurisdiction, because "the matter in dispute did not exceed the sum or value of $2,000," was denied; the ground for the denial assigned being that "the motion is to dismiss the appeal" and that the decree in favor of two of the libelants was greater than $2,000 when the interest allowed by the circuit court to the date of its decree was included with the principal. The Rio Grande, 19 Wall. 178, 22 L. Ed. 60, citing The Patapsco, 12 Wall. 451, 20 L. Ed. 457.

Where a verdict is recovered against a railroad company for $5,000 for injuries to real estate, and at the time of the rendition of the verdict the railroad company moves for a new trial, which motion is denied, and judgment is entered for $5,068.33, that being the amount of the verdict with interest added to the date of the judgment, this court has jurisdiction. "It is true that our jurisdiction depends on the amount of the judgment, exclusive of interest thereon, Knapp *v.* Banks, 2 How. 73, 11 L. Ed. 184; Western Union

actions ex contractu, according to the terms of the contract upon which the action is based, jurisdiction may attach.[50]

Where a judgment of the district court of a territory is affirmed by the supreme court of a territory, and at the date of the affirmance the interest, added to the original judgment, is sufficient to give this court jurisdiction, the value of the matter in dispute is to be determined by the amount due at the time of the judgment of the supreme court of the territory.[51]

The distinction is elementary between interest as such and the use of an interest calculation as an instrumentality in arriving at the amount of damages to be awarded on the principal demand. And much confusion of thought often results from the failure to distinguish between a principal and an accessory demand. Accordingly, in an action on a warranty of title in a deed, the sum of the principal demand is the amount of the purchase money paid, although interest and price and other things may have constituted some of the elements entering into the legal unit, as the damage which the party was entitled to recover.[52]

16. SHOWING AND DETERMINATION OF AMOUNT—a. *In General.*—To ascertain the right of jurisdiction as dependent on the amount in controversy, we look not to a single feature of the case, but to the entire controversy between the parties.[53]

Tel. Co. *v.* Rogers, 93 U. S. 565, 566, 23 L. Ed. 977; but here the interest accrued before judgment, and not after. In The Patapsco, 12 Wall. 451, 20 L. Ed. 457, jurisdiction was taken in a case where the decree was for $1,982, 'and interest from the date of the report,' which made more than $2,000 due at the time of the decree, that being then the jurisdictional limit." New York Elevated R. Co. *v.* Fifth Nat. Bank, 118 U. S. 608, 610, 30 L. Ed. 259.

Suits for accounting.—Where in an action in equity, brought in the court below by the appellant, for the purpose of having an account stated between him and the appellee, the case was referred to a special auditor, who reported a balance due to the appellant of $784.53, and the account involved a large number of items, amounting in the aggregate to several thousand dollars, but the complainants filed exceptions to the report of the auditor, which were overruled and judgment entered for the complainant for the amount awarded by the special auditor, it was held, that the matters in dispute on this appeal were those presented by the exceptions to the master's report, and if the addition of interest to this amount, from the date at which the master made up the account, until the decree below, will not make the value of the amount in dispute equal to that necessary to give this court jurisdiction, the appeal will be dismissed. Burr *v.* Myers, 154 U. S. 654, 25 L. Ed. 976.

50. Zeckendorf *v.* Johnson, 123 U. S. 617, 31 L. Ed. 277; The Patapsco, 12 Wall. 451, 20 L. Ed. 457; The Rio Grande, 19 Wall. 178, 22 L. Ed. 60; District of Columbia *v.* Gannon, 130 U. S. 227, 228, 32 L. Ed. 922.

51. Benson Min., etc., Co. *v.* Alta Min., etc., Co., 145 U. S. 428, 36 L. Ed. 762, following Zeckendorf *v.* Johnson, 123 U. S. 617, 31 L. Ed. 277.

In Zeckendorf *v.* Johnson, 123 U. S. 617, 31 L. Ed. 277, a judgment was rendered September 28, 1885, by the district court of Arizona, in and for the county of Pima, against L. Zeckendorf & Co., the [illegible] for $4,304.93, "with interest on $3,800 [illegible] at the rate of two per cent. per month from the date hereof until paid, and interest on $1,504.33, at the rate of ten per cent. per annum from the date hereof until paid." This judgment was affirmed by the supreme court of the territory, on appeal, November 8, 1886. From that judgment of affirmance this appeal was taken, which the appellee moves to dismiss, on the ground that the value of the matter in dispute does not exceed $5,000, as now required by law. Act of March 3, 1885, c. 355, 23 Stat. 443. The court said: "The value of the matter in dispute is to be determined by the amount due at the time of the judgment brought here for review, to wit, the judgment of the supreme court of the territory, and not at the time of the judgment of the district court. Adding the interest to the judgment of the district court until the date of that of the supreme court, as we must for the purpose of determining our jurisdiction, The Patapsco, 12 Wall. 451, 20 L. Ed. 457; New York Elevated R. Co. *v.* Fifth Nat. Bank, 118 U. S. 608, 30 L. Ed. 259, we find that the amount due at the time of the judgment of the supreme court was considerably more than $5,000. The motion to dismiss is, therefore, denied."

52. Brown *v.* Webster, 156 U. S. 328, 39 L. Ed. 440.

53. In general.—Stinson *v.* Dousman, 20 How. 461, 15 L. Ed. 966; Shappirio *v.*

Must Appear Affirmatively.—The fact of value in excess of the limit prescribed by congress to give this court appellate jurisdiction must affirmatively appear in the record, as it is essential to the existence and exercise of jurisdiction. This court will not proceed in any case unless its right and duty to do so are apparent upon the face of the record.[54] Enough must appear to show affirmatively that the jurisdiction exists. A writ of error to a circuit court in an ejectment was dismissed, where the record stated that the land for which the suit was brought was "of the value of $500 and over."[55] The practice of ascertaining the damages in the circuit court cannot affect the question of jurisdiction. The amount claimed must be sufficient on the face of the pleading.[56] Where the plaintiff in error fails to show, either from the record, or by affidavits, that the matter in dispute exceeds five thousand dollars, this court will dismiss the writ for want of jurisdiction.[57] That the requisite amount is involved may be made to appear in such manner as shall establish it to the satisfaction of the court.[58]

b. *Burden of Proof and Weight of Evidence.*—The burden of showing jurisdiction is on the plaintiff in error. He must establish as a fact by a fair preponderance of testimony that the value of the property in dispute exceeds the jurisdictional amount.[59] In like manner, where it is contended by the appellant that the controversy does not involve the requisite amount, exclusive of interest and costs, the burden of proof is upon the appellant to establish by a preponderance of the evidence that the amount involved is less than the jurisdictional amount.[60]

Preponderance of Evidence.—Where upon an examination of the record as returned, it appears that the jurisdictional value is not made out by a preponderance of evidence, the writ of error will be dismissed.[61] The value of the

Goldberg, 192 U. S. 232, 240, 48 L. Ed. 419; Kirby *v.* American Soda Fountain Co., 194 U. S. 141, 144, 48 L. Ed. 911.

54. Elgin *v.* Marshall, 106 U. S. 578, 27 L. Ed. 249, reaffirmed in Plainview *v.* Marshall, 106 U. S. 583, 27 L. Ed. 250.

The appellant to sustain his appeal must show affirmatively that more in pecuniary value than our jurisdictional requirement has been adjudged against him. Green *v.* Fisk, 103 U. S. 518, 26 L. Ed. 486.

"To support that jurisdiction, it is necessary that it should appear upon the face of the record, or upon affidavits to be filed by the parties, that the sum or value in controversy exceeds $2,000, exclusive of costs." Hagan *v.* Foison, 10 Pet. 160, 9 L. Ed. 381, 382.

55. Parker *v.* Latey, 12 Wall. 390, 20 L. Ed. 404.

A motion to dismiss an appeal will be granted where it does not appear in the record or by affidavits that the value of the matter in dispute exceeds $5,000. Parker *v.* Morrill, 106 U. S. 1, 27 L. Ed. 72.

Where the record shows that the appellee, who raises the objection that the lands which are the matter in controversy are not of sufficient value to give this court jurisdiction, bought them for $21,000, and by virtue of that purchase claims them here, and the prayer for appeal, which is verified by the affidavit of the appellant, shows that they are worth more than $5,000, held, that this court has jurisdiction. May *v.* Sloan, 101 U. S. 231, 25 L. Ed. 797.

In order to review the decision of a territorial supreme court, it must appear that this court has jurisdiction of the case, and such jurisdiction does not exist if the value of the subject matter in dispute does not exceed $5,000. McClung *v.* Penny, 189 U. S. 143, 47 L. Ed. 751.

56. Udall *v.* Steamship Ohio, 17 How. 17, 15 L. Ed. 42.

57. Johnson *v.* Wilkins, 116 U. S. 392, 29 L. Ed. 671.

58. United States *v.* Freight Ass'n., 166 U. S. 290, 310, 41 L. Ed. 1007.

59. Burden of proof and weight of evidence.—Wilson *v.* Blair, 119 U. S. 387, 388, 30 L. Ed. 439; United States *v.* The Union, 4 Cranch 216, 2 L. Ed. 600; Hagan *v.* Foison, 10 Pet. 160, 9 L. Ed. 381; Johnson *v.* Wilkins, 116 U. S. 392, 29 L. Ed. 671; Troy *v.* Evans, 97 U. S. 1, 24 L. Ed. 941.

"The onus probandi of the amount in controversy, to establish the jurisdiction in a case brought before the court by writ of error, is upon the party seeking to obtain a revision of the case. He may prove that the value exceeds two thousand dollars exclusive of costs. In this case, the matter in question is the ownership of one negro woman and two children, who were slaves, and it is not supposed their value can be equal to that sum. The writ of error was dismissed." Hagan *v.* Foison, 10 Pet. 160, 9 L. Ed. 381.

60. Hunt *v.* New York Cotton Exchange, 205 U. S. 322, 51 L. Ed. 821, citing Sheppard *v.* Graves, 14 How. 505, 14 L. Ed. 309; Wetmore *v.* Rymer, 169 U. S. 115, 42 L. Ed. 682; Gage *v.* Pumpelly, 108 U. S. 164. 26 L. Ed. 668.

61. Red River Cattle Co. *v.* Needham, 137 U. S. 632, 633, 34 L. Ed. 799.

matter in controversy cannot be supplied by speculation.[62]

c. *Right to Introduce Evidence to Prove Amount.*—**In General.**—It has long been the settled practice of the courts of the United States in actions where the demand is not money, and the nature of the action does not require the value of the property in controversy to be stated, to allow the value to be proved at the trial.[63] The value of the subject matter in controversy may be shown from the record, or by evidence aliunde, when it is disputed.[64]

This court will permit viva voce testimony to be given of the value of the matter in dispute.[65]

Thus, on an appeal in admiralty, where the record has failed to show that the sum necessary to give this court jurisdiction of such an appeal was in controversy below, the court, in a proper case, and where it is asserted by the appellant that such sum was really in controversy, will allow him a limited time to make proof of the fact.[66]

Weight and Sufficiency.—An appraisement made by order of the district judge, by three sworn appraisers, is not conclusive evidence of the value, but it is better evidence than the opinion of a single witness, examined viva voce in open court.[67]

Continuance.—After deciding the question of value, upon the weight of the evidence, the court will not continue the cause, for the party to produce further evidence as to the value.[68]

d. *Affidavits.*—**In General.**—Where the value does not, according to the usual forms of proceeding, appear in the pleadings or evidence in the record, affidavits of value may be received here, in order to show that the value is large enough to give jurisdiction to this court.[69]

62. Durham *v.* Seymour, 161 U. S. 235, 40 L. Ed. 682; Huntington *v.* Saunders, 163 U. S. 319, 41 L. Ed. 174.

63. Right to introduce evidence to prove amount.—Ex parte Bradstreet, 7 Pet 643, 647, 8 L. Ed. 810; Beard *v.* Federy, 3 Wall. 478, 494, 18 L. Ed. 88.

In an appeal in admiralty, where the record has failed to show that the sum necessary to give this court jurisdiction of such an appeal was in controversy below, the court, in a proper case, and where it is asserted by the appellant that such sum was really in controversy, will allow him a limited time to make proof of the fact. The Grace Girdler, 6 Wall. 441, 18 L. Ed. 790, citing Rush *v.* Parker, 5 Cranch 287, 3 L. Ed. 810. But see Richmond *v.* Milwaukee, 21 How. 391, 16 L. Ed. 72.

When the pleadings in an action of ejectment do not state the value of the property in controversy, the value may be shown at the trial. Beard *v.* Federy, 3 Wall. 478, 480, 18 L. Ed. 88.

64. Beebe *v.* Russell, 19 How. 283, 286, 15 L. Ed. 668.

65. United States *v.* The Union, 4 Cranch 216, 2 L. Ed. 600.

Extrinsic evidence.—Where an appellee comes and enters an appearance for the purposes of his motion, which motion was to set aside and annul the judgment of reversal and to dismiss the appeal, because the value of the matter in dispute did not exceed $2,500, but it appears upon the face of the record that the decree appealed from is for the full jurisdictional amount, this court will not consider extrinsic evidence after notice to him to appear, for the purpose of ascertaining the amount in dispute. Dodge *v.* Knowles, 114 U. S. 430, 29 L. Ed. 144.

66. The Grace Girdler, 6 Wall. 441, 18 L. Ed. 790.

67. United States *v.* The Union, 4 Cranch 216, 2 L. Ed. 600.

68. United States *v.* The Union, 4 Cranch 216, 2 L. Ed. 600.

69. Affidavits admissible to show value.—Course *v.* Stead, 4 Dall. 22, 1 L. Ed. 724; Rush *v.* Parker, 5 Cranch 287, 3 L. Ed. 103, Mr. Justice Livingston disapproving; Hagan *v.* Foison, 10 Pet. 160, 9 L. Ed. 381; Williamson *v.* Kincaid, 4 Dall. 20, 1 L. Ed. 723; Street *v.* Ferry, 119 U. S. 385, 30 L. Ed. 439; Glacier Mountain Silver Min. Co. *v.* Willis, 127 U. S. 471, 479, 32 L. Ed. 172; Richmond *v.* Milwaukee, 21 How. 391, 16 L. Ed. 72; United States *v.* McDowell, 4 Cranch 316, 2 L. Ed. 632.

Where there is nothing in the record to show the value of the matter in dispute, it is good practice to allow the parties in the court below leave on motion, to file affidavits and counterclaims of value. Wilson *v.* Blair, 119 U. S. 387, 30 L. Ed. 439.

"Undoubtedly, congress, in establishing a rule for determining the appellate jurisdiction of this court, among other reasons of convenience that dictated the adoption of the money value of the matter in dispute, had in view that it was precise and definite. Ordinarily, it would appear in the pleadings and judgment, where the

The result of the cases may be fairly stated to be that where a writ of error is brought or an appeal taken without question as to the value, and the latter is nowhere disclosed by the record, affidavits may be received to establish the jurisdictional amount, and counter affidavits may be allowed if the existence of such value is denied in good faith.[70]

Affidavits Presented by Supplemental Record.—Although where the value is not definitely determined by the pleadings or decree, it should generally be settled in the first instance by the circuit court upon notice and testimony, and not upon additional testimony here, yet it is undoubted that it is not in the

claim must be stated and determined; but where the recovery of specific property, real or personal, is sought, affidavits of value were permitted, from the beginning, as a suitable mode of ascertaining the fact, and bringing it upon the record. Williamson *v.* Kincaid, 4 Dall. 20, 1 L. Ed. 723; Course *v.* Stead, 4 Dall. 22, 1 L. Ed. 724; United States *v.* The Union, 4 Cranch 216, 2 L. Ed. 600." Elgin *v.* Marshall, 106 U. S. 578, 580, 27 L. Ed. 249, reaffirmed in Plainview *v.* Marshall, 106 U. S. 583, 27 L. Ed. 250.

As stated by Mr. Chief Justice Taney, in Richmond *v.* Milwaukee, 21 How. 391, 16 L. Ed. 72, in cases in which the value does not, according to the usual forms of proceeding, appear in the pleadings or evidence in the record, affidavits have been received to show that the value is large enough to give jurisdiction to this court; Course *v.* Stead, 4 Dall. 22, 1 L. Ed. 723; Williamson *v.* Kincaid, 4 Dall. 20, 1 L. Ed. 723, but "in Rush *v.* Parker, 5 Cranch 287, 3 L. Ed. 103, Mr. Justice Livingston expressed his opinion strongly against giving time to file affidavits of value, and the court refused to continue the case for that purpose." And the chief justice added that a practice to postpone or reinstate a case in order to give the party time to furnish such affidavits "would be irregular and inconvenient, and might sometimes produce conflicting affidavits, and bring on a controversy about value occupying as much of the time of the court as the merits of the case." Red River Cattle Co. *v.* Needham, 137 U. S. 632, 634, 34 L. Ed. 799.

Where, in a suit for partition, there was no distinct statement anywhere in the record of the value of the property in controversy, the parties will be permitted to file affidavits in this court on that subject, and if the affiant swears that the property is worth more than the jurisdictional amount, this court will entertain the appeal. Whiteside *v.* Haselton, 110 U. S. 296, 28 L. Ed. 152.

Where, as in ejectment or a suit for dower, the value does not appear in the pleadings or evidence, affidavits may be received to show that the value is large enough to give jurisdiction to this court. Richmond *v.* Milwaukee, 21 How. 391, 16 L. Ed. 72.

Suit to decide title to land.—Where the suit is not one to recover a sum of money, but to decide a question of title to a considerable tract of land, it is competent to show by ex parte affidavits the amount of the value of the matter in dispute. Carr *v.* Fife, 156 U. S. 494, 39 L. Ed. 508.

Pecuniary value of slaves.—In Lee *v.* Lee, 8 Pet. 44, 8 L. Ed. 860, decided in 1834, a petition to the circuit court for the District of Columbia set forth that the petitioners were entitled to their freedom, and were held in slavery by the defendant; he pleaded that they were not entitled to their freedom as they had alleged; upon that plea issue was joined, and a verdict and judgment rendered for the defendant; and the petitioners sued out a writ of error. A preliminary objection to the jurisdiction of this court was overruled, and the judgment below considered on the merits and reversed. The ground of the decision upon the question of jurisdiction appears to have been that the single matter in dispute between the parties was the freedom of slavery of the petitioners—to the petitioners, the value of their freedom, not to be estimated in money; to the defendant, claiming to be their owner, the pecuniary value of the slaves as property, which, if he had been the plaintiff in error, might have been ascertained by affidavits. Cited in Kurtz *v.* Moffitt, 115 U. S. 487, 495, 29 L. Ed. 458.

Where the matter in dispute is the freedom of slaves, this court has no jurisdiction, because the matter in dispute, the value of their freedom, is not susceptible of pecuniary valuation. And affidavits estimating the value of freedom, are entirely inadmissible. Lee *v.* Lee, 8 Pet. 44, 8 L. Ed. 860.

70. Red River Cattle Co. *v.* Needham, 137 U. S. 632, 635, 636, 34 L. Ed. 799.

The bill need not state, in so many words, that a certain amount exceeding one thousand dollars is in controversy in order that this court may have jurisdiction on appeal from the circuit court of appeals. The statutory amount must, as a matter of fact, be in controversy, yet that fact may appear by affidavit after the appeal is taken to this court. Whiteside *v.* Haselton, 110 U. S. 296, 28 L. Ed. 152; Red River Cattle Co. *v.* Needham, 137 U. S. 632, 34 L. Ed. 799; United States *v.* Freight Ass'n, 166 U. S. 290, 310, 41 L. Ed. 1007; Coulter *v.* Louisville, etc., R. Co., 196 U. S. 606, 49 L. Ed. 615.

power of the circuit court to determine the extent and limits of our jurisdiction, for that is a matter which this court must finally decide for itself. Accordingly, this court will consider subsequent affidavits, presented to this court by a supplemental record brought up by stipulation of the parties.[71]

Dismissal.—Where affidavits of value are filed in the court below after the allowance of an appeal, and these affidavits are sent here with the transcript, and other affidavits are filed in this court after the case is docketed, if this court is satisfied on consideration of the whole that the value is not sufficient to give us jurisdiction, the appeal will be dismissed.[72]

Where Value Is Apparent on Record.—But affidavits can only be used to furnish evidence of value not appearing on the face of the record when the nature of the matter in dispute is such as to admit of an estimate of its value in money.[73] Therefore, where the value is stated in the pleadings or proceedings of the court below, affidavits here have never been received to vary it or enhance it, in order to give jurisdiction.[74] The result of the cases may be fairly stated to be, that where the demand is not for money but the nature of the action requires the value of the thing demanded to be stated in the pleadings, affidavits will not be received here to vary the value as appearing upon the face of the record.[75]

Right to Contradict Finding of Court Below.—So, also, when the value of the property in dispute is one of the questions in the case and was necessarily involved in its determination in the court below, this court will not, on a motion to dismiss for want of jurisdiction, consider affidavits tending to contradict the finding of that court in respect of its value.[76]

71. Rector *v.* Lipscomb, 141 U. S. 557, 35 L. Ed. 857, distinguishing Red River Cattle Co. *v.* Needham, 137 U. S. 632, 34 L. Ed. 799.

72. Street *v.* Ferry, 119 U. S. 385, 30 L. Ed. 439, 441.

73. Youngstown Bank *v.* Hughes, 106 U. S. 523, 525, 27 L. Ed. 268.

74. Red River Cattle Co. *v.* Needham, 137 U. S. 632, 34 L. Ed. 799; Henderson *v.* Carbondale Coal, etc., Co., 140 U. S. 25, 32, 35 L. Ed. 332; Richmond *v.* Milwaukee, 21 How. 391, 16 L. Ed. 72.

In Talkington *v.* Dumbleton, 123 U. S. 745, 31 L. Ed. 313, it was accordingly held, that when the value of the property in dispute was necessarily involved in the determination of the case in the court below, this court would not, on a motion to dismiss for want of jurisdiction, consider affidavits tending to contradict the finding of that court in that respect.

And Mr. Chief Justice Waite remarked, in Zeigler *v.* Hopkins, 117 U. S. 683, 689, 29 L. Ed. 1019, "Where affidavits were submitted, the finding of the court below as to value was not a material question in the case upon its merits, but was more in the nature of an inquiry for the purpose of determining whether an appeal should be allowed, as in Wilson *v.* Blair, 119 U. S. 387, 30 L. Ed. 439. Here, however, the value of the property was one of the questions in the case and necessarily involved in its determination."

"In Zeigler *v.* Hopkins, 117 U. S. 683, 29 L. Ed. 1019, this court treated the finding of the court below upon the question of value as entitled to well nigh conclusive weight; while in Wilson *v.* Blair, it was declared to be good practice for the circuit court to allow affidavits and counter affidavits of value to be filed, as calculated to save trouble to the parties and to the court. There, as in the case at bar, the district judge holding the circuit court, without the formality of deciding the question of value, allowed the writ of error, thus sending the case here on the affidavits free from any decision whatever as to their affects." Red River Cattle Co. *v.* Needham, 137 U. S. 635, 34 L. Ed. 799.

In Gage *v.* Pumpelly, 108 U. S. 164, 26 L. Ed. 668, the appeal was allowed after a contest as to the value of the matter in dispute, Judge Blodgett, who held the circuit court, filing an opinion upon the question; and Mr. Chief Justice Waite, speaking for the court, said: "When an appeal has been allowed, after a contest as to the value of the matter in dispute, and there is evidence in the record which sustains our jurisdiction, the appeal will not be dismissed simply because upon examination of all the affidavits we may be of the opinion that possibly the estimates acted upon below were too high."

75. Red River Cattle Co. *v.* Needham, 137 U. S. 632, 635, 34 L. Ed. 799.

76. Talkington *v.* Dumbleton, 123 U. S. 745, 31 L. Ed. 313, distinguishing Zeigler *v.* Hopkins, 117 U. S. 683, 689, 29 L. Ed. 1019; Wilson *v.* Blair, 119 U. S. 387, 30 L. Ed. 439.

Where the court below has found as a fact that the value of the matter in dispute exceeds the jurisdictional amount, and this appears on the face of the record, a motion to dismiss will be denied, al-

Where No Conclusion Is Drawn from Proof Offered.—The result of the cases may be fairly stated to be that the filing of affidavits will not be ordinarily permitted where evidence of value has been adduced below on both sides, and the proofs have been transmitted either with or without the announcement of a definite conclusion deduced therefrom.[77] The practice of permitting affidavits to be filed in this court arose from instances of accidental omission, where the value was not really in dispute, and it should not be encouraged to the extent of requiring us to reach a result upon that careful weighing of conflicting evidence, so frequently involved in determining issues of fact. If there be a real controversy on the point, let it be settled below in the first instance and on due notice; not here, upon ex parte opinions, which may embody nothing more than speculative conclusions.[78]

Notice.—Notice must be given the opposite parties,[79] and motion for leave to file is necessary.[80]

Time for Introducing Affidavits.—A case will not be postponed or reinstated, in order to give the party time to produce affidavits of value.[81] They come too late, after the case has been heard and dismissed for want of jurisdiction.[82]

After Hearing Below.—Where motion is made for leave to file a petition for rehearing under the eighty-eighth rule in equity, on the ground that no appeal would lie from the decree of the circuit court to the supreme court of the United States, for the reason that the amount involved was insufficient, which does not appear to have been controverted by the defendant, but to have been conceded as true, the petitioner cannot, after hearing in the court below, file affidavits to show that the amount involved exceeds the jurisdictional amount. His concession upon which the petition was heard cannot now be recalled. He should have shown that the matter in controversy was sufficient at the time the motion for leave to file the petition for rehearing was argued, instead of conceding its insufficiency as alleged.[83]

Sufficiency of Showing.—If the affidavits show by a fair preponderance of the evidence that the value in dispute exceeds the amount this is sufficient.[84] When an appeal has been allowed, after a contest as to the value of the matter

though affidavits as to value as entered by the movant, taken by themselves, show that possibly the amount may be less. They are not enough to overcome the finding of the court below that it was actually worth more than that sum. Zeigler *v.* Hopkins, 117 U. S. 683, 29 L. Ed. 1019.

77. Red River Cattle Co. *v.* Needham, 137 U. S. 632, 635, 34 L. Ed. 799.

In Red River Cattle Co. *v.* Needham, 137 U. S. 632, 636, 34 L. Ed. 799, it was said: "In the case in hand, the value of the whole property was alleged in the petition, but was not an issuable fact, and the circuit court allowed the writ of error upon the prima facie showing made by the defendant, and on plaintiff's subsequently presenting evidence to the contrary, the controversy was referred to this court. This being the attitude of the case, we do not think it proper to allow affidavits to be filed here as if the question were now raised for the first time."

78. Red River Cattle Co. *v.* Needham, 137 U. S. 632, 636, 34 L. Ed. 799.

79. Glacier Mountain Silver Min. Co. *v.* Willis, 127 U. S. 471, 32 L. Ed. 172.

Where, on writ of error, the value of the matter in dispute does not appear on the record, and cannot be determined by plaintiff's demand, nor fixed by the finding of the jury, it may be ascertained by affidavits, on ten days' notice; the writ of error not to be supersedeas. Williamson *v.* Kincaid, 4 Dall. 20, 1 L. Ed. 723.

80. Wilson *v.* Blair, 119 U. S. 387, 30 L. Ed. 439.

81. Richmond *v.* Milwaukee, 21 How. 391, 16 L. Ed. 72, citing Williamson *v.* Kincaid, 4 Dall. 20, 1 L. Ed. 723; Rush *v.* Parker, 5 Cranch 287, 3 L. Ed. 103.

82. Richmond *v.* Milwaukee, 21 How. 391, 16 L. Ed. 72. See Dodge *v.* Knowles, 114 U. S. 430, 29 L. Ed. 144.

After the decree of the court below is reversed, and an entry made to that effect, this court will not consider extrinsic evidence at this late day for the purpose of ascertaining whether the value of the matter in dispute exceeded the jurisdictional amount, especially where upon the face of the record, our jurisdiction is complete. Dodge *v.* Knowles, 114 U. S. 430, 29 L. Ed. 144.

83. Moelle *v.* Sherwood, 148 U. S. 21, 37 L. Ed. 350.

84. Cissel *v.* Dutch, 122 U. S., appx., 638.

in dispute, and there is evidence in the record which sustains our jurisdiction, the appeal will not be dismissed simply because upon examination of all the affidavits we may be of the opinion that possibly the estimates acted upon below were too high.[85]

Counter Affidavits.—The defendants in error may file counter affidavits to contradict the showing made by the plaintiffs in error.[86]

Amendment by Affidavit.—Although the record does not contain a specific allegation that the matter in dispute exceeds the jurisdictional amount, at the time of entering the final decree, this defect may be cured by an amendment by affidavits.[87] A more formal proceeding, where the record is permitted to be amended by affidavits to supply the formal averments of value, is to set the decree aside, and renew it after the amendment has been made; but where the term at which the decree was entered is not ended, so that the court still had power to permit the amendment of the record, this court will not reverse the decree because of the manner in which the court below exercised its power of amendment.[88]

e. *Order of Court.*—Where in addition to affidavits filed on the subject of value, the record contains an order made by the supreme court of the territory on application for appeal, stating that the value of the matter in controversy is more than five thousand dollars, a motion to dismiss the appeal must be denied, because this court will assume that the order was based upon proof as to value.[89]

f. *Determination from Pleadings*—(1) *In General.*—It is the established rule that in an action upon a money demand, where the general issue is pleaded, the matter in dispute is the debt claimed, and its amount, as stated in the body of the declaration; and not merely the damages alleged, or the prayer for judgment at its conclusion, must be considered in determining whether this court can take jurisdiction on a writ of error sued out by the plaintiff.[90] Ordinarily the plain-

85. Gage *v.* Pumpelly, 108 U. S. 164, 26 L. Ed. 668.

86. "Neither the pleadings nor the evidence found in the records show the value of the property, but on suing out the writs of error the plaintiffs in error in each case filed two affidavits to the effect that the value was more than $5,000. Since the cases were docketed here, however, the defendant in error has filed counter affidavits which prove beyond all doubt that this is a mistake, and that the value in every one of the cases is very much less than our jurisdictional limit." Wells *v.* Wilkins, 116 U. S. 393, 394, 29 L. Ed. 671.

87. Carr *v.* Fife, 156 U. S. 494, 39 L. Ed. 508.

88. Carr *v.* Fife, 156 U. S. 494, 39 L. Ed. 508.

89. Order of court.—Potts *v.* Hollen, 177 U. S. 365, 369, 44 L. Ed. 808.

90. Determination from pleadings.—Lee *v.* Watson, 1 Wall. 337, 17 L. Ed. 557; Schacker *v.* Hartford Fire Ins. Co., 93 U. S. 241, 23 L. Ed. 862; Gray *v.* Blanchard, 97 U. S. 564, 24 L. Ed. 1108; Tinstman *v.* National Bank, 100 U. S. 6, 25 L. Ed. 530; Banking Ass'n *v.* Insurance Ass'n, 102 U. S. 121, 26 L. Ed. 45; Hilton *v.* Dickinson, 108 U. S. 165, 27 L. Ed. 688; Webster *v.* Buffalo Ins. Co., 110 U. S. 386, 388, 28 L. Ed. 172.

It is undoubtedly true that until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction, but it is equally true that when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail. Lee *v.* Watson, 1 Wall. 337, 17 L. Ed. 557; Schacker *v.* Hartford Fire Ins. Co., 93 U. S. 241, 23 L. Ed. 862; Gray *v.* Blanchard, 97 U. S. 564, 24 L. Ed. 1108; Tinstman *v.* National Bank, 100 U. S. 6, 25 L. Ed. 530; Banking Ass'n *v.* Insurance Ass'n, 102 U. S. 121, 26 L. Ed. 45; Hilton *v.* Dickinson, 108 U. S. 165, 174, 27 L. Ed. 688.

Where the plaintiff sues for an amount, exceeding $2,000, if by reason of any erroneous ruling of the court below he recovers nothing, or less than that sum, the sum claimed by the plaintiff in his writ and declaration in that state of the case, is the sum in controversy for which a writ of error will lie. Merrill *v.* Petty, 16 Wall. 338, 345, 21 L. Ed. 499, citing Gordon *v.* Ogden, 3 Pet. 33, 34, 7 L. Ed. 592; Wise *v.* Columbian Turnpike Co., 7 Cranch 276, 33 L. Ed. 341; Kanouse *v.* Martin, 15 How. 198, 207, 14 L. Ed. 467.

It has often been decided that the sum in controversy in a suit is the damages claimed in the declaration. If the plaintiff shall recover less than five hundred dollars, it cannot affect the jurisdiction of the court, a greater sum having been claimed in his writ. But in such case, the plaintiff does not recover his costs; and, at the discretion of the court, he

tiff's claim with respect to the value of the property taken from him or the amount of damages incurred by him through the defendants' wrongful act, meas-

may be adjudged to pay costs. The damages claimed by the plaintiff in his suit give jurisdiction to the court, whether it be an original suit in the circuit court of the United States or brought there by petition from a state court. Gordon *v.* Longest, 16 Pet. 97, 10 L. Ed. 900; Merrill *v.* Petty, 16 Wall. 338, 345, 21 L. Ed. 499.

An action was instituted in the circuit court of Jefferson county, in the state of Kentucky, by a citizen of that state, under an act of the legislature of Kentucky, against a citizen of the state of Pennsylvania, to recover damages, alleging the same in the declaration to be one thousand dollars, for having taken on board of the steamboat Guyandotte, commanded by him, a slave belonging to the plaintiff, from the shore of Indiana, on the voyage of the steamboat, proceeding up the Ohio River from Louisville to Cincinnati. The act of the legislature of Kentucky subjects the master of a steamboat to the penalties created by the law, who shall take on board the steamboat under his command, a slave from the shore of the Ohio, opposite to Kentucky, in the same manner as if he had been taken on board from the shores or rivers within the state. On entering his appearance, the defendant claimed to remove the cause to the circuit court of the United States for the District of Kentucky, he being a citizen of Pennsylvania, and the plaintiff a citizen of Kentucky; and offered to comply with the requisitions of the judiciary act of 1789. The court refused to allow the removal of the cause, deciding that it did not appear to its satisfaction that the damages exceeded five hundred dollars. The case went on to trial, and the jury gave a verdict for the plaintiff for six hundred and fifty dollars; and on a writ of error to the court of appeals of Kentucky, the judgment of the circuit court on the verdict was affirmed. Before the court of appeals the plaintiff in error excepted to the jurisdiction of the court of Jefferson county, and also to the constitutionality of the law of Kentucky on which the suit was founded. Held, that the decision of the court of appeals was erroneous, and the judgment of that court was reversed. Gordon *v.* Longest, 16 Pet. 97, 10 L. Ed. 900.

Where the law gives no rule, as in actions of tort or trespass, the demand of the plaintiff furnishes the rule; but where the law gives the rule, as in actions of debt on a bond, the legal cause of action, and not the plaintiff's demand, must be regarded. Wilson *v.* Daniel, 3 Dall. 401, 1 L. Ed. 655, overruled in Gordon *v.* Ogden, 3 Pet. 34, 7 L. Ed. 593.

"The demand of the plaintiff is alone to be regarded; but that the value of the thing put in demand furnished the rule. The nature of the case must certainly guide the judgment of the court; and whenever the law makes a rule, that rule must be pursued. Thus, in an action of debt on a bond for £100, the principal and interest are put in the demand, and the plaintiff can recover no more, though he may lay his damages at £10,000. The form of the action, therefore, gives in that case the legal rule. But in an action of trespass, or assault and battery, where the law prescribes no limitation as to the amount to be recovered, and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put in demand, and presents the only criterion, to which, from the nature of the action, we can resort in settling the question of jurisdiction. The proposition then is simply this: Where the law gives no rule, the demand of the plaintiff must furnish one, but where the law gives the rule, the legal cause of action and not the plaintiff's demand, must be regarded." Wilson *v.* Daniel, 3 Dall. 401, 407, 1 L. Ed. 655, 657, overruled in Gordon *v.* Ogden, 3 Pet. 34, 7 L. Ed. 593.

The plaintiff claimed in his declaration the sum of one thousand, two hundred and forty-one dollars, and laid his damages at one thousand dollars; a general verdict having been given against him, the matter in dispute is the sum he claims in the ad damnum. The court cannot judicially take notice, that by computation it may possibly be made out as matter of inference from the plaintiff's declaration that the claim may be less than one thousand dollars; much less can it take such notice in a case where the plaintiff might be allowed interest by a jury, so as to swell the claim beyond one thousand dollars. Scott *v.* Lunt, 6 Pet. 349, 8 L. Ed. 423.

Where a bill asking for an injunction is filed, seeking the aid of this court to prohibit the infringement of a patent right assigned to the complainants, the sum mentioned in the bill, and for which the privilege to use the patent in question was sold by the appellant must be taken as the true value of the amount in controversy; and if such amount is less than $2,000, the appeal must be dismissed for want of jurisdiction in this court. Brown *v.* Shannon, 20 How. 55, 15 L. Ed. 826.

Definiteness of claim.—Where the amount claimed in a libel is "eighteen hundred dollars and upwards," although these terms were intended to embrace the interest, which to the time of trial would increase the sum to over $2,000, the claim

ures for jurisdictional purposes the value of the matter in controversy,[91] unless, upon inspection of the plaintiff's declaration, it appears that, as a matter of law, it is not possible for the plaintiff to recover the jurisdictional amount.[92] And the rule that the plaintiff's allegations of value govern in determining the jurisdiction, except where, upon the face of his own pleadings, it is not legally possible for him to recover the jurisdictional amount, controls even where the declaration shows that a perfect defense might be interposed to a sufficient amount of the claim to reduce it below the jurisdictional amount.[93]

(2) *In Tort Actions.*—In suits brought to recover damages for a tort, there can be no rule to ascertain the jurisdiction of the court but the value laid in the declaration.[94]

(3) *Where Damages Are Liquidated.*—Cases, as we have already seen, may

is too indefinite to give this court jurisdiction. The interest not being specially claimed in the pleadings, cannot be considered on this question. "The interest in an action of this kind, if taken into view, is considered as a part of the damages, being merged in that claim, and is not estimated as a distinct item. The claim of more than $1,800 is too indefinite to give jurisdiction under the act of congress; and the interest not being specially claimed, for the reason stated, cannot be computed. The appeal is therefore dismissed for want of jurisdiction. Gordon *v.* Ogden, 3 Pet. 33, 34, 7 L. Ed. 592; Scott *v.* Lunt, 6 Pet. 349, 8 L. Ed. 423." Olney *v.* Steamship Falcon, 17 How. 19, 15 L. Ed. 43.

Eminent domain proceedings.—In a proceeding under the statute of Alabama to ascertain the amount of compensation to be paid the railroad company for the appropriation of its property to the uses of the telegraph company, the value of the matter in dispute in this court is the difference between the amount of compensation claimed by the railroad company on its intervention and the amount assessed by the jury. Hilton *v.* Dickinson, 108 U. S. 165, 27 L. Ed. 688. "There is nothing in the record to show that the alleged value of the property is not the true measure of the compensation to be assessed. As this amount is $12,000, and the jury allowed only $500, it follows that the value of the matter in dispute is sufficient to give us jurisdiction." East Tenn., etc., R. Co. *v.* Southern Tel. Co., 112 U. S. 306, 309, 28 L. Ed. 746.

Where exemplary damages are claimed.—Where exemplary damages beyond the sum necessary to give a circuit court of the United States jurisdiction are claimed in an action for a malicious trespass, the court should not dismiss the case for want of jurisdiction simply because the record shows that the actual injury caused to the plaintiff by the trespass was less than the jurisdictional amount. Barry *v.* Edmunds, 116 U. S. 550, 29 L. Ed. 729.

In Smith *v.* Greenhow, 109 U. S. 669, 671, 27 L. Ed. 1080, the value of the property taken was stated in the declaration to be $100, while the damages for the alleged trespass were laid at $6,000, and no circumstances of malice or of special damage were averred. It was said by the court: "We cannot, of course, assume as a matter of law that the amount laid, or a less amount, greater than $500, is not recoverable upon the case stated in the declaration, and cannot, therefore, justify the order remanding the cause on the ground that the matter in dispute does not exceed the sum or value of $500. But if the circuit court had found, as matter of fact, that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case removable under the act of congress, so that, in the words of the 5th section of the act of 1875 it appeared that the suit 'did not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court,' the order remanding it to the state court could have been sustained." Barry *v.* Edmunds, 116 U. S. 550, 559, 29 L. Ed. 729.

91. Smith *v.* Greenhow, 109 U. S. 669, 27 L. Ed. 1080; Barry *v.* Edmunds, 116 U. S. 550, 29 L. Ed. 729; Scott *v.* Donald, 165 U. S. 58, 41 L. Ed. 632; Wiley *v.* Sinkler, 179 U. S. 58, 45 L. Ed. 84; Smithers *v.* Smith, 204 U. S. 632, 642, 51 L. Ed. 656.

92. Lee *v.* Watson, 1 Wall. 337, 17 L. Ed. 557; Schacker *v.* Hartford Fire Ins. Co., 93 U. S. 241, 23 L. Ed. 862; Vance *v.* Vandercook Co., 170 U. S. 468, 42 L. Ed. 1111; North American Transportation Co. *v.* Morrison, 178 U. S. 262, 44 L. Ed. 1061; Smithers *v.* Smith, 204 U. S. 632, 642, 51 L. Ed. 656.

93. Schunk *v.* Moline, etc., Co., 147 U. S. 500, 37 L. Ed. 255; Smithers *v.* Smith, 204 U. S. 632, 642, 51 L. Ed. 656.

94. In tort actions.—Hulsecamp *v.* Teel, 2 Dall. 358, 1 L. Ed. 414.

In actions of tort, it is the damages claimed which determine the amount in dispute, but, in an action to recover a specific sum of money, the court examines the body of the declaration, and the cause of action set out, to determine what is the real sum in dispute. Hilton *v.* Dickinson, 108 U. S. 165, 174, 27 L. Ed. 688; Lee *v.* Watson, 1 Wall. 337, 17 L. Ed. 557.

exist, where a rule of law, as in certain cases ex contractu, in which the amount recoverable is liquidated by the terms of the agreement, fixes the limit of a possible recovery.[95]

(4) *From Prayer of Bill.*—In determining the question as to the amount in controversy, we may look to the allegations and prayer of the bill to ascertain the relief sought, and the real extent of the controversy between the parties.[96] Where the prayer of a bill in equity shows that the demand of the complainant is susceptible of definite computation, and that there can be no recovery over the jurisdictional amount, the appeal to this court will be dismissed on motion, for want of jurisdiction.[97]

(5) *Amended Pleadings.*—**In General.**—When an amended complaint demands a sum different from that demanded in the original, the amended and not the original complaint is to be looked to in determining the question of jurisdiction.[98] But where a pleading is amended for the sole purpose of giving jurisdiction to this court, by increasing the amount in dispute, the writ of error will be dismissed.[99]

95. Where damages are liquidated.—Such was the case of Lee *v.* Watson, 1 Wall. 337, 17 L. Ed. 557, where it appeared "that in the progress of the cause an amendment was made in the amount of damages claimed for the purpose of bringing the case within the appellate jurisdiction of this court." As was said in Hilton *v.* Dickinson, 108 U. S. 165, 174, 27 L. Ed. 688. "It is undoubtedly true, that until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will govern in all questions of jurisdiction, but it is equally true that, when it is shown that the sum demanded is not the real matter in dispute, the sum shown and not the sum demanded will prevail." Barry *v.* Edmunds, 116 U. S. 550, 561, 29 L. Ed. 729.

96. From prayer of bill.—Shappirio *v.* Goldberg, 192 U. S. 232, 240, 48 L. Ed. 419.

Where a bill contains a prayer for the conveyance of a small strip of ground, which was purchased for $300, if that were the only subject matter of the suit, the amount required to give the supreme court the right to review would not be in controversy. But where if this relief is denied, the complainants seek, in the alternative, to have the contract rescinded and the payment of the sum of $6,000, the purchase money, with costs and interest, decreed against the respondents; this sum is also in dispute between the parties, and the supreme court has jurisdiction. Shappirio *v.* Goldburg, 192 U. S. 232, 240, 48 L. Ed. 419.

97. Sewall *v.* Chamberlain, 5 How. 6, 12 L. Ed. 25.

98. Amended Pleadings.—Washer *v.* Bullitt County, 110 U. S. 558, 28 L. Ed. 249.

When a petition is amended by leave of the court, the cause proceeds on the amended petition. Washer *v.* Bullitt County, 110 U. S. 558, 562, 28 L. Ed. 249.

99. Bowman *v.* Chicago, etc., R. Co., 115 U. S. 611, 29 L. Ed. 502, citing Lee *v.* Watson, 1 Wall. 337, 17 L. Ed. 557; Smith *v.* Greenhow, 109 U. S. 669, 27 L. Ed. 1080.

In a suit against a carrier for refusing to receive and carry goods, it appears that there were two counts to the declaration on the same cause of action, and in each it is stated that the damages sustained amounted to $1,200. Pleas were filed by the company setting up excuses for not receiving and carrying the goods, to which pleas plaintiff demurred, and that the declaration was amended by leave of the court so as to increase the damages demanded to $10,000. The demurrer to the pleas was overruled on the same day that they were filed, and the parties then filed a stipulation that in making up the record to this court the clerk of the circuit court should only transmit the amended declaration and pleas thereto; and judgment was then entered for defendant on the demurrer. Held: "Upon the face of this record it is apparent that the actual value of the matter in dispute is not sufficient to give us jurisdiction. It is now well settled that our jurisdiction in an action upon a money demand is governed by the value of the actual matter in dispute in this court, as shown by the whole record, and not by the damages claimed or the prayer for judgment alone. Lee *v.* Watson, 1 Wall. 337, 17 L. Ed. 557; Schacker *v.* Hartford Fire Ins Co., 93 U. S. 241, 23 L. Ed. 862; Gray *v.* Blanchard, 97 U. S. 564, 24 L. Ed. 1108; Tintsman *v.* National Bank, 100 U. S. 6, 25 L. Ed. 530; Banking Ass'n *v.* Insurance Ass'n, 102 U. S. 121, 26 L. Ed. 45; Hilton *v.* Dickinson, 108 U. S. 165, 174, 27 L. Ed. 688; The Jesse Williamson, Jr., 108 U. S. 305, 309, 27 L. Ed. 730; Jenness *v.* Citizens' Nat. Bank, 110 U. S. 52, 28 L. Ed. 67; Webster *v.* Buffalo Ins. Co., 110 U. S. 386, 388, 28 L. Ed. 172; Bradstreet Co. *v.* Higgins, 112 U. S. 227, 28 L. Ed. 715. As was said in Hilton *v.* Dickinson, 'It is undoubtedly true that until it is in some way shown by the record that the sum demanded is not the matter in dispute, that sum will

Right to Increase Amount by Amendments.—An amendment will not be allowed solely for the purpose of making up the required amount. If amendments were allowed, so as to give jurisdiction to this court, where there was no jurisdiction when the trial was had and the appeal taken, parties would be taken by surprise and litigation would be encouraged. The plaintiff, in such circumstances, would never fail to sustain the jurisdiction of this court on appeal.[1] Hence, it is too late, when the case has reached this court, to amend a libel by inserting a special claim of interest in order to make up the amount required to give jurisdiction. The twenty-fourth admiralty rule ought not to be construed to extend the cases where an amendment would give jurisdiction, which would not exist without such amendment.[2]

(6) *Cross Bills.*—When the averments of the cross bill are directly responsive to the allegations in the original bill, and the matter set up is directly connected with the transaction which he alleges as the gravamen of his complaint, the amount claimed by the cross bill can properly be taken into consideration in determining the jurisdiction of this court; and if that amount is more than the jurisdictional amount, a motion to dismiss for want of jurisdiction will be denied.[3]

(7) *Qualifications of General Rule.*—**In General.**—While in the absence of anything to the contrary the prayer for judgment by the plaintiff in his declaration or complaint, upon a demand for money only, or by the defendant in his counterclaim or set-off, will be taken as indicating the amount in dispute, yet if the actual amount in dispute does otherwise appear in the record, reference may be had to that for the purpose of determining our jurisdiction. Ordinarily this will be found in the pleadings, but we need not necessarily confine ourselves to them. We hear the case upon the record which is sent up, and if, taking the whole record together, it appears that we have no jurisdiction, the case must be dismissed.[4] The amount as stated in the body of the declaration, and not merely the damages alleged, or the prayer for judgment at its conclusion, must be shown in determining whether this court can take jurisdiction. The same is true of the counterclaim or set-off. It is the actual matter in dispute as shown by the record and not the ad damnum alone, which must be looked to.[5]

govern in all questions of jurisdiction, but it is equally true that, when it is shown that the sum demanded is not the real matter in dispute, the sum shown, and not the sum demanded, will prevail.'" Bowman *v.* Chicago, etc., R. Co., 115 U. S. 611, 613, 29 L. Ed. 502.

1. Udall *v.* Steamship Ohio, 17 How. 17, 15 L. Ed. 42; Northern Pac. R. Co. *v.* Booth, 152 U. S. 671, 38 L. Ed. 591.

When, to authorize the re-examination of a final judgment of the circuit court, the matter in dispute must exceed the sum or value of $2,000, that amount—if the action be upon a money demand and the general issue be pleaded—must be stated both in the body of the declaration and in the damages claimed, or the prayer for judgment. When the amount alleged to be due in the body of the declaration is less than $1,000, an amendment merely in the matter of amount of damages claimed, so as to exceed $2,000, will not give jurisdiction to this court, and enable it to review the final judgment in the case. Lee *v.* Watson, 1 Wall. 337, 17 L. Ed. 557.

2. Udall *v.* Steamship Ohio, 17 How. 17, 15 L. Ed. 591.

3. Cross bills.—Lovell *v.* Cragin, 136 U. S. 130, 34 L. Ed. 372; Kirby *v.* American Soda Fountain Co., 194 U. S. 141, 145, 48 L. Ed. 911.

4. Qualifications of general rule.—Gray *v.* Blanchard, 97 U. S. 564, 565, 24 L. Ed. 1108.

5. Hilton *v.* Dickinson, 108 U. S. 165, 27 L. Ed. 688, citing Lee *v.* Watson, 1 Wall. 337, 17 L. Ed. 557; Gray *v.* Blanchard, 97 U. S. 564, 565, 24 L. Ed. 1108; Schacker *v.* Hartford Fire Ins. Co., 93 U. S. 241, 23 L. Ed. 862.

"We have held, at this term, on a full review of the subject, in Hilton *v.* Dickinson, 108 U. S. 165, 27 L. Ed. 688, that while we have jurisdiction of a writ of error or appeal by a plaintiff below when he sues for as much as or more than our jurisdiction requires and recovers nothing, the actual matter in dispute in this court, as shown by the record, and not alone the damages alleged or prayed for in the declaration, must be looked to in determining the question of jurisdiction." The Jessie Williamson, Jr., 108 U. S. 305, 309, 27 L. Ed. 730.

A writ of error sued out upon a judgment on a money demand will be dismissed where it affirmatively appears from the record, taken as a whole, that the amount actually in dispute is not suf-

Claim Must Be Made in Good Faith.—Nevertheless, however stringent and far reaching the rule may be that it is the plaintiff's statement of his case which

ficient to give this court jurisdiction. Gray *v.* Blanchard, 97 U. S. 564, 24 L. Ed. 1108, citing Lee *v.* Watson, 1 Wall. 337, 17 L. Ed. 557; Schacker *v.* Hartford Fire Ins. Co., 93 U. S. 241, 23 L. Ed. 862.

In Hilton *v.* Dickinson, 108 U. S. 165, 27 L. Ed. 688, it was decided, on full consideration, that our jurisdiction for the review of the judgments and decrees of the circuit courts, in actions to recover money, depends on the value of the matter in dispute here, and that it is the actual matter in dispute, as shown by the whole record, and not the ad damnum alone, which governs.

Action on promissory note.—This court would not hear a case where the plaintiff counted solely upon a promissory note of two hundred dollars, simply because he concluded his declaration with an averment that he had sustained damages from its nonpayment of over two thousand, and prayed judgment for the latter sum. Reference must be had both to the debt claimed, and to the damages alleged, or the prayer for judgment. The damages or prayer for judgment must be regarded, inasmuch as the plaintiff may seek a recovery for less than the sum to which he appears entitled by the allegations in the body of the declaration. Lee *v.* Watson, 1 Wall. 337, 339, 17 L. Ed. 557.

Where in an action upon a policy of insurance upon a cargo of goods, although the value of the goods is alleged to be more than $5,000, and a judgment is asked for that amount, yet if it appears distinctly by the pleadings that the insurance was in fact for a less amount, the writ of error will be dismissed, and this court will not accept a stipulation of the parties that judgment might be entered for a sum in excess of that amount. "Arrangements between parties contradictory to their pleadings, and so evidently made for the purpose of enlarging the case sufficiently to bring it within the jurisdiction of this court, cannot be recognized here." Webster *v.* Buffalo Ins. Co., 110 U. S. 386, 389, 28 L. Ed. 172.

In Schacker *v.* Hartford Fire Ins. Co., 93 U. S. 241, 23 L. Ed. 862, citing Lee *v.* Watson, 1 Wall. 337, 17 L. Ed. 557, we dismissed a case in which it appeared that the action was upon a policy of insurance for $1,400, because, although damages to our jurisdictional amount were claimed, it was apparent from the whole record that there could not be a recovery for more than the amount of the policy, and a small sum in addition for interest.

Interpleader-funds and deposits in court.—In Hilton *v.* Dickinson, 108 U. S. 165; 27 L. Ed. 688, a bill of interpleader was filed by a trustee against A., B. and C. to determine the ownership of $2,500, which he held as trustee. The fund was paid into court, and when a decree below was rendered, had increased by investment to more than $3,000. A., B. and C. each claimed a whole. The court at special term decreed the whole to A. From this decree both B. and C. appealed. Then the decree at special term was modified so as to direct the payment of the fund to A. and B. in equal moieties and to adjudge the costs to A. alone. It was held, that the matter in dispute is only the difference between what A. has recovered and what he is sued for, and as that is only one-half of the $3,000, it follows as to him that the matter in dispute in this court is only $1,500. On appeal from the supreme court to the District of Columbia we have jurisdiction only when the matter in dispute exceeds $2,500.

Action of trespass.—In Smith *v.* Greenhow, 109 U. S. 669, 27 L. Ed. 1080, the action begun in a state court was trespass for taking and carrying away personal property of the value of $100, but the damages were laid at $6,000. On the removal of the case to the circuit court of the United States, it was remanded, on the ground that the case was not one arising under the constitution or laws of the United States. This we decided was error, and, therefore, reversed the order to remand, but, in doing so, remarked that, "if the circuit court had found, as matter of fact, that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of reasonable expectation of recovery, for the purpose of creating a case removable under the act of congress, * * * the order remanding it to the state court could have been sustained." This was said in reference to the requirement of the removal act of 1875, which limits the jurisdiction of the circuit courts, under such circumstances, to cases "where the matter in dispute exceeds * * * the sum of five hundred dollars," but it is equally applicable to appeals and writs of error to this court where our jurisdiction depends on the money value of the matter in dispute. Bowman *v.* Chicago, etc., R. Co., 115 U. S. 611, 614, 29 L. Ed. 502.

Supreme court of District of Columbia.—In a case brought up by writ of error to the court of the District of Columbia, jurisdiction cannot be vested in the supreme court of the United States by a mere claim of damages unsupported by facts. Magruder *v.* Armes, 180 U. S. 496, 45 L. Ed. 638, citing and approving Bowman *v.* Chicago, etc., R. Co., 115 U. S. 611, 29 L. Ed. 502.

A declaration alleged that the plaintiff was damaged to the amount of $6,000, by the payment of less than $90 to preserve from sale under levy of execution prop-

governs in determining the jurisdiction, it does not exclude the power of the court to protect itself against fraud.[6] In other words the general rule that where judgment goes for the defendant, the amount of the plaintiff's claim is the test of jurisdiction, is subject to the qualification that the demand shall appear to have been made in good faith for such amount. If it appear clearly from the whole record that under no aspect of the case the plaintiff could recover the full amount of his claim, this court will decline to assume jurisdiction of the case. If, for instance, a greater amount than $5,000 were claimed in the ad damnum clause of the declaration, and the bill of particulars showed the actual claim to be less, the latter would determine the jurisdiction. Examples of the distinction between the sum demanded and the sum actually in dispute are frequent in the decisions of this court.[7] Where the plaintiff asserts, as his cause of action, a claim which he cannot be legally permitted to sustain by evidence, a mere ad damnum clause

erty worth only $1,800. The declaration charged illegality and spite, but there was no allegations of personal violence, insult or anything which sometimes opens the door to punitive damages. It was held, that jurisdiction is not given to the supreme court of the United States on writ of error to the district court of Columbia by such allegations. Magruder *v.* Armes, 180 U. S. 496, 45 L. Ed. 638, citing and approving Bowman *v.* Chicago, etc., R. Co., 115 U. S. 611, 29 L. Ed. 502.

6. Claim must be made in good faith.—Smithers *v.* Smith, 204 U. S. 632, 643, 51 L. Ed. 656.

This was pointed out in Smith *v.* Greenhow, 109 U. S. 669, 27 L. Ed. 1080, where it was said that, if the court found as a fact that the damages were laid in the declaration colorably and beyond a reasonable expectation of recovery for the purpose of creating jurisdiction, there would be authority for dismissing the case, and, following this statement of the law, it was held, that where the judge of the circuit court, upon sufficient evidence, found that the damages had been claimed and magnified fraudulently beyond the jurisdictional amount, the action should be dismissed. Globe Refining Co. *v.* Landa Cotton Oil Co., 190 U. S. 540, 47 L. Ed. 1171; Smithers *v.* Smith, 204 U. S. 632, 643, 51 L. Ed. 656.

7. When sum demanded not test of jurisdiction.—Lee *v.* Watson, 1 Wall. 337, 17 L. Ed. 557; Schacker *v.* Hartford Fire Ins. Co., 93 U. S. 241, 23 L. Ed. 862; Gray *v.* Blanchard, 97 U. S. 564, 24 L. Ed. 1108; Tinstman *v.* National Bank, 100 U. S. 6, 25 L. Ed. 503; Hilton *v.* Dickinson, 108 U. S. 165, 27 L. Ed. 688; Jenness *v.* Citizens' Nat. Bank, 110 U. S. 52, 28 L. Ed. 67; Wabash, etc., R. Co. *v.* Knox, 110 U. S. 304, 28 L. Ed. 155; Gorman *v.* Havird, 141 U. S. 206, 208, 35 L. Ed. 717; Barry *v.* Edmunds, 116 U. S. 550, 560, 29 L. Ed. 729; Wilson *v.* Daniel, 3 Dall. 401, 407, 1 L. Ed. 655; Vance *v.* Vandercook Co., 170 U. S. 468, 472, 42 L. Ed. 1111.

The amount of damages laid in the declaration, however, in cases where the law gives no rule, is not conclusive upon the question of jurisdiction; but if upon the case stated there could legally be a recovery for the amount necessary to the jurisdiction, and that amount is claimed, it would be necessary, in order to defeat the jurisdiction since the passage of the act of March 3, 1875, for the court to find, as matter of fact, upon evidence legally sufficient, "that the amount of damages stated in the declaration was colorable, and had been laid beyond the amount of a reasonable expectation of recovery, for the purpose of creating a case" within the jurisdiction of the court. Then it would appear to the satisfaction of the court that the suit "did not really and substantially involve a dispute or controversy properly within the jurisdiction of said circuit court." Barry *v.* Edmunds, 116 U. S. 550, 560, 29 L. Ed. 729.

"It is true, indeed, that in some cases it might appear as matter of law, from the nature of the case as stated in the pleadings, that there could not legally be a judgment recovered for the amount necessary to the jurisdiction, notwithstanding the damages were laid in the declaration at a larger sum. In the early case of Wilson *v.* Daniel, 3 Dall. 401, 407, 1 L. Ed. 655, decided in this court in 1798, under the judiciary act of 1789, then in force, it was declared, by Chief Justice Ellsworth, that, 'The nature of the case must certainly guide the judgment of the court; and whenever the law makes a rule, that rule must be pursued. Thus, in an action of debt on a bond for £100, the principal and interest are put in demand and the plaintiff can recover no more, though he may lay his damages at £ 10,000. The form of the action, therefore, gives in that case the legal rule. But in an action of trespass, or assault and battery, where the law prescribes no limitation as to the amount to be recovered and the plaintiff has a right to estimate his damages at any sum, the damage stated in the declaration is the thing put in demand, and presents the only criterion to which, from the nature of the action, we can resort in settling the question of jurisdiction. The proposition, then, is simply this: Where the law gives no rule, the demand of the plaintiff must furnish one; but where the law gives the

will not confer jurisdiction on the circuit court, but the court on motion or demurrer, or of its own motion, may dismiss the suit.[8] While it has sometimes been said that it is the amount claimed by the plaintiff in his declaration that brings his case within the jurisdiction of the circuit court, that was in suits for unliquidated damages, in which the amount which the plaintiff was entitled to recover was a question for the jury; an inspection of the declaration did not disclose and could not disclose but that the plaintiff was entitled to recover the amount claimed, and hence, even if the jury found a verdict in a sum less than the jurisdictional amount, the jurisdiction of the court would not be defeated.[9]

(8) *Sufficiency of Pleadings.*—An allegation that the amount instead of the matter exceeds the jurisdictional requirement is sufficient. The meaning of such an allegation is clear.[10]

g. *From Exceptions to Master's Report.*—In suits for accounting, the matter in dispute may be shown by the exceptions to the master's report.[11]

h. *Jurisdiction Dependent upon Sum in Dispute as Case Stands in This Court.*—The matter in dispute, on which our jurisdiction depends, is the matter in dispute between the parties, as the case stands upon the writ of error or appeal; that is, the same as it stands in this court.[12]

rule, the legal cause of action, and not the plaintiff's demand, must be regarded.'" Barry *v.* Edmunds, 116 U. S. 550, 560, 29 L. Ed. 729.

Since the courts of South Carolina have held that in an action of trover consequential damages are not recoverable, and have also held that in the action of claim and delivery, damages for the detention must have respect to the property and to a direct injury arising from the detention, it follows that they cannot be considered in making up the jurisdictional amount, though claimed in the declaration. Vance *v.* Vandercook Co., 170 U. S. 468, 480, 42 L. Ed. 1111.

8. North American Transportation Co. *v.* Morrison, 178 U. S. 262, 267, 44 L. Ed. 1061.

9. Barry *v.* Edmunds, 116 U. S. 550, 29 L. Ed. 729; Scott *v.* Donald, 165 U. S. 58, 89, 41 L. Ed. 632; North American Transportation Co. *v.* Morrison, 178 U. S. 262, 266, 44 L. Ed. 1061.

10. Sufficiency of pleading.—Blackburn *v.* Portland Gold Min. Co., 175 U. S. 571, 44 L. Ed. 276.

11. From exceptions to master's report.—Burr *v.* Myers, 154 U. S. 654, 25 L. Ed. 976.

Where the controversy in the suit is as to the account between the appellant and the railroad company, and the amount in dispute, as shown by the exceptions to the master's report, is more than $5,000; and that the appellee seeks payment of a debt due him from the appellant out of the proceeds of the litigation between the appellant and the railroad company, and if it should appear that the appellant was not bound to return the company any of the money which was paid to her, he can have no decree against her personally, and it appears that the original claim of the appellee exceeded $5,000, and the appellant resists the payment of the whole, and it has all been allowed in the progress of the cause, this court has jurisdiction, although the final decree in the appellee's favor was less than $5,000, where the remainder of the claim had, by an order of the court, been paid before from the proceeds of the litigation. Scruggs *v.* Memphis, etc., R. Co., 131 U. S. appx. cciv, 26 L. Ed. 741.

12. Jurisdiction dependent upon sum in dispute as case stands in this court.—Gordon *v.* Ogden, 3 Pet. 33, 7 L. Ed. 592, overruling Wilson *v.* Daniel, 3 Dall. 401, 1 L. Ed. 655.

The jurisdiction of the supreme court is determined by the value of the matter in dispute in that court. New Jersey Zinc Co. *v.* Trotter, 108 U. S. 564, 27 L. Ed. 828, citing Hilton *v.* Dickinson, 108 U. S. 165, 27 L. Ed. 688, which reviews all the cases on this point.

Where a suit is brought to recover an amount in excess of $5,000, but a judgment is in fact rendered for less, this court has no jurisdiction, under the rule laid down in Hilton *v.* Dickerson, 108 U. S. 165, 27 L. Ed. 688, holding that the jurisdiction of this court depends on the value of the matter in dispute here. Dows *v.* Johnson, 110 U. S. 223, 28 L. Ed. 128.

"As to both parties, the matter in dispute, on which our jurisdiction depends, is the matter in dispute 'between the parties as the case stands upon the writ of error' or appeal, that is to say, as it stands in this court. That was the question in Wilson *v.* Daniel, 3 Dall. 401, 1 L. Ed. 655. Where it was held that, to avoid giving one party an advantage over another, it was necessary to make jurisdiction depend 'on the matter in dispute when the action was instituted.' When, therefore, that case was overruled in Gordon *v.* Ogden, 3 Pet. 33, 7 L. Ed. 592, and it was held, as to a defendant, that his rights depended on the matter in dispute in this court, we entertain no doubt it was the intention of the court to adopt as an

i. *Distinction between Appeals by Plaintiff and by Defendant.*—**In General.**—Formerly it was a good deal controverted whether the sum or value in controversy is to be determined by reference to the amount claimed or the amount of the judgment, or the amount in dispute in this court. It has been long settled, however, that when the judgment is for the defendant or for the plaintiff, and for less than the jurisdictional amount, and the plaintiff sues out the writ of error, this court has jurisdiction if the damages claimed in the declaration exceed that sum; but that if the judgment is for the plaintiff and not for more than the jurisdictional amount and the defendant prosecutes in error, this court has not jurisdiction, for the amount in controversy, as to the defendant, is fixed by the judgment.[13]

Appeals by Plaintiff.—Where a judgment is for the defendant, and the plaintiff appeals, the amount in controversy is the amount of the demand in the plaintiff's declaration.[14]

Appeals by Defendant.—It is the settled rule that where a judgment or de-

entirety the position of Mr. Justice Iredell in his dissenting opinion, and to put both sides upon an equal footing. Certainly it could not have been intended to give a plaintiff any advantage over a defendant, when there is nothing in the law to show any such superiority in position." Hilton *v.* Dickinson, 108 U. S. 165, 175, 27 L. Ed. 688.

13. Distinction between appeals by plaintiff and by defendant.—Cooke *v.* Woodrow, 5 Cranch 13, 3 L. Ed. 22; Wise *v.* Columbian Turnpike Co., 7 Cranch 276, 3 L. Ed. 341; Gordon *v.* Ogden, 3 Pet 33, 7 L. Ed. 592; Smith *v.* Honey, 3 Pet. 469, 7 L. Ed. 744; Walker *v.* United States, 4 Wall. 163, 164, 18 L. Ed. 319.

This court has jurisdiction over final judgments and decrees of the circuit court where the matter in dispute exceeds the sum or value of two thousand dollars. The jurisdiction of the court has been supposed to depend on the sum or value of the matter in dispute in this court, not on that which was in dispute in the circuit court. If the writ of error be brought by the plaintiff below, then the sum which his declaration shows to be due may be still recovered, should the judgment for a smaller sum be reversed; and consequently the whole sum claimed is still in dispute. But if the writ of error be brought by the defendant in the original action, the judgment of this court can only affirm that of the circuit court, and consequently the matter in dispute cannot exceed the amount of that judgment. Nothing but that judgment is in dispute between the parties. Gordon *v.* Ogden, 3 Pet. 33, 34, 7 L. Ed. 592.

In cases where the plaintiff sues for money, and claims in his pleadings a larger sum than $2,000, and obtains a judgment for a smaller amount, the sum for which the judgment is rendered is the only matter in controversy, when the defendant brings the writ of error. Because, if the plaintiff rests satisfied with it, and takes no step to reverse it, he is bound by it as well as the defendant. Both parties, therefore, stand upon an equal footing in that respect. But if the plaintiff brings the writ of error upon the ground that he is entitled to more than the judgment was rendered for, then his averment in his declaration shows the amount he claimed; and as that claim is the matter for which he brings suit, he is entitled to the writ of error if that claim appears to be large enough to give jurisdiction to this court. Bennett *v.* Butterworth, 8 How. 124, 129, 12 L. Ed. 1013.

The right of appeal from the circuit to the supreme court is given, "where the matter in dispute exceeds the sum or value of two thousand dollars, exclusive of costs." The defendant can appeal, where the judgment or decree against him exceeds the sum or value of two thousand dollars; but an appeal may be taken by the plaintiff where his claim of damages, in the declaration or libel, exceeds the above sum, or where the value of the thing claimed exceeds it, as this is held to be the matter in dispute. Olney *v.* Steamship Falcon, 17 How. 19, 22, 15 L. Ed. 43.

14. Cook *v.* Woodrow, 5 Cranch 12, 13, 3 L. Ed. 22; Pratt *v.* Law, 9 Cranch 456, 457, 3 L. Ed. 791; Gordon *v.* Ogden, 3 Pet. 33, 7 L. Ed. 592; Knapp *v.* Banks, 2 How. 73, 11 L. Ed. 184.

We have jurisdiction of a writ of error or appeal by a plaintiff below when he sues for as much as or more than our jurisdiction requires and recovers nothing, or recovers only a sum which, being deducted from the amount or value sued for, leaves a sum equal to or more than our jurisdictional limit, for which he failed to get a judgment or decree. Hilton *v.* Dickinson, 108 U. S. 165, 175, 27 L. Ed. 688.

Where the plaintiff in the court below claims $2,000 or more, and the ruling of the courts is for a less sum, he is entitled to a writ of error. But the defendant is not entitled to such writ where the judgment against him is for a less sum than $2,000 at time of the rendition thereof. Knapp *v.* Banks, 2 How. 73, 11 L. Ed. 184.

cree against a defendant, who pleads no counterclaim or set-off, and asks no affirmative relief, is brought by him to this court by writ of error or appeal, the amount in dispute on which the jurisdiction depends is the amount of the judgment or decree which is sought to be reversed.[15] The same rule is applicable to

15. Gordon *v.* Ogden, 3 Pet. 33, 7 L. Ed. 592; Oliver *v.* Alexander, 6 Pet. 143, 8 L. Ed. 349; Knapp *v.* Banks, 2 How. 73, 11 L. Ed. 184; Rich *v.* Lambert, 12 How. 347, 13 L. Ed. 1017; Walker *v.* United States, 4 Wall. 163, 18 L. Ed. 319; Merrill *v.* Petty, 16 Wall. 338, 21 L. Ed. 499; Troy *v.* Evans, 97 U. S. 1, 24 L. Ed. 941; Hilton *v.* Dickinson, 108 U. S. 165, 27 L. Ed. 688; Bradstreet Co. *v.* Higgins, 112 U. S. 227, 28 L. Ed. 715; First National Bank *v.* Redick, 110 U. S. 224, 28 L. Ed. 124; Henderson *v.* Wadsworth, 115 U. S. 264, 276, 29 L. Ed. 377; Smith *v.* Honey, 3 Pet. 469, 7 L. Ed. 744; Thompson *v.* Butler, 95 U. S. 694, 695, 24 L. Ed. 540; United States *v.* 84 Boxes of Sugar, 7 Pet. 453, 458, 8 L. Ed. 745; Pacific Express Co. *v.* Malin, 131 U. S. 394, 33 L. Ed. 204; Lamar *v.* Micou, 104 U. S. 465, 26 L. Ed. 774.

Prima facie, the judgment against a defendant in an action for money is the measure of our jurisdiction in his behalf. This prima facie case continues until the contrary is shown. Troy *v.* Evans, 97 U. S. 1, 3, 24 L. Ed. 941; Gray *v.* Blanchard, 97 U. S. 564, 24 L. Ed. 1108.

The rule is settled that, when a writ of error is sued out from this court by the defendant below, and no question is presented growing out of a partial defense to the action, or a counterclaim or a set-off, the value of the matter in dispute is fixed by the amount of the judgment. Gordon *v.* Ogden, 3 Pet. 33, 7 L. Ed. 592; Hilton *v.* Dickinson, 108 U. S. 165, 27 L. Ed. 688; Henderson *v.* Wadsworth, 115 U. S. 264, 276, 29 L. Ed. 377; New York Elevated R. Co. *v.* Fifth Nat. Bank, 118 U. S. 608, 609, 30 L. Ed. 259.

Where the plaintiff below claims more than $2,000 in his declaration, but obtains a judgment for a less sum, it was held, that a writ of error will be dismissed because the court has no jurisdiction of the cause. Gordon *v.* Ogden, 3 Pet. 33, 7 L. Ed. 592, following Wise *v.* Columbian Turnpike Co., 7 Cranch 276, 3 L. Ed. 341, overruling Wilson *v.* Daniel, 3 Dall. 401, 1 L. Ed. 655.

If the verdict is given against the defendant for a less sum than $2,000, and judgment is rendered against him accordingly, in that state of the case nothing is in controversy between him and the plaintiff, if the plaintiff acquiesces in the judgment, beyond the sum for which the judgment is given, and consequently the defendant is not entitled to any writ of error. Knapp *v.* Banks, 2 How. 73, 11 L. Ed. 184; Winston *v.* United States, 3 How. 771, 11 L. Ed. 823; Rogers *v.* St. Charles, 19 How. 108, 112, 15 L. Ed. 563; Udall *v.* Steamship Ohio, 17 How. 17, 15 L. Ed. 42; Olney *v.* Steamship Falcon, 17 How. 19, 15 L. Ed. 43; Gruner *v.* United States, 11 How. 163, 13 L. Ed. 647; Brown *v.* Shannon, 20 How. 55, 15 L. Ed. 826; Oliver *v.* Alexander, 6 Pet. 143, 8 L. Ed. 349; Spear *v.* Henry Place, 11 How. 522, 13 L. Ed. 796; Rich *v.* Lambert, 12 How. 347, 13 L. Ed. 1017; Clifton *v.* Sheldon, 23 How. 481, 16 L. Ed. 429; Sampson *v.* Welsh, 24 How. 207, 16 L. Ed. 632; Seaver *v.* Bigelow, 5 Wall. 208, 18 L. Ed. 595; Merrill *v.* Petty, 16 Wall. 338, 344, 21 L. Ed. 499.

"The rule in this court has been settled for the period of sixty years, that where the writ of error is brought by the defendant in the original action, the matter in dispute is the amount of the judgment rendered in the circuit court, as this court can only affirm the judgment rendered in that court. Gordon *v.* Odgen, 3 Pet. 33, 34, 7 L. Ed. 592; Wise *v.* Columbian Turnpike Co., 7 Cranch 276, 3 L. Ed. 341." Merrill *v.* Petty, 16 Wall. 338, 344, 21 L. Ed. 499.

When a defendant brought a case here, the judgment or decree against him governed our jurisdiction, unless he had asked affirmative relief, which was denied; and this because as to him jurisdiction depended on the matter in dispute here. If the original demand against him was for more than our jurisdictional limit, and the recovery for less, the record would show that he had been successful below as to a part of his claim, and that his object in bringing the case here was not to secure what he had already got, but to get more. As to him, therefore, the established rule is that, unless the additional amount asked for is as much as our jurisdiction requires, we cannot review the case. Hilton *v.* Dickinson, 108 U. S. 165, 174, 27 L. Ed. 688, citing Cook *v.* Woodrow, 5 Cranch 12, 3 L. Ed. 22.

We have jurisdiction of a writ of error or appeal by a defendant when the recovery against him is as much in amount or value as is required to bring a case here, and when, having pleaded a set-off or counterclaim for enough to give us jurisdiction, he is defeated upon his plea altogether, or recovers only an amount or value which, being deducted from his claim as pleaded, leaves enough to give us jurisdiction, which has not been allowed. Hilton *v.* Dickinson, 108 U. S. 165, 175, 27 L. Ed. 688.

This court cannot take jurisdiction of a writ of error sued out by the defendant below, when the judgment against him upon a money demand is for only $1,118, although the record shows that, having pleaded the general issue, he gave notice

plaintiffs in replevin suits, where the defendant gets judgment for a return of property taken and delivered under the writ, or its value. Thus, where in replevin judgment was rendered in favor of the plaintiff for a portion of the property delivered under the writ, and in favor of the defendant for a return of the residue, or its value, the same not being $5,000, and the plaintiff sued out a writ of error to this court, the writ must be dismissed for want of jurisdiction.[16] And the case is not changed by the fact that if, under an appeal which is pending in another suit, it shall be found the appellant was credited in this suit with an amount which properly belonged to that, the decree in that suit will be reduced, while the one in this cannot be correspondingly increased.[17]

Amendment of Judgment by Defendant.—Where a judgment as originally rendered does not exceed the sum or value of five thousand dollars, it cannot be amended on the motion of the defendant by the addition of an amount not claimed by the plaintiff, so as to bring the case within our jurisdiction.[18]

Appeals from Intermediate Courts.—Where the libelant in his libel demanded $25,000 damages, but he recovered in the district court a decree for $500, which, upon appeal by the adverse party, the libelant not appearing, was reversed by the circuit court, and the libel dismissed, and the libelant thereupon appealed to this court from the decree of the circuit court, it was held, that the amount in controversy in the circuit court and here being but $500, the appeal must be dismissed.[19]

j. *Amount or Kind of Money.*—Our jurisdiction is to be determined by the amount of money to be paid and not the kind.[20]

k. *Value of Property or Right*—(1) *In General.*—Where the possession or enjoyment of property is in litigation, the value of the property of which the defendant may be deprived by the decree sought is the test of jurisdiction, and not the claim of the complainant,[21] provided the title of so much land as is necessary

of a set-off claiming $10,000. Gray *v.* Blanchard, 97 U. S. 564, 24 L. Ed. 1108.

Case overruled.—The decision in Wilson *v.* Daniel, 3 Dall. 401, 1 L. Ed. 655, that the thing demanded and not the thing found constitutes the matter in dispute between the parties, was overruled in Gordon *v.* Ogden, 3 Pet. 33, 7 L. Ed. 592.

In an action of trover, if the judgment below be in favor of the original defendant, the value of the matter in dispute upon the writ of error in the supreme court of the United States, is the sum claimed as damages in the declaration. Cook *v.* Woodrow, 5 Cranch 12, 3 L. Ed. 22, cited in Hilton *v.* Dickinson, 108 U. S. 169, 27 L. Ed. 688.

16. Pierce *v.* Wade, 100 U. S. 444, 445, 25 L. Ed. 735.

17. Lamar *v.* Micou, 104 U. S. 465, 26 L. Ed. 774, citing Thompson *v.* Butler, 95 U. S. 694, 24 L. Ed. 540; Sampson *v.* Welsh, 24 How. 207, 16 L. Ed. 632.

18. Right of defendant to amend judgment.—Northern Pac. R. Co. *v.* Booth, 152 U. S. 671, 38 L. Ed. 591.

19. Appeals from intermediate courts.—Where the libelant recovered in the district court a decree for $500, which, upon appeal by the adverse party, was reversed by the circuit court and the libel dismissed, and, the libelant thereupon appealed to this court, held, that, the amount in controversy in the circuit court and here being but $500, the appeal must be dismissed. "As the matter in dispute here is that which was in dispute in the circuit court, it follows that the amount in controversy between the parties in the present state of the proceedings is not sufficient to give us jurisdiction. Gordon *v.* Ogden, 3 Pet. 33, 34, 7 L. Ed. 592; Smith *v.* Honey, 3 Pet. 469, 7 L. Ed. 744; Walker *v.* United States, 4 Wall. 163, 164, 18 L. Ed. 319." The D. R. Martin, 91 U. S. 365, 23 L. Ed. 439.

20. Amount or kind of money—Thompson *v.* Butler, 95 U. S. 694, 697, 24 L. Ed. 540.

21. In general.—Jones *v.* Fritschle, 154 U. S. 590, 21 L. Ed. 522; Hunt *v.* New York Cotton Exchange, 205 U. S. 322, 337, 51 L. Ed. 821; United States *v.* 84 Boxes of Sugar, 7 Pet. 453, 458, 8 L. Ed 745.

Where a plaintiff in the court below filed a petition for the recovery from the defendant of four slaves, whose value he alleged to be $2,700, and the jury found a verdict for the plaintiff "for $1,200, the value of the negro slaves in suit," and the plaintiff thereupon released the judgment for $1,200, and the court adjudged that he recover of the said defendant the said slaves, the case is within the appellate jurisdiction of this court. The plaintiff averred in his petition, that the slaves were worth $2,700, and by his releasing the judgment for $1,200, the only question before this court is the right to the property. And as the defendant below prosecuted the appeal, the plaintiff can-

not be allowed to deny here the truth of his own averment of the value of the property in dispute. Bennett *v.* Butterworth, 8 How. 124, 12 L. Ed. 1013.

Under a contract for land, containing the clause that in case the vendee fails to perform any covenant on his part, the vendor may declare the contract void, and recover by distress or otherwise, all the interest due on the contract as rent; on failure of payment of the first installment, or of the taxes, or to insure, as agreed, the vendor may recover such interest as rent. Although the rent claimed was not of the value of $1,000, yet as the title to land valued at $8,000 was in dispute, this court has jurisdiction. Stinson *v.* Dousman, 20 How. 461, 15 L. Ed. 966, citing Bennett *v.* Butterworth, 8 How. 124, 12 L. Ed. 1013, approved in Kirby *v.* American Soda Fountain Co., 194 U. S. 141, 144, 48 L. Ed. 911.

The matter in dispute in Richmond *v.* Milwaukee, 21 How. 391, 16 L. Ed. 72, was the title "to the lots which have been sold by the municipal authorities for the nonpayment of the taxes. The taxes assessed were charged upon the respective lots, and created no personal responsibility upon the owner, the lots alone being liable for the payment. And the only evidence or averment of their value is the statement of the complainant in his bill, that they were worth more than $500, and his complaint that more than two hundred per cent. upon their value as mentioned in the books of the corporation, was charged upon them by the assessment, and the proceedings of the city authorities under it. There is nothing in the allegations of the parties, or in the evidence, to show that the value of the lots in question exceeded $2,000 nor anything from which it can be inferred."

Where the plaintiff in error brought suit and recovered judgment in the court below for certain property, but the judgment also was in favor of the defendant in error for a lien of $1508, which the plaintiff in error was adjudged to pay before it could obtain its property, it was held, that the only matter in dispute between the parties is a judgment of $1508, and this is not sufficient in amount to give such jurisdiction. The case is not one where the value of the property in controversy shows the value of the matter in dispute. Pittsburg Locomotive Works *v.* State Nat. Bank, 154 U. S. 626, 24 L. Ed. 270, distinguishing Bennett *v.* Butterworth, 8 How. 124, 128, 12 L. Ed. 1013.

Where a bill in equity is filed to abate a nuisance, or to set aside a deed, or for a decree giving other mandatory or preventive relief, it is the value of the property of which the defendant may be deprived by the decree sought which is the test of jurisdiction, and not the claim of the complainant. Railroad Co. *v.* Ward, 2 Black 485; Market Co. *v.* Hoffman, 101 U. S. 112, 25 L. Ed. 782; Estes *v.* Gunter, 121 U. S. 183, 30 L. Ed. 884.

A proceeding by the United States to compel the defendant to abate a wire fence, by which he was alleged to have inclosed a large tract of public land, belonging to the United States, and subject to entry as agricultural lands, in violation of the act of February 25, 1885, 23 Stat. 321, c. 149, to prevent the unlawful occupancy of public lands, the question at issue between the parties being whether the defendant had color of title to the land in question, does not involve the requisite jurisdictional amount, although the property in controversy exceeded in value the sum of $5,000, because it is not the value of the property in dispute in this case which is involved, but the value of the color of title to property. Cameron *v.* United States, 146 U. S. 533, 36 L. Ed. 1077.

This is an appeal from a decree of the circuit court of the United States for the northern district of California in a proceeding under the act of congress of February 25, 1885, entitled "An act to prevent unlawful occupancy of the public lands," 23 Stat. 321, c. 149, whereby appellant was directed to remove a fence and enclosure from certain sections of land therein described, in default of which it was decreed that the same should be destroyed by the marshal for said district. The value of the fence was claimed to exceed $5,000; but the fence was not the matter in dispute, nor was the appellant deprived thereof. For want of the jurisdictional amount, Cameron *v.* United States, 146 U. S. 533, 36 L. Ed. 1077, the appeal must be dismissed. Abadie *v.* United States, 149 U. S. 261, 262, 37 L. Ed. 726.

Bill to redeem land.—Where a bill in equity is filed by an owner of land which is worth more than $5,000, to set aside and cancel, as creating a cloud upon his title, a tax deed, and a certificate of tax sale procured by the other defendants, and the defendant in his answer, offers to waive his claim of title to the land and reconvey it to the plaintiff, if the plaintiff would pay him the sums paid by him, with penalties accrued thereon and ten per cent interest, and the circuit court holds that the sums which the plaintiff was in equity bound to pay the defendants amounted to less than $5,000, and entered a final decree in favor of the defendants from which they appealed, the amount in controversy is insufficient to support the appellate jurisdiction of this court, and the appeal must be dismissed. "Upon the admissions of the answers, and upon the claims made by the defendants in the circuit court, and renewed in this court, it clearly appears that the plaintiff's title to the land was not really contested, but that the only matter in controversy was the amount of money which the plaintiff was equitably bound to pay to the defend-

to give this court jurisdiction, is actually in issue.[22] Where the controversy relates only to certain land, the value of which, as stated in the pleading, is less than the jurisdictional amount, and the statement is confirmed by the evidence, the appeal must be dismissed.[23] If, however, when the case gets to this court, the property is no longer in dispute, but the sole question is as to liens and encumbrances on the property, and these are below the jurisdictional amount, we have no jurisdiction.[24] It is also a rule that jurisdiction is to be tested by the value of the object to be gained by the bill.[25]

(2) *Removal of Trustees.*—In accordance with the general law that the value of the specific property which is in litigation must determine the jurisdiction of this court, it was held, that upon an appeal from an order removing the trustee, his right of commissions as trustee does not constitute the whole matter in dispute, but that it involves his ownership and control of the trust estate for the objects expressed in the will, and therefore the value of the estate is the value of the matter in dispute for the purpose of an appeal by him.[26]

(3) *Nuisances.*—Where a bill in equity is filed to abate a nuisance, the jurisdiction is tested by the value of the object to be gained by the bill, and that object is the removal of the nuisance. And the want of a sufficient amount of damage having been sustained to give the federal courts jurisdiction, will not defeat the remedy.[27]

ants, and that the difference between the sum which the circuit court held him to pay and the highest sum claimed by the defendants was less than $5,000." Carne *v.* Russ, 152 U. S. 250, 251, 38 L. Ed. 428, citing Act of February 16, 1875, c. 77, § 3; 18 Stat. 316; Peyton *v.* Robertson, 9 Wheat. 527, 6 L. Ed. 151, Farmers' Bank *v.* Hooff, 7 Pet. 168, 8 L. Ed. 646, Ross *v.* Prentiss, 3 How. 771, 11 L. Ed. 824; Tintsman *v.* National Bank, 100 U. S. 6, 25 L. Ed. 530.

In an action of trespass two counts quare clausum fregit are joined with one de bonis asportatis, the plea is not guilty, and no other issue is raised by the pleadings. The court said obiter that had the defendant pleaded title to the land, and issue had been joined on that plea, the land might have been the matter for adjudication, and thus the matter in dispute on the record. But where neither party sets up title, and it does not appear by the record that the title is involved, the amount of the judgment for damages is the matter in dispute. New Jersey Zinc Co. *v.* Trotter, 108 U. S. 564, 27 L. Ed. 828.

22. Carne *v.* Russ, 152 U. S. 250, 38 L. Ed. 428.

In Reynolds *v.* Burns, 141 U. S. 117, 35 L. Ed. 648, the facts were that the grantor had land re-entered for condition broken, the annuity charged thereon being $1,300 in arrear, and sold the same to the plaintiff for less than that amount. The prior grantee obtained judgment in ejectment against the plaintiffs, and was sued to enjoin enforcement of the judgment, the only allegation of their bill being that the whole estate was "not worth $6,000," though how much less it was worth was not stated. It further appeared that the plaintiffs' deeds did not cover the whole of such estate, and that the amount due and unpaid upon the annuity at the time these sales were made is about $1,300. Held, the appeal must be dismissed for want of jurisdiction.

In ejectment, the matter in dispute is the value of the property as set forth in the declaration. Old Grant *v.* M'Kee, 1 Pet. 248, 7 L. Ed. 131; Green *v.* Liter, 8 Cranch 229, 242, 3 L. Ed. 545; Vicksburg, etc., R. Co. *v.* Smith, 135 U. S. 195, 34 L. Ed. 95.

Amount actually in dispute controls.—The court will not take jurisdiction of a case where, although the whole property claimed by the lessor of the plaintiff in error under a patent, and which was recovered in ejectment, exceeded two thousand dollars; the title to a lot of ground, part of the whole tract, which was of less value than five hundred dollars, was only involved in the case before the court. Old Grant *v.* M'Kee, 1 Pet. 248, 7 L. Ed. 131.

23. Jones *v.* Fritschle, 154 U. S. 590, 21 L. Ed. 552.

24. Where the only matter in dispute between the parties is a judgment of $1,508, recovered against the plaintiff in error and the surety upon a delivery bond, this is not sufficient in amount to give this court jurisdiction. Pittsburg Locomotive Works *v.* State Nat. Bank, 154 U. S. 626, 24 L. Ed. 270, distinguishing Bennett *v.* Butterworth, 8 How. 124, 128, 12 L. Ed. 1013, on the ground that that case was one where the value of the property in controversy showed the value of the matter in dispute.

25. Hunt *v.* New York Cotton Exchange, 205 U. S. 322, 51 L. Ed. 821, citing Mississippi, etc., R. Co. *v.* Ward, 2 Black 485, 17 L. Ed. 311.

26. Removal of trustees.—Keneday *v.* Edwards, 134 U. S. 117, 33 L. Ed. 853.

27. Nuisances.—Mississippi, etc., R. Co. *v.* Ward, 2 Black 485, 17 L. Ed. 311; Hunt

(4) *In Suits for Partition.*—In a suit for partition, the value of the matter in dispute is the value of the undivided interest, and not the value of the entire tract to be partitioned.[28]

(5) *In Suits to Restrain Levy and Collection of Tax.*—In a bill in equity to restrain the collection of a specific tax levied under a general and continuing law, the matter in dispute in its relation to jurisdiction is the particular taxes attacked, and unaccrued or unspecified taxes cannot be included, upon conjecture, to make up the requisite amount.[29] On the other hand, in a suit brought by several taxpayers in behalf of themselves and all other taxpayers of a county to restrain the levy of a tax, for a particular year, to pay the interest on a series of bonds the validity of which was the main question at issue, it was held, that the amount in dispute was the value of the bonds, and not the amount of the particular tax to be levied.[30] In a suit in equity by a taxpayer to enjoin and restrain the issue, sale, delivery, pledge, or other disposition of a certain issue of bonds by a municipality, the amount of the interest of the complainant, and not the entire issue of bonds, is the amount in controversy.[31]

(6) *Funds and Deposits in Court.*—The matter in dispute is not the whole amount of the fund in court but only so much as is distributable to the complainants.[32]

(7) *In Detinue and Replevin.*—The value of property sued for is not always

v. New York Cotton Exchange, 205 U. S. 322, 51 L. Ed. 821.

28. In suits for partition.—Parker *v.* Morrill, 106 U. S. 1, 27 L. Ed. 72.

Where a suit was brought to recover one-two hundred and fortieth part of certain lands, and for a partition so as to set off to the appellant in severalty that interest, the matter in dispute is only the value of one-two hundred and fortieth part of the whole property, and not the value of the property sought to be partitioned. McCarthy *v.* Provost, 103 U. S. 673, 26 L. Ed. 337.

Where there is a motion to dismiss an appeal in a partition suit because the value of the matter in dispute does not exceed $5,000, and the appellees, complainants below, claim to be the owners each of one-eighth of the property to be divided, which it is admitted is worth only $10,000, and in the petition it is alleged that the value of the annual income is $5,000, the motion to dismiss will be granted. As the appellant to sustain his appeal must show affirmatively that more in pecuniary value than our jurisdictional requirement has been adjudged against him, he has failed to make a case for us to consider. Green *v.* Fisk, 103 U. S. 518, 26 L. Ed. 486.

29. In suits to restrain levy and collection of tax.—Washington, etc., R. Co. *v.* District of Columbia, 146 U. S. 227, 36 L. Ed. 951.

30. Brown *v.* Trousdale, 138 U. S. 389, 34 L. Ed. 987.

31. Colvin *v.* Jacksonville, 158 U. S. 456, 39 L. Ed. 1053, citing El Paso Water Co. *v.* El Paso, 152 U. S. 157, 38 L. Ed. 396, and distinguishing Brown *v.* Trousdale, 138 U. S. 389, 34 L. Ed. 987; Merritt *v.* *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209.

In El Paso Water Co. *v.* El Paso, 152 U. S. 157, 159, 38 L. Ed. 396, which was a bill filed by the water company against the city of El Paso for an injunction, it was alleged, among other things, that if certain bonds were issued, the complainant would be compelled to pay taxes on its property for the interest on the bonds and to provide a sinking fund for the principal thereof, but the amount of the tax that would be thereby cast upon complainant's property was not disclosed, and we said upon the question whether there was a sufficient amount in controversy to give this court jurisdiction: "The bill is filed by the plaintiff to protect its individual interest, and to prevent damage to itself. It must, therefore, affirmatively appear that the acts charged against the city, and sought to be enjoined, would result in its damage to an amount in excess of $5,000. So far as it respects the matter of taxes which, by the issue of bonds, would be cast upon the property of the plaintiff, it is enough to say that the amount thereof is not stated, nor any facts given from which it can be fairly inferred." Colvin *v.* Jacksonville, 158 U. S. 456, 460, 39 L. Ed. 1053, re-affirmed in Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209.

32. Funds and deposits in court.—In a suit by its creditors against an insolvent bank, which had made an assignment for their benefit, claims amounting to $440,000, including a decree in favor of A. for $23,297, and judgments in favor of B. for $88,000, were proved and allowed. There was realized under the assignment $30,000, the pro rata distribution of which was decreed by the court. A. filed an exception to the allowance of B.'s claim, which was overruled; whereupon he, by leave of the court, took a separate appeal, "without joining any party to the record with him as appellant," or any

the matter in dispute. In replevin, for instance, if the action is brought as a means of trying the title to property, the value of the property replevied is the matter in dispute; but if the replevin is of property distrained for rent, the amount for which avowry is made is the real matter in dispute, and the limit of jurisdiction.[33]

(8) *Right of Possession of Property.*—**In General.**—Where the matter in dispute is the right of possession of real property, and the record shows that the value of the right of possession reaches our jurisdictional amount, this court has jurisdiction.[34] Although the naked legal title to a homestead remains with the United States in trust for the person who may own it, yet in determining the value of the matter in dispute, where a defendant claims to have acquired by his entry and settlement a vested interest in the entire land held by his entry, this court should look at the value of the land, and not simply at the value of the right of present possession.[35]

But this court has no jurisdiction to review the decision of a territorial su-

party as defendant except B. Held, that the amount in dispute here is the interest of A. in that portion of the $30,000 payable by the decree to B., which the former would have received had his exception been sustained, and the amount decreed the latter been distributed pro rata among all the creditors. As that interest is less than $2,000, this court has no jurisdiction. Terry *v.* Hatch, 93 U. S. 44, 23 L. Ed. 796, cited and approved in Chatfield *v.* Boyle, 105 U. S. 231, 26 L. Ed. 944.

Where the litigation below involved in the appeal was between the plaintiff and the insurance company, as to the ownership of a fund in court for distribution amounting to $1411.44, and each of the parties claimed the whole, but the court divided it between them, giving the plaintiff $729.16, and the insurance company $682.29, and the plaintiff appeals but the insurance company is satisfied, it is clear that the value of the matter in dispute is only $682.29. Keogh *v.* Orient Fire Ins. Co., 154 U. S. 639, 24 L. Ed. 558.

In a suit for the foreclosure of a mortgage upon a railroad company, which mortgage was given to the plaintiffs, as trustees to secure 5500 bonds, of $1,000 each issued by the company, and payable to the plaintiffs or bearer, a motion was made to dismiss the appeal on the ground that this court had no jurisdiction of it because the amount involved was not more than $5,000. The ground argued was that the amount involved, so far as the appeal by Richardson and Day was concerned, was only $2,173, which was the amount Day, as assignee of Richardson, was directed to pay into court as having been overpaid on his claim. But it appeared by the master's report that he disallowed the claim of Richardson as pledgee or purchaser for 400 bonds other than the 200 bonds the claim to which was allowed to Richardson. Therefore the amount of money involved in the claim of Richardson and Day to these 400 bonds largely exceeds the sum of $5,000, and the motion to dismiss will be denied. Richardson *v.* Green, 130 U. S. 104, 32 L. Ed. 872.

33. In detinue and replevin.—Peyton *v.* Robertson, 9 Wheat. 527, 6 L. Ed. 151; Gibson *v.* Shufeldt, 122 U. S. 27, 29, 30 L. Ed. 1083.

In replevin, if it be of goods distrained for rent, the amount for which avowry is made is the value of the matter in controversy; but if the writ be issued to try the title to property, it is in the nature or detinue, and the value of the article replevied is the value of the matter in controversy, so as to give jurisdiction to this court upon a writ of error. Peyton *v.* Robertson, 9 Wheat. 527, 6 L. Ed. 151.

34. Right of possession of property.—Willis *v.* Eastern Trust, etc., Co., 167 U. S. 76, 42 L. Ed. 83.

The petition for the writ of certiorari to a justice of the peace alleges, upon the oath of the petitioner, that he is in the possession of the premises under a lease having nearly a year to run, with a privilege of extension for four years more; and that he has expended $15,000 in permanent improvements upon the leased property, of which he will be deprived, if the judgment of the justice of the peace, which he alleges to be void for want of jurisdiction, is not set aside by writ of certiorari. The reasonable inference from this is, that the possession of the premises, with the right to use these improvements, throughout the lease and the extension thereof, would be worth more than $5,000, showing that the matter in dispute is of sufficient pecuniary value to support the jurisdiction of this court, under the act of March 3, 1885, c. 355. 23 Stat. 443. Harris *v.* Barber, 129 U. S. 366, 369, 32 L. Ed. 697, distinguished in Willis *v.* Eastern Trust, etc., Co., 167 U. S. 76, 80, 42 L. Ed. 83.

35. Possession of land claimed as homestead.—Black *v.* Jackson, 177 U. S. 349, 44 L. Ed. 801.

preme court, affirming a decree in an action of forcible entry and detainer, where it is clear that the value of possession does not exceed $5,000.[36]

Relinquishment of Homestead Entry.—Where one has made a homestead or pre-emption entry, but has filed in the land office a relinquishment of all rights obtained thereby, since the relinquishment operates only against the party making the relinquishment and does not destroy any adverse rights of which there is in the land office an existing record, but simply substitutes one party for another in any legal proceedings which he may thereafter institute to assert his rights, it is clear that the value of a relinquishment cannot be greater than that of the land itself, in spite of affidavits by witnesses to the contrary.[37]

(9) *Interference with Exclusive Privileges.*—In an action by a corporation to which a city has granted an exclusive privilege, to prevent the municipality from interfering with such exclusive right, this court has no jurisdiction, unless it affirmatively appears from the record that the acts charged against the city, and sought to be enjoined, would result in its damage to an amount in excess of $5,000.[38] But in a suit by an exchange to enjoin a third person from receiving and using the quotations of sales made upon the exchange, the amount in controversy is not merely the rate paid by the appellant to the telegraph company from which he received the quotations, but is the right to keep the control of the quotations by the exchange and its protection from the competition of bucket shops or the identity of its business with that of bucket shops, and its value determines our jurisdiction, not the rate paid by the appellant to the telegraph company.[39]

(10) *Proof of Value.*—Admissions by the plaintiff in his pleadings as to the value of the property, are binding on him where the defendant below prosecutes the appeal.[40]

1. *Amount of Debt.*—When the object of a suit is to apply property worth more, to the payment of a debt for less, than the jurisdictional amount, it is the amount of the debt, and not the value of the property, that determines the jurisdiction of this court. This is well illustrated by two cases, in one of which the appeal was taken by the creditor, and in the other by a mortgagee of the

36. McClung *v.* Penny, 189 U. S. 143, 47 L. Ed. 751.

37. McClung *v.* Penny, 189 U. S. 143, 47 L. Ed. 751.

38. Interference with exclusive privileges.—El Paso Water Co. *v.* El Paso, 152 U. S. 157, 38 L. Ed. 396.

39. Hunt *v.* New York Cotton Exchange, 205 U. S. 322, 51 L. Ed. 821.

40. Proof of value.—Where a plaintiff in the court below filed a petition for the recovery from the defendant of four slaves, whose value he alleged to be $2,700, and the jury found a verdict for the plaintiff "for $1,200, the value the negro slaves in suit," and the plaintiff thereupon released the judgment for $1,200, and the court adjudged that he recover of the said defendant the said slaves, the case is within the appellate jurisdiction of this court. The plaintiff averred in his petition, that the slaves were worth $2,700, and by his releasing the judgment for $1,200, the only question before this court is the right to the property. And as the defendant below prosecuted the appeal, the plaintiff cannot be allowed to deny here the truth of his own averment of the value of the property in dispute. Bennett *v.* Butterworth, 8 How. 124, 12 L. Ed. 1013, 1014.

Court bound by complainants allegation of value.—Where a person entered land according to law, but omitted to obtain a patent for it, and another person afterwards obtained a patent from the United States by proceeding as if it were vacant land, knowing at the same time that it was not vacant, the patent thus obtained will be set aside. Nor is it sufficient objection to a decree, that the process was by an information in the nature of a bill in chancery, filed by the attorney for the United States. A simple bill in equity would have been better, but this process being so in substance, the case will not be dismissed for want of form. An individual owner of land would, in such a case, be entitled to the relief of having the patent set aside; and the United States, as a landholder, must be entitled to the same. The deeds of conveyance filed as exhibits show the property to have been sold for two thousand dollars, and that it was afterwards converted into a sugar estate. This is sufficient to maintain the jurisdiction of this court. United States *v.* Hughes, 11 How. 552, 13 L. Ed. 809.

property.[41]

m. *Determination as of What Time.*—**In General.**—The amount in controversy is to be decided by the sum in controversy at the time of the judgment, and not by any subsequent additions thereto, such as interest. The distinction constantly maintained is this: Where the plaintiff sues for an amount exceeding the jurisdictional amount, and the ad damnum exceeds that amount, if by reason of any erroneous ruling of the court below, the plaintiff recovers nothing, or less than the amount, there, the sum claimed by the plaintiff is the sum in controversy for which a writ of error will lie. But if a verdict is given against the defendant, for a less sum than the amount, and judgment passes against him accordingly, there it is obvious that there is, on the part of the defendant, nothing in controversy beyond the sum for which the judgment is given; and consequently he is not entitled to any writ of error. We cannot look beyond the time of the judgment in order to ascertain whether the writ of error lies or not.[42]

Amount to Be Determined as of Time of Prayer for Appeal.—A case must stand before this court on the appeal with respect to the amount in controversy, as it stood before the court below at the same time the appeal was prayed. No subsequent action of the court, such as a sale of the property, can affect the question.[43]

n. *Subsequent Change in Value of Subject of Controversy.*—When the sum in controversy is large enough to give the court jurisdiction of a case, such jurisdiction once properly obtained is not taken away by a subsequent change in the value of the subject of controversy.[44] The expression, sum or value of the matter in dispute, has reference to the date of the decree below, alike in cases of appeals in equity, and writs of error at law; they are each grounded on the original process of this court, operating on the final decree or judgment, and are limited

41. Amount of debt.—Gibson *v.* Shufeldt, 122 U. S. 27, 29, 30 L. Ed. 1083.

In Farmers' Bank *v.* Hooff, 7 Pet. 168, 8 L. Ed. 646, this court dismissed an appeal from a decree of the circuit court for the District of Columbia, dismissing a bill to have land, worth more than $1,000, sold for the payment of a debt of less than $1,000, which was the limit of jurisdiction, Chief Justice Marshall saying: "The real matter in controversy is the debt claimed in the bill; and though the title of the lot may be inquired into incidentally, it does not constitute the object of the suit."

In Ross *v.* Prentiss, 3 How. 771, 11 L. Ed. 824, land worth more, and mortgaged for more, than $2,000, was about to be sold on execution for a debt of a less sum, and a bill by the mortgagee to stay the sale was dismissed. He appealed to this court, and insisted that its jurisdiction depended on the value of the property and the amount of his interest therein, and that he might lose the whole benefit of his mortgage by a forced sale on execution. But the appeal was dismissed, Chief Justice Taney saying: "The only matter in controversy between the parties is the amount claimed on the execution. The dispute is whether the property in question is liable to be charged with it or not. The jurisdiction does not depend on the amount of any contingent loss or damage which one of the parties may sustain by a decision against him, but upon the amount in dispute between them; and as that amount is in this case below two thousand dollars, the appeal must be dismissed."

42. Determination as of what time.—Knapp *v.* Banks, 2 How. 73, 11 L. Ed. 184.

43. The claimants of eighty-four boxes of sugar, seized in the port of New Orleans for an alleged breach of the revenue laws, and condemned as forfeited to the United States for having been entered as brown instead of white sugar, claimed an appeal from the district court of the United States to the supreme court. The sugars, while under seizure, were appraised at two thousand, six hundred and two dollars and fifty-one cents; and after condemnation they were sold for two thousand, three hundred and thirty-eight dollars and forty-eight cents; leaving, after deducting the expenses and costs of sale, the sum of two thousand, one hundred and fifty dollars and six cents. The duties on the sugars, considering them as white or brown, being deducted from the amount, reduced the net proceeds below two thousand dollars, the amount upon which an appeal could be taken. Held, that the value in controversy was the value of the property at the time of the seizure, exclusive of the duties, and that the claimant had a right to appeal to this court. United States *v.* 84 Boxes of Sugar, 7 Pet. 453, 8 L. Ed. 745.

44. Subsequent change in value of subject of controversy.—Cooke *v.* United States, 2 Wall. 218, 17 L. Ed. 755.

to the sum or value then in controversy, and of which the decree or judgment furnishes the better evidence, should it furnish any.[45]

o. *Determination of Amount in Particular Proceedings*—(1) *In Injunction Proceedings.*—The penalty of an injunction bond, taken when an injunction is awarded, cannot be referred as evidence of the amount or value in dispute.[46]

(2) *In Actions on Official Bonds.*—In deciding whether the matter in dispute be sufficient to sustain the jurisdiction of this court in an action of debt for the penalty of an official bond given by the defendant for the faithful execution of the duties of his office, it will look to the sum due upon the condition of the bond, and not to the penalty.[47]

(3) *In Probate Proceedings.*—If the probate of a will has any legal operation, and is not merely void, the controversy as to the validity of that probate is the matter in dispute equal to the value of the estate devised away from the heirs seeking to revoke the probate of the will. Opinion of Story, J.[48]

(4) *In Suits for Specific Performance.*—Where the amount agreed upon in a contract for the sale of land is tendered and refused, and a suit for specific performance is brought, the value of the matter in dispute between the parties is the amount so tendered.[49]

(5) *In Suits to Foreclose Mortgages.*—The amount in controversy in a suit to foreclose a mortgage is the entire amount of the encumbrance, and not merely the amount of the deficiency decree.[50]

p. *Appeals after Issuance of Mandate.*—Upon a second appeal or writ of error to this court, after the mandate was issued to the court below, only the amount allowed by the court after receiving the mandate can be considered in determining our jurisdictional amount. Accordingly, where a judgment was affirmed by this court with a blank in the record for costs, and the circuit court afterwards taxed these costs at a sum less than the required amount, and allowed a writ of error to this court, the writ must be dismissed on motion.[51]

q. *Reduction of Amount*—(1) *Reduction by Remission.*—**In General.**—If there is no local statute on the subject of remittitur, it is within the discretion of the court, before rendering judgment, to allow a remittitur reducing the sum recovered below the amount required to sustain an appeal; and, if the court does so, and renders judgment for the reduced sum, the appeal must be dismissed.[52]

45. United States Bank *v.* Daniel, 12 Pet. 32, 52, 9 L. Ed. 989.

46. In injunction proceedings.—Brown *v.* Shannon, 20 How. 55, 15 L. Ed. 826.

Where a bill is filed for an injunction to prohibit the infringement of a patent right assigned to the complainant, the value or amount in controversy cannot be estimated by referring to the penalty of the bond taken in a circuit court when the injunction was granted. Brown *v.* Shannon, 20 How. 55, 15 L. Ed. 826.

47. In actions on official bonds.—United States *v.* McDowell, 4 Cranch 316, 2 L. Ed. 632; United States *v.* Hill, 123 U. S. 681, 31 L. Ed. 275.

48. In probate proceedings.—An appeal lies to this court from the sentence of the circuit court of the District of Columbia, affirming the sentence of the orphans' court of Alexandria county, which dismissed a petition to revoke the probate of a will over an objection that "the decree of dismissal is not any final judgment, order or decree of the circuit court, wherein the matter in dispute, exclusive of costs, exceeds $100." Carter *v.* Cutting, 8 Cranch 251, 3 L. Ed. 553.

49. In suits for specific performance.—On an appeal from a decree denying an assignee the specific enforcement of a contract for the sale of school lands by a county the matter in dispute between the appellant and the county, is the sum tendered to the county and its officers, and not the several interests of the county officers. Corbin *v.* County, 105 U. S. 659, 664, 26 L. Ed. 1136.

50. In suits to foreclose mortgages.—Elliott *v.* Sackett, 108 U. S. 132, 27 L. Ed. 678.

51. Appeals after issuance of mandate.—Sizer *v.* Many, 16 How. 98, 14 L. Ed. 861. See City Bank *v.* Hunter, 152 U. S. 512, 38 L. Ed. 534.

52. Reduction by remission.—Alabama Gold Life Ins. Co. *v.* Nichols, 109 U. S. 232, 239, 27 L. Ed. 915; Pacific Postal, etc., Co. *v.* O'Connor, 128 U. S. 394, 32 L. Ed. 488; Texas, etc., R. Co. *v.* Horn, 151 U. S. 110, 38 L. Ed. 91; Simms *v.* Simms, 175 U. S. 162, 169, 44 L. Ed. 115; Baltimore, etc., R. Co. *v.* Trook, 100 U. S. 112, 25 L. Ed. 571.

Where a judgment has been recovered in a territorial district court of sufficient

Before Judgment.—Where the party in whose favor the verdict is rendered in the court below remits by leave of court such part of his recovery before judgment as reduces the recovery below the jurisdictional amount, the appeal or writ of error will be dismissed for want of jurisdiction.[53]

Remission after Judgment.—But when the jurisdiction of the supreme court on appeal has once attached, it cannot be defeated by a waiver or release of the amount of the judgment below in excess of the jurisdictional amount on appeal.[54]

amount to give this court jurisdiction from the supreme court of the territory, but the party obtaining the judgment has the right to remit by release a sufficient amount of the judgment to reduce it below the jurisdiction of this court, while the case is pending on appeal in the territorial court and the release is not regarded by the territorial court, but the judgment of the district court is affirmed, this court will, on appeal by the adverse party, modify the judgment of the supreme territorial court, to the amount in the release, and the decree will be affirmed as reduced without a consideration of the rules of the case. Simms *v.* Simms, 175 U. S. 162, 44 L. Ed. 115.

53. Thompson *v.* Butler, 95 U. S. 694, 24 L. Ed. 540, followed in Northwestern Mutual Ins. Co. *v.* Martin, 24 L. Ed. 542; Pacific Postal, etc., Co. *v.* O'Connor, 128 U. S. 394, 32 L. Ed. 488; Alabama Gold Life Ins. Co. *v.* Nichols, 109 U. S. 232, 27 L. Ed. 915; First Nat. Bank *v.* Redick, 110 U. S. 224, 28 L. Ed. 124.

When the plaintiff below in open court, by permission of court, remits all of the verdict in excess of $5,000 and judgment is entered for that sum and costs, the writ of error will be dismissed for want of jurisdiction. First Nat. Bank *v.* Redick, 110 U. S. 224, 28 L. Ed. 124, citing Thompson *v.* Butler, 95 U. S. 694, 24 L. Ed. 540; Alabama Gold Life Ins. Co. *v.* Nichols, 109 U. S. 232, 27 L. Ed. 915.

Where verdicts have been rendered against the plaintiff in error (the defendant below), for more than $5,000, but the plaintiffs respectively remit all over that sum, and judgments are entered by the court against the remonstrance of the defendant for $5,000 and no more, and the case is brought here by the defendant below, the writ of error will be dismissed because the amount in controversy is not sufficient to give us jurisdiction. Northwestern Mutual Ins. Co. *v.* Martin, 24 L. Ed. 542, following Thompson *v.* Butler, 95 U. S. 694, 24 L. Ed. 540.

It was held, in Alabama Gold Life Ins. Co. *v.* Nichols, 109 U. S. 232, 27 L. Ed. 915, that it was within the discretion of the court of the United States sitting in Texas, if a plaintiff appears in open court and remits the part of the verdict in his favor, to make the proper reduction and enter judgment accordingly. And if such remittitur reduces the amount below our jurisdictional amount, errors in the record will be shut out from our re-examination in cases where our jurisdiction depends on the amount in controversy. Citing and following Thompson *v.* Butler, 95 U. S. 694, 24 L. Ed. 540.

In Thompson *v.* Butler, 95 U. S. 694, 24 L. Ed. 540, we declined to take jurisdiction where the verdict was for more than $5,000, but the plaintiff, before judgment, with leave of the court, remitted the excess, and actually took judgment for $5,000 and no more. In that case it was said, p. 696: "Undoubtedly the trial court may refuse to permit a verdict to be reduced by a plaintiff on his own motion; and if the object of the reduction is to deprive the appellate court of jurisdiction in a meritorious case, it is to be presumed the trial court will not allow it to be done. If, however, the reduction is permitted, the errors in the record will be shut out from our re-examination in cases where our jurisdiction depends upon the amount in controversy." Opelika City *v.* Daniel, 109 U. S. 108, 109, 27 L. Ed. 873.

In a suit in the circuit court, where the defendant pleaded neither a set-off nor a counterclaim, the plaintiff remitted so much of a verdict in his favor as was in excess of $5,000, and took judgment for the remainder "in coin." The defendant sued out a writ of error. Held, that the amount in controversy, whether payable in coin or any other kind of money, is not sufficient to give this court jurisdiction. "If the remittitur had not been entered until after the judgment, the case would have been different, and, if the reduction was made without the assent of the defendant, more like Kanouse *v.* Martin, 15 How. 198, 14 L. Ed. 467, where a declaration was amended in a state court so as to reduce the damages claimed below the jurisdictional amount, after the necessary steps had been taken for the transfer of the cause to the circuit court, and in which we held that the jurisdiction of the circuit court could not be defeated in that way." Thompson *v.* Butler, 95 U. S. 694, 24 L. Ed. 540.

54. New York Elevated R. Co. *v.* Fifth Nat. Bank, 118 U. S. 608, 30 L. Ed. 259.

"Our jurisdiction cannot be invoked until after a final judgment, and, until such a judgment has been rendered, the cause remains in the full judicial control of the court in which it is pending. It was because of this that we declined to take jurisdiction in Thompson *v.* Butler, 95 U. S. 694, 24 L. Ed. 540, where the verdict

(2) *Reduction Authorized by Act of Congress.*—The mere fact that an act of congress authorizes a judgment obtained by the government against a party to be discharged by the payment of a sum less than the required amount, is no ground to ask a dismissal of a case of which the court had properly obtained jurisdiction before the act passed. The party may not choose thus to settle the judgment, but prefer to try to reverse it altogether.[55]

(3) *Reduction by Payment and Settlement.*—Where at the time of issuing and serving the writ of error, the sum in controversy is large enough to give this court jurisdiction, such jurisdiction cannot be taken away by a subsequent reduction of the amount by an actual payment.[56] But where the defendant by his own action has reduced the judgment by a voluntary settlement and payment below the amount which is necessary to give this court jurisdiction to review it, this is fatal to the appeal.[57] And although the facts as to the settlement

was for more than $5,000, but was reduced to that amount, by leave of the court, before the judgment, which was for the reduced sum." New York Elevated R. Co. *v.* Fifth Nat. Bank, 118 U. S. 608, 609, 30 L. Ed. 259.

In Pacific Postal, etc., Co. *v.* O'Connor, 128 U. S. 394, 32 L. Ed. 488, the plaintiff below who had recovered a verdict for $5,500, on the day after the judgment was entered thereon, asked leave in open court to remit the sum of $500, which was granted, and judgment rendered for $5,000 and costs. The subsequent motion by the defendant below to set aside the allowance of the remittitur and to correct the judgment was denied, although the remittitur was rendered in the absence of the defendant and his counsel.

In Texas, etc., R. Co. *v.* Horn, 151 U. S. 110, 38 L. Ed. 91, upon the trial of a cause a verdict was returned for the plaintiff in the sum of $11,000, and upon the suggestion of the court the plaintiff entered a remittitur of $6,001 and prayed that the same be allowed, and judgment entered for $4,999. A bill of exceptions, a writ of error and the citation all described the judgment as being for $4,999. The judgment, however was in form for $11,000, but recited that the plaintiff had filed a remittitur for $6,001, and ordered that execution should issue for $4,999 only. It was held that, "Although the judgment was entered immediately upon the return of the verdict in accordance with the practice in that jurisdiction, and therefore, for the amount of the verdict, it was within the power of the court to allow the remittitur; and while the order to that effect might have been more accurately worded, we are of opinion that, upon the entire record, plaintiff in error cannot be permitted to insist that the judgment as it stands is for a larger sum than $4,999, nor can it be hereafter held liable as on judgment for any other amount."

55. Reduction authorized by act of congress.—Cooke *v.* United States, 2 Wall. 218, 17 L. Ed. 755.

56. Reduction by payment and settlement.—Cooke *v.* United States, 2 Wall. 218, 17 L. Ed. 755.

57. Thorp *v.* Bonnifield, 177 U. S. 15, 44 L. Ed. 652; Pacific Coast Steamship Co. *v.* Pande, 180 U. S. 635, 45 L. Ed. 709; Shute *v.* Keyser, 149 U. S. 649, 37 L. Ed. 884.

"The plaintiff in error cites various cases to maintain the proposition that when the defendant in the case below brings it here for review the amount of the judgment or decree against him governs our jurisdiction, and, as in this case, the judgment is more than seven thousand dollars, he maintains that this court has jurisdiction notwithstanding the payment and settlement above mentioned. But those cases have no application when the defendant by his own action has reduced the judgment by a voluntary settlement and payment below the amount which is necessary in order to give this court jurisdiction to review it. The real matter in dispute is in such case the balance still remaining due on the judgment. Otherwise he might voluntarily settle the controversy and pay the whole judgment, and then seek to review it. An event has intervened subsequently to the entry of the judgment, and one which owes its existence to the act of the defendant himself, which has taken away his right of review in this court." Thorp *v.* Bonnifield, 177 U. S. 15, 18, 44 L. Ed. 652.

Compromise or settlement pending appeal.—In Cox *v.* Western Land, etc., Co., 123 U. S. 375, 31 L. Ed. 178, a suit was brought originally to recover 135 head of Colorado steers, alleged to be worth $6,000. At the time of the judgment only 79 head were in dispute. As to the rest, a settlement had been made during the pendency of the suit. The court has found as a fact that the 79 head were sold in open market the day after they were taken possession of under the writ in this case, and that the net proceeds of the sale only amounted to $4,526.15. There is nothing to show that they were really any less valuable at the time of the sale than when they were taken. Upon the

and payment appear in the record here, they may be shown by other evidence.[58]

(4) *Reduction by Amendment or Set-Off.*—Where the amount is reduced by amendment or set-off before the appeal is taken, this will defeat our jurisdiction. The rule is the same whether the reduction is made before trial or after verdict.[59] But where a citizen of New Jersey was sued in a state court in New York, and filed his petition to remove the case into the circuit court of the United States, offering a bond with surety, the amount claimed in the declaration being $1,000, it became the duty of the state court to accept the surety, and proceed no further in the cause. Consequently, it was erroneous to allow the plaintiff to amend the record and reduce his claim to $499.[60]

r. *Effect of Admissions by Parties.*—The writ will be dismissed, although the judgment was for $8,233.59, if by an agreed statement of facts in the record, it appears that the defendant admitted he owed $5,099.59 of the amount recovered.[61]

facts as found the recovery could not have exceeded five thousand dollars if there had been a judgment in favor of Cox, the plaintiff in error. Accordingly, the motion to dismiss was granted.

58. Thorp *v.* Bonnifield, 177 U. S. 15, 44 L. Ed. 652; Shute *v.* Keyser, 149 U. S. 649, 37 L. Ed. 884.

59. Reduction by amendment or set-off.—Nagle *v.* Rutledge, 100 U. S. 675, 25 L. Ed. 772; Thompson *v.* Butler, 95 U. S. 694, 24 L. Ed. 540.

In Opelika City *v.* Daniel, 109 U. S. 108, 27 L. Ed. 873, the action was brought originally upon 119 interest coupons cut from 24 municipal bonds, aggregating $24,000, the amount claimed to be due on the coupons being more than $5,000. At first a demurrer was filed to the complaint. This being overruled, the validity of the bonds was put in issue by various pleas. Before trial the plaintiff asked and obtained leave to amend his complaint so as to include only 90 of the coupons originally sued for. The verdict was for less than $5,000, and a judgment was entered thereon for that amount and no more. It was held, that it was clearly within the discretion of the court to permit the amendment of the complaint before trial, and that a motion to dismiss because the value of the matter in dispute did not exceed $5,000 will be granted, following Elgin *v.* Marshall, 106 U. S. 578, in which it was said that the jurisdiction of this court depends on the matter which is directly in dispute in the particular cause in which the judgment or decree sought to be reviewed has been rendered, and that this court will not be permitted, for the purpose of determining its sum or value, to estimate its collateral effect in a subsequent suit between the same or other parties.

Upon a libel to recover damages against ship owners, a decree passed against them for over $2,000, with leave to set off a sum due them for freight, which would reduce the amount decreed against them to less than $2,000. The party elected to make the set-off, saving his right to appeal to this court. The reduced decree was the final decree, and the party cannot save a right of appeal where it is not allowed by act of congress. Sampson *v.* Welsh, 24 How. 207, 16 L. Ed. 632, cited in Lamar *v.* Micou, 104 U. S. 465, 26 L. Ed. 774.

In Sampson *v.* Welsh, 24 How. 207, 16 L. Ed. 632, "we refused to take jurisdiction upon an appeal in admiralty, where a decree had been rendered against a respondent for more than $2,000, with leave to him, if he chose, to set off an amount due him for freight, and he afterwards, by the set-off, reduced the decree below our jurisdictional amount, notwithstanding, in signifying his election to make the set-off, he expressly stated in a writing, which appeared in the record, that he did not thereby waive his right of appeal." Approved in Thompson *v.* Butler, 95 U. S. 694, 24 L. Ed. 540.

"As the cross demand was not set up until after the plaintiffs had been compelled by the defendant to make their items of loss more specific, and had thus reduced the amount claimed below the jurisdiction of this court, there is color for the contention on the part of the defendants in error that it was put forward for the purpose of giving this court jurisdiction. But assuming this not to have been so, and that the writ of error should not be dismissed, we are of opinion that the motion to affirm must be sustained under the circumstances, and it is so ordered." Pacific Express Co. *v.* Malin, 132 U. S. 531, 538, 32 L. Ed. 450.

60. Kanouse *v.* Martin, 15 How. 198, 14 L. Ed. 467, distinguished in Sampson *v.* Welsh, 24 How. 207, 16 L. Ed. 632.

61. Effect of admissions by parties.—Jenness *v.* Citizens' Nat. Bank, 110 U. S. 52, 28 L. Ed. 67; Wabash, etc., R. Co. *v.* Knox, 110 U. S. 304, 28 L. Ed. 155, following Tintsman *v.* National Bank, 100 U. S. 6, 25 L. Ed. 530.

Where, by an agreed statement of facts in the nature of a special verdict, the plaintiff's claim was admitted by the defendant, except the sum of $3,134.20, held, that that sum was the amount actually in dispute, and although judgment was ren-

s. *Stipulations of Parties.*—A stipulation between the parties as to the amount is not controlling, but in the discretion of the court it may be regarded in a particular case, and with reference to the other facts appearing in the record, as sufficient proof of the amount in controversy to sustain the jurisdiction of this court.[62]

17. Jurisdiction without Regard to Sum or Value in Dispute—a. *Review of Judgments or Decrees of Supreme Court or Court of Appeals of District of Columbia or of Any of the Territories.*—The act of March 3, 1885, c. 355, 23 Stat. 443, "by § 1, limits appeals to this court from the supreme courts of the territories and from the supreme court of the District of Columbia to cases where the value of the matter in dispute exceeds five thousand dollars, except, by § 2, where the validity of a patent or copyright is involved, or the validity of a treaty or a statute, or an authority exercised under the United States is drawn in question." The value here referred to is the value at the time of the final judgment or decree, not at the time of the appeal or writ of error.[63]

The act does not apply in either section to any criminal case.[64]

Must Be Susceptible of Pecuniary Estimation.—But is applicable to all judgments or decrees in suits at law or in equity in which there is a pecuniary matter in dispute, and it inhibits any appeal or writ of error therefrom except as stated.[65] In other words, in order to give this court jurisdiction under the act of March 3, 1885, entitled an act regulating appeals from the supreme court of the District of Columbia, and the supreme court of the several territories, the matter in dispute must be money, or some right, the value of which in money can be calculated and ascertained. Therefore habeas corpus proceedings are not reviewable.[66]

Special Allocatur from Circuit Court of the District.—An act of congress gave jurisdiction to this court over the circuit court of the District of Columbia on a judge's allocatur when the amount in controversy was less than $1,000.[67]

dered below for the entire claim, being more than $5,000, the writ of error must be dismissed for want of jurisdiction. Tintsman *v.* National Bank, 100 U. S. 6, 25 L. Ed. 530.

62. Stipulations of parties.—United States *v.* Freight Ass'n, 166 U. S. 290, 310, 41 L. Ed. 1007.

63. The term "value" defined.—Street *v.* Ferry, 119 U. S. 385, 30 L. Ed. 439.

64. Farnsworth *v.* Montana, 129 U. S. 104, 32 L. Ed. 616; United States *v.* Sanges, 144 U. S. 310, 36 L. Ed. 445; Cross *v.* Burke, 146 U. S. 82, 87, 36 L. Ed. 896; Chapman *v.* United States, 164 U. S. 436, 41 L. Ed. 504; Prather *v.* United States, 164 U. S. 452, 41 L. Ed. 510.

Moreover, the second section does not apply to any criminal case. The cases to which the second section is to apply are to be cases where there is a pecuniary matter in dispute, or where that pecuniary matter is measurable by some sum or value, and where the case is also one of the kind mentioned in the second section. Farnsworth *v.* Montana, 129 U. S. 104, 32 L. Ed. 616; Gonzales *v.* Cunningham, 164 U. S. 612, 617, 41 L. Ed. 572.

In Farnsworth *v.* Montana, 129 U. S. 104, 32 L. Ed. 616, in which it was claimed that the validity of an authority exercised under the United States was drawn in question, it was held, that the second section of the act did not extend to criminal cases, but that both sections applied to cases where there was a matter in dispute measurable by some sum or value in money. The view taken was that the second section contained an exception or limitation carved out of the first section, and that the words, that in the enumerated cases, "an appeal or writ of error may be brought without regard to the sum or value in dispute," clearly implied that in those cases also there must be a pecuniary matter in dispute measurable by some sum or value, though not restricted in amount. Chapman *v.* United States, 164 U. S. 436, 448, 41 L. Ed. 510; Folk *v.* United States, 180 U. S. 636, 45 L. Ed. 709. See United States *v.* Sanges, 144 U. S. 310, 36 L. Ed. 445.

65. Must be susceptible of pecuniary estimation.—Cross *v.* Burke, 146 U. S. 82, 87, 36 L. Ed. 896.

66. Kurtz *v.* Moffitt, 115 U. S. 487, 29 L. Ed. 458; Cross *v.* Burke, 146 U. S. 82, 88, 36 L. Ed. 896.

67. Special allocatur from circuit court of the district.—Campbell *v.* Read, 2 Wall. 198, 17 L. Ed. 779; Bank *v.* Millard, 154 U. S. 656, 25 L. Ed. 529.

On the opening of the record for the argument of this case, it was found that the sum in controversy was less than the amount which, according to the act of

Questions of Law of Extensive Interest and Operation.—An act of congress of April 2, 1816, 3 Stat. at Large 261, regulating appeals and writs of error from the circuit court of the District of Columbia to this court, which limited them to cases in which the matter in dispute was of the value of $1,000 or upwards, provided that if "any questions of law of such extensive interest and operation as to render a final decision of them by the supreme court desirable" are involved in the alleged errors of the circuit court, the case might be heard here, even though the matter in dispute be of less value than $1,000.[68] But § 706 of the Revised Statutes and § 848 of the Revised Statutes of the District of Columbia, which provided for the allowance of appeals and writs of error by the justices of this court under special circumstances, are no longer in force.[69]

b. *Revenue Cases.*—**In General.**—Section 699 of the Revised Statutes provides for a writ of error without regard to the sum or value in dispute, upon "any final judgment of a circuit court * * * in any civil action brought by the United States for the enforcement of any revenue law thereof." The original statute, of which this is a re-enactment, was passed May 31, 1844, c. 31, 5 Stat. 658, and is as follows: "That final judgments in any circuit court of the United States, in any civil action brought by the United States for the enforcement of the revenue laws of the United States, or for the collection of duties due, or alleged to be due, on merchandise imported therein, may be re-examined and reversed or affirmed, in the supreme court of the United States, upon writs of error, as in other cases, without regard to the sum or value in controversy, in such action, at the instance of either party."[70] The third subdivision of § 699 of the Revised Statutes giving this court appellate jurisdiction without regard to the sum or value in dispute, "relates to judgments 'in any civil action against any officer of the revenue, for any act done by him in the performance of his official duty, or for the recovery of any money exacted by or paid to him which shall have been paid into the treasury.' This applies only to suits, whether sounding in tort or in contract, brought by individuals or corporations against officers of the revenue acting on behalf of the United States, and does not include any suit brought by the United States against one of those officers. It has regard to actions in which the interest of the United States is as defendants, not as plaintiffs."[71]

What Is an Action for Enforcement of Revenue Laws.—The term "revenue law," when used in connection with the jurisdiction of the courts of the United States, means a law imposing duties on imports or tonnage, or a law providing in terms for revenue; that is to say, a law which is directly traceable to the power granted to congress by § 8, art. 1, of the constitution, "to lay and collect taxes, duties, imports, and excises."[72]

congress, authorizes a writ of error except on a special allocatur from the circuit court of the District of Columbia to this court. The provisions of the law permit writs of error to be sued out without such allocatur, when the sum in controversy amounts to one thousand dollars and upwards. On the application of the counsel, stating the questions in the case were of great public importance, and were required to be determined, in order to the final settlement of other accounts in which the same principles were involved, the court gave the special allocatur. United States *v.* Ringgold, 8 Pet. 150, 8 L. Ed. 899.

63. Questions of law of extensive interest and operation.—A question involving the construction of a statute regulating intestacies within the District of Columbia, is not a question of law of "such extensive interest and operation," as that if the matter involved is not of the value of $1,000 or upwards, this court will assume jurisdiction under the act of congress of April 2d, 1816. Campbell *v.* Read, 2 Wall. 198, 17 L. Ed. 779.

69. Act of February 25, 1879, ch. 99, 20 Stat. 320, ch. 99; Railroad Co. *v.* Grant, 98 U. S. 398, 25 L. Ed. 231; Dennison *v.* Alexander, 103 U. S. 522, 26 L. Ed. 313; Act of March 3, 1885, 23 Stat. 443, ch. 355; Cross *v.* Burke, 146 U. S. 82, 87, 36 L. Ed. 896; Trask *v.* Wanamaker, 147 U. S. 149, 37 L. Ed. 118.

70. Revenue cases.—United States *v.* Hill, 123 U. S. 681, 684, 31 L. Ed. 275; Pettigrew *v.* United States, 97 U. S. 385, 386, 24 L. Ed. 1029.

71. United States *v.* Haynes, 130 U. S. 653, 654, 32 L. Ed. 1060.

72. What is an action for enforcement

An action against sureties to recover on a bail bond conditioned for the appearance of the principal to answer to an indictment for making and forging checks against an assistant treasurer, is not a case for the enforcement of a revenue law, within the intent of the Revised Statutes, § 699.[73]

A suit upon an official bond is not an action for the enforcement of a revenue law of the United States, within the meaning of § 699 of the Revised Statutes, giving this court appellate jurisdiction without regard to the sum or value in dispute.[74]

An action by the United States, to recover the proceeds arising from sales of tobacco, which, found in the hands of the defendant, a bailee, was seized as forfeited for the nonpayment of the tax due thereon, and then left with him, under an agreement with the collector of internal revenue that he, the bailee, should sell it and hold the proceeds, subject to the decision of the proper court, is, within the meaning of § 699 of the Revised Statutes, an action to enforce a revenue law, and this court has jurisdiction to re-examine the judgment, without regard to the amount involved.[75]

Judgment Must Be Rendered in Federal Court.—The act of May 31st, 1844 (5 Stat. at Large 658), gives jurisdiction to this court in revenue cases, without regard to amount, only where the judgment is rendered in a circuit court of the United States. Therefore, where the case was brought from the court of appeals for the territory of Florida, and the amount in controversy did not exceed one thousand dollars, the case must be dismissed for want of jurisdiction.[76]

United States Must Be Plaintiff in Suit.—But the writ of error which is authorized by the act of May 31st, 1844 (5 Stat. 658), at the instance of either party, upon a final judgment in a circuit court in any civil action brought by the United States for the enforcement of the revenue laws, or for the collection of duties, due or alleged to be due, without regard to the sum or value in controversy, is authorized in those cases only in which the United States is plaintiff in

of revenue laws.—United States *v.* Hill, 123 U. S. 681, 686, 31 L. Ed. 275.

Section 844, Rev. Stat., requiring the clerk of a court of the United States to pay into the treasury any surplus of fees and emoluments which his return shows to exist over and above the compensation and allowances authorized by law to be retained by him, is not a revenue law within the meaning of that clause of § 699, Rev. Stat., which provides for a writ of error without regard to the sum or value in dispute, "upon any final judgment of a circuit court * * * in any civil action brought by the United States for the enforcement of any revenue law thereof." "Certainly it will not be claimed that the clerk of a district court of the United States is an 'officer of the revenue,' but there is nothing to indicate that the term revenue has any different signification in this subdivision of the section from that which it has in the other. The clerk of a court of the United States collects his taxable 'compensation,' not as the revenue of the United States, but as the fees and emoluments of his office, with an obligation on his part to account to the United States for all he gets over a certain sum which is fixed by law. This obligation does not grow out of any 'revenue law,' properly so called, but out of a statute governing an officer of a court of the United States." United States *v.* Hill, 123 U. S. 681, 686, 31 L. Ed. 275.

Revenue of postoffice department.—"Under the act of congress passed the 31st of May, 1844, 5 Stat. at Large, 658, directing that final judgments in a circuit court in any civil action brought by the United States for the enforcement of the revenue laws may be reviewed in this court without regard to the sum or value in controversy, this court can exercise jurisdiction. The revenue of the postoffice department is a part of the revenue of the government." United States *v.* Bromley, 12 How. 88, 13 L. Ed. 905.

73. United States *v.* Broadhead, 127 U. S. 212, 32 L. Ed. 147, following United States *v.* Hill, 123 U. S. 681, 31 L. Ed. 275.

74. United States *v.* Haynes, 130 U. S. 653, 32 L. Ed. 1060, citing United States *v.* Hill, 123 U. S. 681, 31 L. Ed. 275.

As early as United States *v.* McDowell, 4 Cranch 316, 2 L. Ed. 632, it was decided that in an action on an official bond given for the faithful performance of the duties of an office, our jurisdiction would depend on the amount due for the breach of the condition, and not on the penal sum. United States *v.* Hill, 123 U. S. 681, 683, 31 L. Ed. 275.

75. Pettigrew *v.* United States, 97 U. S. 385, 24 L. Ed. 1029.

76. Judgment must be rendered in federal court.—United States *v.* Carr, 8 How. 1, 12 L. Ed. 963.

the suit. The law cannot be extended to suits brought by the importer against the collector.[77]

c. *Cases Touching Patent Rights and Cases Involving Validity of Patents and Copyrights.*—Section 699 of the Revised Statutes provides that a writ of error or appeal may be allowed from any final judgment or decree of the circuit court, without regard to the sum or value in dispute, "in any case touching patent rights." This section substantially re-enacts the corresponding provision of the patent act of 1870, in which the words were "in any action, suit, controversy or case, at law or in equity, touching patent rights."[78] The general rule is that "where a suit is brought on a contract of which a patent is the subject matter, either to enforce such contract, or to annul it, the case arises on the contract, or out of the contract, and not under the patent laws."[79]

77. United States must be plaintiff in suit.—Mason *v.* Gamble, 21 How. 390, 16 L. Ed. 81.

78. Cases touching patent rights and cases involving validity of patents and copyrights.—Act of July 8, 1870, c. 230, § 56, 16 Stat. 207; St. Paul Plow Works *v.* Starling, 127 U. S. 376, 377, 32 L. Ed. 251. But see Durham *v.* Seymour, 161 U. S. 235, 239, 40 L. Ed. 682.

In Marsh *v.* Nichols, 140 U. S. 344, 356, 35 L. Ed. 413, which was a writ of error to a state court, this court, speaking through Mr. Chief Justice Fuller, said: "It has also been decided that an action in the circuit court by a patentee for breach of an agreement of the licensee to make and sell the patented article and to pay royalties, in which the validity and the infringement of the patent are controverted, is a case 'touching patent rights,' of which this court has appellate jurisdiction, under § 699 of the Revised Statutes, without regard to the sum or value in dispute. St. Paul Plow Works *v.* Starling, 127 U. S. 376, 32 L. Ed. 251. And attention was in that case called to the fact that the language applied to this subject in the patent act of 1836, under which the cases of Wilson *v.* Sandford, 10 How. 99, 13 L. Ed. 344, and Brown *v.* Shannon, 20 How. 55, 15 L. Ed. 826, were decided, was that used in that act in defining the jurisdiction of the circuit court in patent cases, namely, 'actions, suits, controversies and cases arising under any law of the United States granting or confirming to inventors the exclusive rights to their inventions or discoveries' (5 Stat. 124), while by the act of 1870, the words were, 'in an action, suit, controversy or case, at law or in equity, touching patent rights' (16 Stat. 207); and that this language was carried forward into the corresponding section of the Revised Statutes."

An action in the circuit court by a patentee for breach of an agreement of a licensee to make and sell the patented article and to pay royalties, in which the validity and the infringement of the patent are controverted, is a "case touching patent rights," of which this court has appellate jurisdiction, under § 699 of the Revised Statutes, without regard to the sum or value in dispute. St. Paul Plough Works *v.* Starling, 127 U. S. 376, 32 L. Ed. 251.

79. Dale Tile Mfg. Co. *v.* Hyatt, 125 U. S. 46, 31 L. Ed. 683; Wood Mowing Machine Co. *v.* Skinner, 139 U. S. 293, 35 L. Ed. 193; In re Ingalls, 139 U. S. 548, 35 L. Ed. 266; Marsh *v.* Nichols, 140 U. S. 344, 35 L. Ed. 413; Wade *v.* Lawder, 165 U. S. 624, 627, 41 L. Ed. 851.

Suit to enforce or set aside contract for use of patent right.—It has been decided that a bill in equity in the circuit court of the United States by the owner of letters patent, to enforce a contract for the use of the patent right, or to set aside such a contract because the defendant has not complied with its terms, is not within the acts of congress, by which an appeal to this court is allowable in cases arising under the patent laws, without regard to the value of the matter in controversy. Act of July 4, 1836, c. 357, § 17, 5 Stat. 124; Rev. Stat., § 699; Wilson *v.* Sandford, 10 How. 99, 13 L. Ed. 344; Brown *v.* Shannon, 20 How. 55, 15 L. Ed. 826. Dale Tile Mfg. Co. *v.* Hyatt, 125 U. S. 46, 52, 31 L. Ed. 683.

Where the action was brought upon a contract in writing between the parties, being the joint owners of a patent for an improved rope reel, by which it was agreed that the defendant should have the exclusive control of the manufacture and sale of the reel, paying to the plaintiff a certain royalty on each reel sold, this was not a case arising under the patent laws of the United States, within the exclusive jurisdiction of the federal courts. Dale Tile Mfg. Co. *v.* Hyatt, 125 U. S. 46, 31 L. Ed. 683; Felix *v.* Scharnweber, 125 U. S. 54, 58, 31 L. Ed. 687.

The complaint that an assessment of taxes is illegal because in effect levied on patents or patent rights, does not involve the construction, or the validity, or the infringement of patents, or any other question under the patent laws, and is therefore not a suit "arising under the patent laws." Holt *v.* Indiana Mfg. Co., 176 U. S. 68, 44 L. Ed. 374, reaffirmed in Western *v.* Tierney, 184 U. S. 695, 46 L. Ed. 763; Douglas Co. *v.* Stone, 191 U. S.

The right given by the acts of February 18th, 1861, and July 20th, 1870, of appeal or writ of error without regard to the sum in controversy in questions arising under laws of the United States, granting or conferring to authors or inventors the exclusive right to their inventions or discoveries, applies to controversies between a patentee or author and alleged infringer as well as to those between rival patentees.[80]

From District of Columbia and the Territories.—And it is provided by § 8 of the act of February 9, 1893, c. 74, establishing a court of appeals for the District of Columbia, that a case may be brought to this court without regard to the sum or value in dispute, in which there is "involved the validity of any patent or copyright." The patent referred to in § 2 of the act of March 3, 1885, c. 355, 23 Stat. 443, allowing appeals to this court from the supreme courts of the territory and from the supreme court of the District of Columbia regardless of the value of the matter in dispute, where the validity of a patent or copyright is involved or the validity of a treaty or a statute, or an authority exercised under the United States is drawn in question, is a patent for an invention or discovery, and not a patent for land.[81] A writ of error will not lie from this court to review a decision of the court of appeals of the District of Columbia, denying a writ of mandamus to the commissioner of patents to register a trademark without regard to the sum or value in dispute, on the ground that there is involved the validity of any patent or copyright.[82]

d. *Suits for Infringement of Trademarks.*—The act of 1881 confers upon the courts of the United States, in general terms, jurisdiction, original and appellate, over suits for infringement of a trademark, without regard to the amount in controversy.[83]

e. *Cases in Which the Validity of a Treaty or a Statute of, or an Authority Exercised under the United States Is Drawn in Question.*—**In General.**—The

557, 48 L. Ed. 301; Weston *v.* Tierney, 184 U. S. 695, 46 L. Ed. 763.

Suit to set aside assignment.—The seventeenth section of the act of 1836 gives the right of appeal to this court, when the sum in dispute is below the value of two thousand dollars, "in all actions, suits, controversies on cases arising under any law of the United States, granting or confirming to inventors the exclusive right to their inventions or discoveries," provided the court below shall deem it reasonable to allow the appeal. But a bill filed on the equity side of the circuit court to set aside an assignment, upon the ground that the assignee had not complied with the terms of the contract, is not one of these enumerated cases; and the value in dispute being less than two thousand dollars, this court has no jurisdiction over the case. "The dispute in this case does not arise under an act of congress; nor does the decision depend upon the construction of any law in relation to patents. It arises out of the contract stated in the bill; and there is no act of congress providing for or regulating contracts of this kind. The rights of the parties depend altogether upon common law and equity principles." Wilson *v.* Sanford, 10 How. 99, 13 L. Ed. 344.

Where a bill is filed to enforce the specific execution of a contract in relation to the use of a patent right, this court has no appellate jurisdiction, unless the matter in controversy exceeds two thousand dollars. The jurisdiction, where the bill is founded upon a contract, differs materially from the jurisdiction on a bill to prevent the infringement of the monopoly of the patentee, or of those claiming under him by legal assignments, and to protect them in their rights to the exclusive use. Brown *v.* Shannon, 20 How. 55, 15 L. Ed. 826.

While this court can exercise no appellate power in a case arising under contracts like those exhibited, unless the amount or value of the matter in controversy exceeds two thousand dollars, it may yet lawfully exercise its appellate jurisdiction when a far less amount is in dispute, it the party is proceeding either at law or in equity for the infringement of a patent right to which he claims to be entitled. Brown *v.* Shannon, 20 How. 55, 56, 15 L. Ed. 826.

80. Philip *v.* Nock, 13 Wall. 185, 20 L. Ed. 567.

81. Street *v.* Ferry, 119 U. S. 385, 30 L. Ed. 439.

82. South Carolina *v.* Seymour, 153 U. S. 353, 38 L. Ed. 742.

83. **Suits for infringement of trademarks.**—In re Keasbey, etc., Co., 160 U. S. 221, 230, 40 L. Ed. 402.

second section of the act of March 3, 1885, 23 Stat. 443, c. 355, provides that the appellate jurisdiction of this court over cases from the territorial courts shall not be determined by the amount in dispute, if the validity of a treaty or a statute of, or an authority exercised under, the United States, is drawn in question, but that in such cases an appeal or writ of error may be brought without regard to the sum or value in dispute.[84] So, also, this court has jurisdiction to entertain an appeal or writ of error to the supreme court of the District of Columbia or the court of appeals of the District, regardless of the sum or value in dispute, where "the validity of a treaty or a statute of or an authority exercised under the United States" is drawn in question in the case.[85]

Necessity for Adverse Decision.—The second section of the act of congress of March 3, 1885, 23 Stat. 443, c. 355, allows an appeal or writ of error from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, or in the supreme court of any of the territories in the United States, without regard to the sum or value in dispute where there is involved the validity of any patent or copyright, or where there is drawn in question the validity of a treaty or statute of or an authority exercised under the United States. "It will be observed that this second section of the statute, while

84. Cases in which the validity of a treaty or a statute of, or an authority exercised under the United States is drawn in question.—Smith *v.* Adams, 130 U. S. 167, 175, 32 L. Ed. 895.

This court has jurisdiction to entertain an appeal from the decision of the supreme court of the territory irrespective of the amount in controversy, where there is drawn in question the authority of the territorial government to make an appointment to the office of auditor of public accounts, under the act of March 3, 1885, 23 Stat. 433, giving this court jurisdiction over the supreme court of the District of Columbia, or over the supreme court of any of the territories regardless of the amount, where there is drawn in question the validity of a treaty or a statute or an authority exercised under the United States. Clayton *v.* Utah, 132 U. S. 632, 33 L. Ed. 455, affirmed in Jack *v.* Utah, 132 U. S. 643, 33 L. Ed. 459.

85. United States *v.* Lynch, 137 U. S. 280, 281, 34 L. Ed. 700, citing 23 Stat. 443, c. 355; South Carolina *v.* Seymour, 153 U. S. 353, 357, 38 L. Ed. 742.

Under the act of congress of March 3, 1885 (23 Stat. 443), no appeal or writ of error can be allowed from any judgment or decree in any suit at law or in equity in the supreme court of the District of Columbia, unless the matter in dispute exclusive of costs shall exceed the sum of five thousand dollars, or unless the validity of a patent or copyright is involved in the suit, or the validity of a treaty or statute of, or an authority exercised under, the United States, is drawn in question therein. Under this statute, the court refused to instruct at the trial of an action against the District of Columbia to recover for injuries received on its sidewalks that the District of Columbia is not liable for damages resulting from such accident that if the care of the streets of the city of Washington as a public duty is imposed by the statutes upon the district of Columbia, the performance of which is for the general benefit, and the district derives no profit from it, then no action can be maintained for damages resulting from a neglect to perform public duty, it was held, that the validity of an authority exercised under the United States was not drawn in question, so as to give this court jurisdiction over the supreme court of the District of Columbia regardless of the amount in dispute. District of Columbia *v.* Gannon, 130 U. S. 227, 32 L. Ed. 922, following Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 32 L. Ed. 908.

Oregon territory.—By the act of congress organizing the inhabitants of Oregon territory into a government, it was provided that writs of error and appeals from final decisions of the supreme court of Oregon shall be allowed to the supreme court of the United States where the constitution of the United States, or an act of congress, or a treaty of the United States was brought in question. Lownsdale *v.* Parrish, 21 How. 290, 16 L. Ed. 80.

Congress passed no law in any wise affecting title to lands in the territory of Oregon until September, 1850; and therefore where a controversy arose, in July, 1850, relating to titles to land, neither party could be said to have a legal title. "Neither the constitution of the United States, nor an act of congress, or a treaty, was 'brought in question' in the lower court; neither side could have legitimately raised such a question, and called for its decision; and to give this court jurisdiction of the case, in this instance, the question must have been raised and decided in the lower courts, and it must so appear on the record." Lownsdale *v* Parrish, 21 How. 290, 294, 16 L. Ed. 80.

it is based upon the general principle which is found in the act of congress allowing writs of error from this court to the highest courts of a state, namely, to protect parties against the exercise of an unlawful power on the part of the state authorities, does not use the language which is found in that act, that to give this court jurisdiction, the decision of the state court must be against the right or power set up by the party under the laws of the United States. On the contrary, this peculiar feature of the appellate jurisdiction of this court over that of the state courts is left out when the matter comes to be applied to the territories, and it is held sufficient that there should be drawn 'in question the validity of a treaty or statute of or an authority exercised under the United States;' and it is not required that the decision of the state court should be against the validity of the treaty, statute or authority so exercised or claimed."[86]

When Is Validity of Statute Drawn in Question.—Whenever the power to enact a statute as it is by its terms, or is made to read by construction, is fairly open to denial and denied, the validity of such statute is drawn in question, but not otherwise.[87]

86. Clayton *v.* Utah, 132 U. S. 632, 637, 33 L. Ed. 455, affirmed in Jack *v.* Utah, 132 U. S. 643, 33 L. Ed. 459.

The act of congress entitled "An act regulating appeals from the supreme court of the District of Columbia, and the supreme courts of the several territories," approved March 3, 1885, 23 Stat. 443, c. 355, provides: "That no appeal or writ of error shall hereafter be allowed from any judgment, or decree in any suit at law or in equity in the supreme court of the District of Columbia, or in the supreme court of any of the territories of the United States, unless the matter in dispute, exclusive of costs, shall exceed the sum of five thousand dollars. Section 2. That the preceding section shall not apply to any case wherein is involved the validity of any patent or copyright, or in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States; but in all such cases an appeal or writ of error may be brought without regard to the sum or value in dispute." When the validity of a statute of, or authority exercised under, the United States, is drawn in question in a state court, the decision of the latter must be against its validity in order to justify a review of such decision, but under this act it is sufficient if the validity is drawn in question irrespective of the conclusion reached. So that the inquiry is confined to whether the validity of such a statute or authority is actually controverted. Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 222, 32 L. Ed. 908, 912, followed in District of Columbia *v.* Gannon, 130 U. S. 227, 32 L. Ed. 922.

87. Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 224, 32 L. Ed. 908, 912, followed in District of Columbia *v.* Gannon, 130 U. S. 227, 32 L. Ed. 922; Cook County *v.* Calumet, etc., Co., 138 U. S. 635, 653, 34 L. Ed. 1110; Miller *v.* Cornwall R. Co., 168 U. S. 131, 133, 42 L. Ed. 409, reaffirmed in Charleston, etc., Bridge Co. *v.* West Virginia, 168 U. S. 704, 42 L. Ed. 1212.

That part of original § 25, and of the act of 1867, as to decisions in favor of the validity of a statute of, or of an authority exercised under, any state, when drawn in question on the ground of their being repugnant to the constitution, treaties, or laws of the United States, has been frequently passed upon, and the distinction between the construction of a statute, or the extent of an authority, and the validity of a statute, or of an authority, pointed out. Thus in Commercial Bank *v.* Buckingham, 5 How. 317, 12 L. Ed. 169, where a general law had declared all banks liable to pay six per cent. interest on their notes, when they had refused payment on demand, and a subsequent act, incorporating the bank in question, provided for the payment of twelve per cent., and the question was whether the bank was liable to pay eighteen, this court held that the question submitted to and decided by the state court was one of construction and not of validity. There both the prior and subsequent statutes were admitted to be valid under any construction of them, "and therefore no construction placed by the state court on either of them, could draw in question its validity, as being repugnant to the constitution of the United States, or any act of congress." Bridge Proprietors *v.* Hoboken, etc., Co., 1 Wall. 116, 144, 17 L. Ed. 571; Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 223, 32 L. Ed. 908, 912, followed in District of Columbia *v.* Gannon, 130 U. S. 227, 32 L. Ed. 922.

"Validity of authority exercised under United States."—In Millingar *v.* Hartupee, 6 Wall. 258, 261, 262, 18 L. Ed. 829, it was held, that the word "authority" stands upon the same footing with "treaty" or "statute;" and said the court, through Chief Justice Chase: "Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended

Mere Construction.—In order to come within this clause, the validity, and not the construction only, of a treaty or statute of the United States, or of an au-

by the act is one having a real existence, derived from competent governmental power. If a different construction had been intended, congress would doubtless have used fitting words. The act would have given jurisdiction in cases of decisions against claims of authority under the United States." "In many cases the question of the existence of an authority is so closely connected with the question of its validity that the court will not undertake to separate them, and in such cases the question of jurisdiction will not be considered apart from the question upon the merits, or except upon hearing in regular order. But where, as in this case, the single question is not of the validity but of the existence of an authority, and we are fully satisfied that there was, and could have been, no decision in the state court against any authority under the United States existing in fact, this court has no jurisdiction." Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 224, 32 L. Ed. 912, followed in District of Columbia *v.* Gannon, 130 U. S. 227, 32 L. Ed. 922.

Dismissal of civil service clerk.—No writ of error will lie from this court to review the judgment of a court of appeals of the District of Columbia, affirming the decision of the supreme court of the district, denying a petition for mandamus to compel the secretary of war to restore a clerk in the classified civil service of the United States, who had been dismissed from the service for making very serious reflections upon the president of the United States in a designated newspaper article, on the ground that the validity of an authority exercised under the United States is drawn in question, because the relator does not question the authority of the president or his representative to dismiss him, if the required formalities had been complied with, but simply claims that there were certain rules and regulations of the civil service which were not observed in the matter on dismissal, and that therefore dismissal was illegal. Taylor *v.* Taft, 203 U. S. 461, 51 L. Ed. 269, citing South Carolina *v.* Seymour, 153 U. S. 353, 38 L. Ed. 742; United States *v.* Lynch, 137 U. S. 280, 34 L. Ed. 700, and distinguishing Steinmetz *v.* Allen, 192 U. S. 543, 48 L. Ed. 555.

An injunction restraining a person from prosecuting an ordinary suit in replevin in a court established under the authority of the United States, does not necessarily involve a question of "the validity of a treaty or statute of or an authority exercised under the United States." In re Craft, 124 U. S. 370, 373, 31 L. Ed. 449.

"Exercise of authority under United States."—In an action against the Baltimore and Potomac Railroad Company to recover for injuries suffered by an unlawful use of the streets of Washington by the company, the judgment being for less than the jurisdictional amount necessary to sustain a writ of error, this court will not acquire jurisdiction by reason of a charge to the jury which instructs them that certain uses of those streets were warranted by statutes of the United States, and that certain other uses were not authorized by them, because this does not involve the exercise of an authority under the United States. Semble, that that company is not authorized to occupy the public streets of Washington for the purposes of a freight yard as such. Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 32 L. Ed. 908, 912, followed in District of Columbia *v.* Gannon, 130 U. S. 227, 32 L. Ed. 922.

Jurisdiction of District Justices.—A writ of error will lie from this court to the court of appeals of the District of Columbia under the act of February 9, 1893, c. 74, § 8, 27 Stat. 436, to review its determination upon the serious and important question of the validity, as well as the interpretation and effect, of the legislation of congress conferring upon justices of the peace, in the District of Columbia, jurisdiction in civil actions in which the matter in dispute exceeds twenty dollars in value, and providing for a trial by a jury before the justice of the peace, an appeal from his judgment to the supreme court of the District of Columbia, and a trial by jury, at the request of either party, in the appellate court. Capital Traction Co. *v.* Hof, 174 U. S. 1, 4, 43 L. Ed. 873, citing Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 224, 32 L. Ed. 912; Parsons *v.* District of Columbia, 170 U. S. 45, 42 L. Ed. 943.

Constitutionality of assessment laws.—Where the questions raised in the court of appeals of the District of Columbia were three: "1st, whether the act of the legislative assembly of the District of Columbia, approved June 23, 1873, in reference to the construction of water mains, and providing the mode of assessment therefor, and also the act of congress of August 11, 1894, 'to regulate water main assessments in the District of Columbia,' are constitutional and valid enactments; 2d, whether in the assessment there was a sufficient description of the appellant's property; 3d, whether there was sufficient notice of the assessment given to the appellants," those questions are clearly within the terms of the statute authorizing this court to review the final judgments or decrees of the court of appeals, without regard to the sum or value of the matter in dispute, where the judgment of the court below involved the

thority exercised under the United States, must be directly drawn in question.[88] It has been held, upon writ of error to the supreme court of the District of Columbia, that the words of the act of March 3, 1885, 23 Stat. 443, c. 355—"the validity of a statute of, or authority exercised under the United States"—do not embrace a case which depends only on a judicial construction of an act of congress, there being no denial of the power of congress to pass the act, or of the right to enjoy whatever privileges are granted by it.[89] A writ of error will not lie to this court to review a judgment of the supreme court of the District of Columbia denying a writ of mandamus to the commissioner of patents to register a trademark, without regard to the sum or value in dispute, on the ground that there is drawn in question the validity of a treaty or statute of or an authority exercised under the United States. In order to come within this clause, the validity, and not the construction only, of a treaty or statute of the United States, or of an authority exercised under the

validity of a statute of the United States or of an authority exercised under the United States. Parsons *v.* District of Columbia, 170 U. S. 45, 50, 42 L. Ed. 943.

Validity of rule of commissioner of patents.—Where the validity of a rule of practice established by the commissioner of patents as authorized by § 483 of the Revised Statutes, is assailed in the court of appeals of the District of Columbia, the supreme court has jurisdiction to review the judgment in the court of appeals by virtue of the act of Feb. 9, 1893, which gives an appeal to the supreme court from final judgments or decrees of the court of appeals in cases in which there is drawn in question the validity of "an authority exercised under the United States." Steinmetz *v.* Allen, 192 U. S. 543, 556, 48 L. Ed. 555.

88. South Carolina *v.* Seymour, 153 U. S. 353, 358, 38 L. Ed. 742; Taylor *v.* Taft, 203 U. S. 461, 51 L. Ed. 269; United States *v.* Ware, 189 U. S. 507, 47 L. Ed. 922; The Columbian Correspondence College *v.* Cortelyou, 200 U. S. 615, 50 L. Ed. 621.

In Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 226, 32 L. Ed. 908, 912, the question in controversy was whether a railroad corporation, authorized by acts of congress to establish freight stations, and to lay as many tracks as "its president and board of directors might deem necessary" in the District of Columbia, had the right to occupy a public street for the purposes of a freight yard. It was argued that the validity of an authority, exercised under the United States, to so occupy the public streets, was drawn in question; but this court held otherwise, and said: "The validity of the statutes and the validity of authority exercised under them, are, in this instance, one and the same thing; and the 'validity of a statute,' as these words are used in this act of congress, refers to the powers of congress to pass the particular statute at all, and not to mere judicial construction as contradistinguished from a denial of the legislative power." Linford *v.* Ellison, 155 U. S. 503, 508, 39 L. Ed. 239.

This court has no jurisdiction without regard to the sum or value in dispute to review the judgment of a territorial supreme court against the tax collector of a municipal corporation for the value of the property levied on by him for unpaid municipal taxes, in a less amount than $5,000, rendered on the ground that a municipal corporation, which is a small village but has extensive limits, cannot tax farming lands for municipal purposes lying within the corporate limits, but outside of the platted portion of the city, and so far removed from the settled portion thereof that the owner would derive no benefits from the municipal government, because the decision of the supreme court of the territory only involves the construction of the organic law and the scope of the authority to legislate conferred upon the territorial legislature; and the validity of that authority and of the statute is not drawn in question. Linford *v.* Ellison, 155 U. S. 503, 39 L. Ed. 239, citing United States *v.* Lynch, 137 U. S. 280, 34 L. Ed. 700; Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 32 L. Ed. 908, 912; South Carolina *v.* Seymour, 153 U. S. 353, 38 L. Ed. 742, Mr. Justice Harlan dissenting.

Unanimous verdicts of juries.—A decision by the supreme court of a territory that the act of congress vested in the territorial legislature such unlimited legislative power as enabled it to provide that unanimity of action on the part of jurors in civil cases was not necessary to a valid verdict, and that the act was not in violation of the seventh amendment to the constitution of the United States, involves not merely a matter of construction of the territorial act, but the validity of the act was drawn in question, and hence may be reviewed by this court regardless of the amount, because the validity of an act of congress was drawn in question. Salt Lake City *v.* Tucker, 166 U. S. 707, 41 L. Ed. 1172.

89. Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 32 L. Ed. 912.

United States, must be directly drawn in question.[90]

An inquiry as to the jurisdiction, original and appellate, of the territorial court, draws in question the validity of an authority exercised under the United States within the meaning of § 2, of the act of March 3, 1885, authorizing this court, without regard to the sum or value in dispute, to review the judgment or decree of the supreme court of a territory, in any case in which is drawn in question the validity of an authority exercised under the United States.[91]

Must Be Drawn in Question Directly.—In order to give jurisdiction to this court under the statute allowing an appeal or writ of error to this court regardless of amount, where "the validity of an authority exercised under the United States is drawn in question in the case," the validity of the authority must have been drawn in question directly and not incidentally. The validity of a statute is not drawn in question every time rights claimed under such statute are controverted, nor is the validity of an authority, every time an act done by such authority is disputed. The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry."[92]

90. South Carolina *v.* Seymour, 153 U. S. 353, 38 L. Ed. 742.

In Snow *v.* United States, 118 U. S. 346, 353, 30 L. Ed. 207, in which it was contended that a court established by act of congress, and admitted to have a lawful existence, and jurisdiction of the case, misconstrued the act and went beyond the authority which it conferred, it was held, that all that was drawn in question was whether there was or was not error in the administration of the statute, and not "the validity of an authority exercised under the United States," within the meaning of the act of March 3, 1885, c. 355.

In Baltimore, etc., R. Co. *v.* Hopkins, 130 U. S. 210, 32 L. Ed. 908, which also arose under the act of March 3, 1885, c. 355, the question in controversy was whether a railroad corporation authorized by acts of congress to establish freight stations, and to lay as many tracts "as its president and board of directors might deem necessary," in the District of Columbia, had the right to occupy a public street for the purposes of a freight yard. It was argued that the validity of an authority, exercised under the United States, to so occupy the public streets was drawn in question. But this court held, that only the construction of the acts of congress, and the extent of the authority claimed under them, and not the validity, either of the statutes, or of the authority, was drawn in question; or, in other words, it was "a case which depends only on a judicial construction of an act of congress, there being no denial of the power of congress to pass the act, or of the right to enjoy whatever privileges are granted by it." Clough *v.* Curtis, 134 U. S. 361, 370, 33 L. Ed. 945.

In District of Columbia *v.* Gannon, 130 U. S. 227, 32 L. Ed. 922, it was held, that the validity of the authority of the commissioners of the district was not drawn in question by contesting the liability of the district in damages for the negligence of the commissioners in failing to keep the streets in repair.

91. Clough *v.* Curtis, 134 U. S. 361, 369, 33 L. Ed. 945, citing Clayton *v.* Utah, 132 U. S. 632, 33 L. Ed. 455.

92. United States *v.* Lynch, 137 U. S. 280, 285, 34 L. Ed. 700; Cook County *v.* Calumet, etc., Co., 138 U. S. 635, 34 L. Ed. 1110; McLean *v.* Denver, etc., R. Co., 203 U. S. 38, 47, 51 L. Ed. 78; Linford *v.* Ellison, 155 U. S. 503, 508, 39 L. Ed. 239.

In Clayton *v.* Utah, 132 U. S. 632, 33 L. Ed. 455, the power vested in the governor of the territory of Utah by the organic act, to appoint an auditor of public accounts, was drawn in question; and in Clough *v.* Curtis, 134 U. S. 361, 369, 33 L. Ed. 945, the lawful existence, as the legislative assembly of the territory of Idaho, of a body of persons claiming to exercise as such the legislative power conferred by congress, was controverted. In Neilson *v.* Lagow, 7 How. 772, 775, 12 L. Ed. 399, and Neilson *v.* Lagow, 12 How. 98, 13 L. Ed. 46, the plaintiff in error claimed the land in dispute through an authority exercised by the secretary of the treasury, and the state court decided against its validity. The existence or validity of the authority was primarily involved in these cases.

In United States *v.* Lynch, 137 U. S. 280, 34 L. Ed. 700, in which the court below had denied a writ of mandamus to compel accounting officers of the treasury to allow a claim for mileage, it was contended that under the acts of congress, and the construction given them by a previous decision of this court, the duty of the accounting officers "was merely

Since the right to legislate in the territories is conferred, under constitutional authority, by the congress of the United States, the passage of a territorial law is the exertion of an authority exercised under the United States within the meaning of this statute. Therefore, this court has jurisdiction where it is contended that a territorial act passed in pursuance of the authority given by the United States to the territorial legislature, violates the territorial constitution, and is therefore invalid.[93]

Taxation.—The question whether a territory has authority under its organic act to extend its taxing power beyond its limits and over a reservation created by act of congress so as to authorize it to tax a railroad which has been granted by congress a right of way over an Indian reservation within the territory, may be brought to this court without regard to the value of the matter in dispute, because "there is drawn in question the validity of a treaty or statute of or an authority exercised under the United States."[94] On the other hand, it is clear that such issues as involve the regularity of the tax, the sum of the penalties due, the extent of the lien given by the territorial law, etc., do not present any question of the exercise of authority under laws of the United States.[95]

Validity of Authority Exercised by United States.—A proceeding by the United States to compel the defendant to abate a wire fence, by which he was alleged to have inclosed a large tract of public lands, belonging to the United States, and subject to entry as agricultural lands, in violation of the act of February 25, 1885, 23 Stat. 321, c. 149, to prevent the unlawful occupancy of public lands, cannot be brought to this court under § 2 of the act of March 3, 1885 providing that the limit of $5,000 will not apply to any case in which is drawn in question the validity of a statute of or an authority exercised under the United States.[96] "Nor can our jurisdiction be sustained under the second section of the act of March 3, 1885, providing that the limit of $5,000 shall not apply to any case in which is drawn in question the validity of a, * * * statute of or an authority

ministerial, and that by the disallowance of the relator's claim for mileage, these officers exercised a discretion which they did not possess; that this was an invalid exercise of an authority under the United States; and that hence the validity of the authority was drawn in question." To which this court, speaking by the chief justice, answered: "In order to justify this position, however, the validity of the authority must have been drawn in question directly and not incidentally. The validity of a statute is not drawn in question every time rights claimed under such statute are controverted; nor is the validity of an authority, every time an act done by such authority is disputed. The validity of a statute or the validity of an authority is drawn in question when the existence, or constitutionality, or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry." The court accordingly held that the authority of the accounting officers of the treasury was not thus denied, nor the validity of that authority questioned; but that it was only contended that in the exercise of a valid authority those officers erred in respect to the allowance, in view of the decision of this court in another case; that if the judgment should be reversed upon the ground urged, it would not be for want of power in these officers to audit and pass upon the account, but because they had disallowed what they ought to have allowed, and erroneously construed what needed no construction; and that this would not in any degree involve the validity of their authority.

93. McLean *v.* Denver, etc., R. Co., 203 U. S. 38, 48, 51 L. Ed. 78: "In other words, the validity of an authority exercised under the United States in the passage and enforcement of this law is directly challenged, and the case does involve the validity of an authority exercised under the power derived from the United States. It is not a case merely involving the construction of a legislative act of the territory, as was the fact in Snow *v.* United States, 118 U. S. 346, 30 L. Ed. 207. The power to pass the act at all, in view of the requirements of the constitution of the United States, is the subject matter in controversy, and brings the case in this aspect within the second section of the act."

94. Maricopa, etc., R. Co. *v.* Arizona, 156 U. S. 347, 39 L. Ed. 447, citing Clayton *v.* Utah, 132 U. S. 632, 33 L. Ed. 455, and distinguishing Linford *v.* Ellison, 155 U. S. 503, 39 L. Ed. 239.

95. Linford *v.* Ellison, 155 U. S. 503, 39 L. Ed. 239; Maricopa, etc., R. Co. *v.* Arizona, 156 U. S. 347, 351, 39 L. Ed. 447.

96. Cameron *v.* United States, 146 U. S. 533, 36 L. Ed. 1077.

exercised under the United States; since this refers to an authority exercised or claimed in favor of one of the parties to the cause, the validity of which was put in issue on the trial of the case, and not to the validity of an authority exercised by the United States in removing the fence pursuant to the judgment of the court. If the latter were the true construction, then every case in which the court issued an injunction or an execution might be said to involve the validity of a statute, or an authority exercised, under the United States, since it is by virtue of such authority that the marshal executes the writ. No question is raised here as to the validity of a statute, but merely as to the application of the statute to this case."[97]

f. *Deprivation of Constitutional Rights and Immunities.*—Under subdivision 4 of § 699 of the Revised Statutes, an appeal or writ of error will lie, without regard to the sum or value in dispute, from any final judgment at law or final decree in equity of any circuit court, or of any district court acting as a circuit court, in any case brought on account of the deprivation of any right, privilege, or immunity secured by the constitution of the United States, or of any right or privilege of a citizen of the United States.[98] Except in certain cases, the mere fact that the matter in dispute arises under the constitution or laws of the United States, or treaties made, does not give us jurisdiction for review of the judgments or decrees of the circuit or district courts. If the value of the matter in dispute, exclusive of costs, does not, in such a case as this, exceed $5,000, we connot consider it any more than others in which the amount in value is less than our jurisdictional limit.[99]

g. *Action for Dower.*—The action of dower is not exempt from, nor excepted out of, the act fixing the jurisdictional amount necessary for an appeal.[1]

97. Cameron *v.* United States, 146 U. S. 533, 536, 36 L. Ed. 1077.

98. **Deprivation of constitutional rights and immunities.**—This court cannot review the action of the court below in refusing plaintiffs in error a separate trial, and in consolidating them under § 921 of the Revised Statutes, unless the value of the matter in dispute is sufficient to give this court jurisdiction; nor under subdivision 4 of § 699 of the Revised Statutes, "because this judgment was not rendered in a 'case brought on account of the deprivation of any right, privilege or immunity secured by the constitution of the United States, or of any right or privilege of a citizen of the United States.' Cogswell *v.* Fordyce, 128 U. S. 391, 32 L. Ed. 484." Hanover Fire Ins. Co. *v.* Kinneard, 129 U. S. 176, 177, 32 L. Ed. 653.

A suit involving the duty of a carrier of goods for hire to carry whenever he is asked to do so, growing out of the duty which in law the common carrier owes to the public at large, is no more secured by the constitution than any other of the ordinary transactions of business. Accordingly the case does not fall within the fourth subdivision of the Revised Statutes which gives this court jurisdiction, "without regard to the sum or value in dispute," for the review of "any final judgment at law or final decree in equity of any circuit court, or of any district court acting as a circuit court, in any case brought on account of the deprivation of any right, privilege, or immunity secured by the constitution of the United States, or of any right or privilege of a citizen of the United States." Bowman *v.* Chicago, etc., R. Co., 115 U. S. 611, 29 L. Ed. 502.

An action upon a bond given to supersede a judgment or decree of a court of the United States, cannot properly be said to be brought on account of the deprivation of any right, privilege, or immunity secured by the constitution of the United States, so as to give this court jurisdiction. "Under the fourth subdivision of § 699 of the Revised Statutes, providing that this court may, without regard to the sum or value in dispute, review any final judgment at law or final decree in equity of any circuit court or of any district court acting as a circuit court, 'in any case brought on account of the deprivation of any right, privilege, or immunity secured by the constitution of the United States, or of any right or privilege of a citizen of the United States.'" "The mere failure or refusal of the obligors in such a bond to comply with its terms is not, within the meaning of the statute referred to, a 'deprivation' of a right secured to the obligee by the constitution of the United States, or of any right or privilege belonging to him, as a citizen of the United States." Cogswell *v.* Fordyce, 128 U. S. 391, 392, 32 L. Ed. 484, citing Bowman *v.* Chicago, etc., R. Co., 115 U. S. 611, 29 L. Ed. 502.

99. Adams *v.* Crittenden, 106 U. S. 576, 577, 27 L. Ed. 99.

1. **Action for dower.**—Clay *v.* Field, 138 U. S. 464, 479, 34 L. Ed. 1044.

h. *Cases of Violation of or Departure from Mandate.*—An appeal will not lie from a decree, simply upon the ground that it is in violation of or a departure from a mandate of this court, without reference to the value of the matter in dispute. While compliance with the mandate of this court, which leaves nothing to the judgment or discretion of the court below, and simply requires the execution of our decree, may be enforced by mandamus, without regard to the value of the matter in dispute, we cannot entertain an appeal, if the value of the matter in dispute upon such appeal is less than $5,000.[2]

i. *Cases Certified from Circuit Courts.*—Prior to the Court of appeals act, it was held that the jurisdiction of this court on a certificate of division of opinion between the judges of the circuit court is not dependent on the value or the amount in controversy.[3]

j. *Suits against United States.*—Under the act of March 3, 1887, entitled "An act to provide for the bringing of suits against the government of the United States," an appeal will lie to this court from a district court, without regard to the amount in controversy.[4]

k. *Cases from Territory of Florida.*—It has been held, repeatedly, that a writ of error will lie to revise the judgments of the circuit and district courts, in the peculiar class of cases described and provided for in § 8 of the act of congress passed 22d of February, 1847, entitled "An act to regulate the exercise of the appellate jurisdiction of the supreme court in certain cases," without reference to the amount in controversy. This act provides amongst other things for the transfer of the records of the proceedings, including the judgments and decrees of all cases not appropriately belonging to state jurisdiction, pending in the superior court or court of appeals in the territory of Florida at the date of her admission into the Union, into the district court of the United States for the state of Florida.[5]

l. *Review of Orders Remanding Causes Removed from State Courts.*—A writ of error would lie to this court under the act of March 3, 1875, c. 137, 18 Stat., pt. 3, p. 470, to review an order of the circuit court remanding an action at law removed thereto from a state court, without regard to the pecuniary value of the matter in dispute. But, as we shall see later, this court can no longer review such orders.[6]

2. Cases of violation of or departure from mandate.—City Bank *v.* Hunter, 152 U. S. 512, 38 L. Ed. 534, citing Nashua, etc., Railroad *v.* Boston, etc., Railroad, 5 U. S. App. 97, and distinguishing Perkins *v.* Fourniquet, 14 How. 328, 14 L. Ed. 441.

3. Cases certified from circuit courts.—Weeth *v.* New England Mortgage Co., 106 U. S. 605, 27 L. Ed. 99. See post, "Certificate of Division of Opinion, V."

On the trial of an action at law, when the judges of the circuit court are opposed in opinion on a material question of law, the opinion of the presiding judge prevails; but the judgment rendered conformably thereto may, without regard to its amount, be reviewed on a writ of error, upon their certificate stating such question. Dow *v.* Johnson, 100 U. S. 158, 25 L. Ed. 632. Mr. Justice Swayne, Mr. Justice Clifford, and Mr. Justice Miller dissenting.

4. Suits against United States.—United States *v.* Davis, 131 U. S. 36, 33 L. Ed. 93; United States *v.* Mosby, 133 U. S. 273, 33 L. Ed. 625.

5. Cases from territory of Florida.—Forsythe *v.* United States, 9 How. 571, 13 L. Ed. 262, reaffirmed in Simpson *v.* United States, 9 How. 578, 13 L. Ed. 265; Cotton *v.* United States, 9 How. 579, 13 L. Ed. 265.

6. Review of orders remanding causes removed from state courts.—Babbitt *v.* Clark, 103 U. S. 606, 26 L. Ed. 507; Richmond, etc., R. Co. *v.* Thouron, 134 U. S. 46, 33 L. Ed. 891.

"Final judgments and decrees in the circuit courts in civil actions cannot ordinarily be brought here for review unless the value of the matter in dispute exceeds $5,000 (Rev. Stat., §§ 691, 692; 18 Stat. 315, c. 77, § 3); but an order of the circuit court remanding a removed suit to the state court is in no just sense a final judgment or decree in the action. It simply fixes the court in which the parties shall go on with their litigation. Under the old law there was no pecuniary limit to our jurisdiction to proceed in this class of cases by mandamus, and we think it was the intention of congress to substitute appeals and writs of error for that mode of proceeding." Babbitt *v.* Clark, 103 U. S. 606, 610, 26 L. Ed. 507.

m. *Cases Involving Jurisdiction of Circuit Courts.*—**In General.**—The act of February 25, 1889, 25 Stat. 693, c. 236, provides that "in all cases where a final judgment or decree shall be rendered in a circuit court of the United States in which there shall have been a question involving the jurisdiction of the court, the party against whom the judgment or decree is rendered shall be entitled to an appeal or writ of error to the supreme court of the United States to review such judgment or decree, without reference to the amount of the same; but in cases where the decree or judgment does not exceed the sum of five thousand dollars the supreme court shall not review any question raised upon the record except such question of jurisdiction.[7] The provisions of this statute plainly disclose the intent of congress that a party whose suit has been dismissed by a circuit court for want of jurisdiction shall have the right to have such judgment reviewed by this court. And we have accordingly heretofore held that the action of the circuit courts in such cases is subject to our revision.[8] But where the judgment does not exceed $5,000, the case can only come to this court on the question of the jurisdiction of the circuit court.[9]

The words "a final judgment or decree," in this act, are manifestly used in the same sense as in the prior statutes which have received interpretation, and therefore orders to remand causes from a circuit court to a state court from which they have been removed, are not final judgments or decrees, whatever the ground upon which the circuit court proceeded.[10]

Raising Question of Jurisdiction Below.—Under this statute although it does not appear that the question of jurisdiction was raised in the court below by any plea or motion, yet if the record fails to affirmatively show jurisdiction, this court must take notice of the defect.[11]

7. Cases involving jurisdiction of circuit courts.—Graves *v.* Corbin, 132 U. S. 571, 591, 33 L. Ed. 462; Richmond, etc., R. Co. *v.* Thouron, 134 U. S. 45, 47, 33 L. Ed. 891, reaffirmed in Texas Land, etc., Co. *v.* Scott, 137 U. S. 436, 34 L. Ed. 730; Texas, etc., R. Co. *v.* Saunders, 151 U. S. 105, 38 L. Ed. 90; Texas, etc., R. Co. *v.* Horn, 151 U. S. 110, 38 L. Ed. 91; Maynard *v.* Hecht, 151 U. S. 324, 326, 38 L Ed. 179; Mattingly *v.* Northwestern, etc., R. Co., 158 U. S. 53, 57, 39 L. Ed. 894.

This is a case "where the jurisdiction is founded only on the fact that the action is between citizens of different states." The question whether under that act the circuit court of the United States for the Western District of Texas had jurisdiction of the case is a question involving the jurisdiction of that court, which this court is empowered, by the act of February 25, 1889, c. 236, to review by writ of error, although the judgment below was for less than five thousand dollars. Southern Pacific Co. *v.* Denton, 146 U. S. 202, 205, 36 L. Ed. 942.

8. Williams *v.* Nottawa, 104 U. S. 209, 26 L. Ed. 719; Barry *v.* Edmunds, 116 U. S. 550, 29 L. Ed. 729; Hartog *v.* Memory, 116 U. S. 588, 29 L. Ed. 725; Morris *v.* Gilmer, 129 U. S. 315, 32 L. Ed. 690; Deputron *v.* Young, 134 U. S. 241, 33 L. Ed. 923; Lehigh Min. Mfg. Co. *v.* Kelly, 160 U. S. 327, 40 L. Ed. 444; Wetmore *v.* Rymer, 169 U. S. 115, 118, 42 L. Ed 682.

9. St. Louis, etc., Railway Co. *v.* McBride, 141 U. S. 127, 35 L. Ed. 659 citing 25 Stat. 693, c. 236; McCormick Harvesting Machine Co. *v.* Walthers, 134 U. S. 41, 33 L. Ed. 833.

10. Richmond, etc., R. Co. *v.* Thouron, 134 U. S. 45, 46, 33 L. Ed. 871, reaffirmed in Texas Land, etc., Co. *v.* Scott, 137 U. S. 436, 34 L. Ed. 730; Birdseye *v.* Shaeffer, 140 U S. 117, 35 L. Ed. 402; Chicago, etc., R. Co. *v.* Roberts, 141 U. S. 690, 694, 35 L. Ed. 905; Graves *v.* Corbin, 132 U. S. 571, 591, 33 L. Ed. 462; German Nat. Bank *v.* Speckert, 181 U. S. 405, 406, 407, 45 L. Ed 926

This court has no jurisdiction of an appeal from a judgment of a circuit court remanding to a state court a cause which had been improperly removed from it. Joy *v.* Adelbert College, 146 U. S. 355, 36 L. Ed. 1003, citing Richmond, etc., R. Co. *v.* Thouron, 134 U. S. 45, 33 L. Ed. 871; Gurnee *v.* Patrick County, 137 U. S 141, 34 L. Ed 601; McLish *v* Roff, 141 U. S. 661, 35 L. Ed. 893; Chicago, etc., R. Co. *v.* Roberts, 141 U. S. 690, 35 L. Ed. 905.

An order sustaining a demurrer and remanding a case to a state court is not such a final judgment as is contemplated by the act of February 25, 1889, providing that when a final judgment shall be rendered in a circuit court involving the question of the jurisdiction of the court, an appeal or writ of error shall lie to this court regardless of that amount. Gurnee *v.* Patrick County, 137 U. S. 141, 34 L. Ed. 601; Hurlbut Land, etc., Co. *v.* Truscott, 165 U. S. 719, 41 L. Ed. 1177.

11. Raising question of jurisdiction below.—Chapman *v.* Barney, 129 U. S 677, 32 L. Ed. 800; Denny *v.* Pironi, 141 U.

The scope of our inquiry is limited to the determination of the question of jurisdiction.[12]

How Question of Jurisdiction Determined.—Undoubtedly, the general rule is that, upon a writ of error, only matters of law appearing on the face of the record can be considered, and that evidence, whether written or oral, and whether given to the court or to the jury, does not become a part of the record unless made so by some regular proceeding at the time of the trial and before the rendition of the judgment. Whatever the error may be and in whatever stage of the cause it may have occurred, it must appear in the record, else it cannot be revised in a court of error exercising jurisdiction according to the course of the common law; and ordinarily a bill of exceptions lies only upon some point arising either upon the admission or rejection of evidence, or is a matter of law arising from a fact found, or not denied, and which has been overruled by the court.[13] But this court may review the judgment of the circuit court dismissing a suit for want of jurisdiction, although that judgment is either based on the verdict of a jury or upon facts found in an agreed statement. "The statute does not prescribe any particular mode in which the question of the jurisdiction is to be brought to the attention of the court, nor how such question, when raised, shall be determined. When such a question arises in an action at law its decision would usually depend upon matters of fact, and also usually involves a denial of formal, but necessary, allegations contained in the plaintiff's declaration or complaint. Such a case would be presented when the plaintiff's allegation that the controversy was between citizens of different states, or when the allegation that the matter in dispute was of sufficient value to give the court jurisdiction, was denied. In such cases, whether the question was raised by the defendant or by the court on its own motion, the court might doubtless order the issue to be tried by the jury. The action of the court, in the admission or rejection of evidence, or in instructing

S. 121, 35 L. Ed. 657; Roberts *v.* Lewis, 144 U. S. 653, 36 L. Ed. 579; Northern Pacific R. Co. *v.* Walker, 148 U. S. 391, 37 L. Ed. 494; Mattingly *v.* Northwestern, etc., R. Co., 158 U. S. 53, 57, 39 L. Ed. 894.

"If the question of jurisdiction had been raised, the cause might have been brought to this court under the act of February 25, 1889, without reference to the amount in controversy, and as it is apparent upon the record that jurisdiction was lacking, we cannot dismiss the case upon the ground that the amount involved was less than the jurisdictional sum, even if we were of opinion that such were the fact, for although the question was not raised, it was necessarily involved." Mattingly *v.* Northwestern, etc., R. Co., 158 U. S. 53, 57, 39 L. Ed. 894.

12. The act of February 25, 1889, which gives this court jurisdiction, 25 Stat. 693, c. 236, provides that "in cases where the decree or judgment does not exceed the sum of five thousand dollars, the supreme court shall not review any question raised upon the record, except such question of jurisdiction." It follows, therefore, that in this case our inquiry must stop with that question of jurisdiction, which we have thus determined. Mississippi Mills *v.* Cohn, 150 U. S. 202, 209, 37 L. Ed. 1052.

In Smith *v.* McKay, 161 U. S. 355, 359, 40 L. Ed. 731, the court distinguished Mississippi Mills *v.* Cohn, 150 U. S. 202, 37 L. Ed. 1052, as follows: "That was an appeal from the circuit court of the United States for the Western District of Louisiana, under the provisions of the act of February 25, 1889, c. 36, 25 Stat. 693. The court below dismissed the complainant's bill in equity on the ground that no relief could be had in equity because, under the practice prescribed by a state law, there was a remedy by an action at law. But this court held that the jurisdiction of federal courts, sitting as courts of equity, cannot be enlarged or diminished by state legislation, and that hence the circuit court had committed error by allowing a state law to overturn the well-settled practice in the federal court. In the condition of the federal statutes at that time there was no circuit court of appeals, and the plaintiff's remedy, given him by the act of February 25, 1889, was by appeal to this court. Should such a state of facts again arise, the remedy would now be by appeal to the circuit court of appeals." Smith *v.* McKay, 161 U. S. 355, 359, 40 L. Ed. 731, reaffirmed in Murphy *v.* Colorado Paving Co., 166 U. S. 719, 41 L. Ed. 1188; Black *v.* Black, 163 U. S. 678, 41 L. Ed. 318, Tucker *v.* McKay, 164 U. S. 701, 41 L. Ed. 1180.

13. How question of jurisdiction determined.—Arthurs *v.* Hart, 17 How. 6, 15 L. Ed. 30; Wetmore *v.* Rymer, 169 U. S. 115, 119, 42 L. Ed. 682.

the jury, would thus be subjected to the review by this court which was intended by congress."[14] And under the act of March 3, 1875, c. 137, 18 Stat. 470, the trial court is not bound by the pleadings of the parties, but may, of its own motion, if led to believe that its jurisdiction is not properly invoked, inquire into the facts as they really exist.[15]

n. *Error to State Court.*—The appellate jurisdiction of this court, in cases brought from the state courts, arising under the constitution, laws and treaties of the Union, is not limited by the value of the matter in dispute.[16]

o. *Effect of Circuit Court of Appeals Act.*—Appellate jurisdiction was given by the circuit court of appeals act in all criminal cases by writ of error either from this court or from the circuit courts of appeals, and in all civil cases by appeal or error without regard to the amount in controversy, except as to appeals or writs of error to or from the circuit courts of appeals in cases not made final as specified in § 6.[17] The act of 1891 nowhere imposes a pecuniary limit upon the appellate jurisdiction, either of this court or of the circuit court of appeals, from a district or circuit court of the United States. The only pecuniary limit imposed is one of $1,000 upon the appeal to this court of a case which has been once decided on appeal in the circuit court of appeals, and in which the judgment of that court is not made final by § 6 of the act.[18]

18. Dismissal and Reinstatement.—An appeal or writ of error must be dismissed when it appears from the record, taken as a whole, that the amount

14. Wetmore *v.* Rymer, 169 U. S. 115, 120, 42 L. Ed. 682.

But whether the judge shall elect to submit the issues to the jury, or to himself hear and determine them, it is the manifest meaning of this legislation that, in either event, the parties are not to be concluded by the judgment of the circuit court. As we have already said, if the questions are submitted to the jury, there will be a ready remedy, by proper exceptions and a writ of error to correct any errors into which the trial court may have fallen. And if the court takes to itself the determination of the disputed questions, it is imperative, in order to give effect to the intention of congress, that its action must take a form that will enable this court to review it, so far as to determine whether the conclusion of the court below was warranted by the evidence before that court. Wetmore *v.* Rymer, 169 U. S. 115, 121, 42 L. Ed. 682.

Although the question whether the amount in controversy was sufficient to give the circuit court jurisdiction is purely one of fact, and although that question was not submitted to the jury, but was passed on by the court upon affidavit, upon a writ of error, this court may nevertheless consider the facts disclosed by the affidavits, and is not restricted to the errors of law shown by the record. Wetmore *v.* Rymer, 169 U. S. 115, 42 L. Ed. 682.

15. Williams *v.* Nottawa, 104 U. S. 209, 26 L. Ed. 719; Barry *v.* Edmunds, 116 U. S. 550, 29 L. Ed. 729; Morris *v.* Gilmer, 129 U. S. 315, 32 L. Ed. 690; Deputron *v.* Young, 134 U. S. 241, 33 L. Ed. 923; Wetmore *v.* Rymer, 169 U. S. 115, 120, 42 L. Ed. 682.

16. Error to state court.—Buel *v.* Van Ness, 8 Wheat. 312, 5 Ed. 428; Weston *v.* Charleston, 2 Pet. 449, 7 L. Ed. 481; Holmes *v.* Jennison, 14 Pet. 540, 10 L. Ed. 579.

Notice the difference between the provisions contained in the twenty-second section of the judiciary act, and those of the twenty-fifth section, in the same act of congress, which gives the appellate power over the judgments of the state courts. In the latter case, the right to reexamine is not made to depend on the money value of the thing in controversy, but upon the character of the right in dispute, and the judgment which the state court has pronounced upon it; and it is altogether immaterial whether the right in controversy can or cannot be measured by a money standard. Barry *v.* Mercein, 5 How. 103, 120, 12 L. Ed. 70.

17. Effect of circuit court of appeals act.—United States *v.* Rider, 163 U. S. 132, 138, 41 L. Ed. 101.

18. The Paquete Habana, 175 U. S. 677, 683, 44 L. Ed. 320; Woey Ho *v.* United States, 191 U. S. 558, 48 L. Ed. 301; Kirby *v.* American Soda Fountain Co., 194 U. S. 141, 144, 48 L. Ed. 911.

There is no pecuniary limit on appeals to this court under § 5 of the act of 1891, c. 517, 26 Stat. 826, 828. The Paquete Habana, 175 U. S. 677, 683, 44 L. Ed. 320; Giles *v.* Harris, 189 U. S. 475, 485, 47 L. Ed. 909.

The operation of the act of March 3, 1891, was to do away with any pecuniary limitation on appeals directly from the circuit court to this court. Holt *v.* Indiana Mfg. Co., 176 U. S. 68, 44 L. Ed. 374, reaffirmed in Weston *v.* Tierney, 184 U. S. 695, 46 L. Ed. 763; Douglas Co. *v.* Stone, 191 U. S. 557, 48 L. Ed. 301.

actually in controversy between the parties was not sufficient to give us jurisdiction.[19]

Sufficiency of Showing.—Upon a motion to dismiss for want of jurisdiction because the amount in dispute is insufficient, as upon a demurrer, a court will not incline to dismiss for want of jurisdiction, unless the facts appearing of record create a legal certainty of that conclusion.[20]

This court of its own motion will dismiss an appeal where it appears on the record that the amount in controversy is not sufficient to give us jurisdiction.[21]

Reinstatement.—Where the affidavits filed with a motion to reinstate a cause which has been dismissed because the amount in controversy is below the jurisdictional amount, fail to satisfy this court that the value of the matter in dispute is sufficient to give us jurisdiction, the motion will be denied.[22] Where a cause is dismissed because the value of the matter in dispute did not exceed the jurisdictional amount, a motion to reinstate accompanied by affidavits not filed until the expiration of more than three months from the time the court entered the order of dismissal, comes too late. Unless the parties act promptly after they have actual notice of what is required of them, they will not be heard.[23] Where a case is dismissed by this court because there is no evidence of there being a sufficient amount in controversy to give this court jurisdiction, and a motion is made to reinstate it, and affidavits are submitted to show that the value of the amount in controversy is over the required amount, if no sufficient opportunity or time has been given to the opposite party to produce counter affidavits, a motion to reinstate will be continued until the next term of the court, with leave for either party to file additional affidavits on the subject.[24]

G. Appeals from District to Circuit Courts.—Cases of admiralty and maritime jurisdiction, where the matter in dispute, exclusive of costs, exceeds the sum or value of fifty dollars, might formerly be removed from the district court into the circuit court by appeal, and the provision was that such appeals should be subject to the same rules, regulations, and restrictions as were prescribed by law in case of writs of error.[25] Jurisdiction in such cases was given to the appellate court by the appeal or writ of error, as the case might be, which ceased to exist, even if regular, when the appeal or writ of error was dismissed, or if not regular in essential particulars, then jurisdiction did not attach for the purpose of affirming the decree upon the merits.[26] But this has been changed by § 4 of the act of March 3, 1891, which provides that no appeal, whether by writ of error or otherwise, shall hereafter be taken or allowed from any district court to the existing circuit courts, and no appellate jurisdiction shall hereafter be exercised or allowed by said existing circuit courts; but appeals by writ of error or otherwise, from said district courts shall only be subject to review in the supreme court of the United States or in the circuit court of appeals hereby established, as is hereinafter provided, and the review, by appeal, by writ of

19. Dismissal and reinstatement.—Banking Ass'n *v.* Insurance Ass'n, 102 U. S. 121, 26 L. Ed. 45, following Gray *v.* Blanchard, 97 U. S. 564, 24 L. Ed. 1108; Winston *v.* United States, 3 How. 771, 11 L. Ed. 823; Jones *v.* Fritschle, 154 U. S. 590, 21 L. Ed. 552; Rogers *v.* St. Charles, 19 How. 108, 15 L. Ed. 563; District of Columbia *v.* Brewer, 131 U. S. 434, 33 L. Ed. 213; Warren *v.* First Nat. Bank, 131 U. S. 450, 33 L. Ed. 201; City Bank *v.* Hunter, 152 U. S. 512, 38 L. Ed. 534; Tintsman *v.* National Bank, 100 U. S. 6, 25 L. Ed. 530; United States *v.* White, 122 U. S. App. 647; Montgomery *v.* Anderson, 21 How. 386, 16 L. Ed. 160.

20. Sufficiency of showing.—Barry *v.* Edmunds, 116 U. S. 550, 29 L. Ed. 729; Wetmore *v.* Rymer, 169 U. S. 115, 42 L. Ed. 682; Blackburn *v.* Portland Gold Min. Co., 175 U. S. 571, 574, 44 L. Ed. 276, reaffirmed in Warder *v.* Loomis, 197 U. S. 619, 49 L. Ed. 909; Empire, etc., Min. Co. *v.* Bunker Hill, etc., Min. Co., 200 U. S. 613, 50 L. Ed. 620.

21. Hilton *v.* Dickinson, 108 U. S. 165, 27 L. Ed. 688.

22. Reinstatement.—Wells *v.* Wilkins, 118 U. S. 230, 30 L. Ed. 210.

23. Johnson *v.* Wilkins, 118 U. S. 228, 30 L. Ed. 210.

24. Hunt *v.* Blackburn, 127 U. S. 774, 32 L. Ed. 323.

25. Appeals from district to circuit courts.—2 Stat. at Large 244.

26. 1 Stat. at Large 84; The Lottawanna, 20 Wall. 201, 217, 22 L. Ed. 259.

error, or otherwise, from the existing circuit courts shall be had only in the supreme court of the United States or in the circuit courts of appeals hereby established according to the provisions of this act regulating the same.[27]

H. General Power to Issue Writs.—By express acts of congress, beginning with the first organization of the judicial system of the United States, this court and the circuit and district courts are empowered to issue all writs, not specially provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the principles and usages of law.[28]

A prohibition cannot issue from this court in cases where there is no appellate power given by law, nor any special authority to issue the writ, hence it will not lie in a criminal case.[29]

IV. Decisions Reviewable.

A. What Law Governs.—The statutes or decisions of a state, as to what decisions are reviewable, are not binding on this court. "When the effect of a state decision is only to regulate the practice of courts, and to determine what shall be a judgment, and the legal effect of that, or any other, judgment, this court cannot consider themselves bound by such decisions, upon the ground that the laws upon which they are made are local in their character." "The statute of Mississippi, taking away the right to a writ of error, in the case of a forthcoming bond forfeited, can have no influence whatever in regulating writs of error to the circuit courts of the United States; a rule of court adopting the statute as a rule of practice would, therefore, be void."[30]

By the decisions of the supreme court of Louisiana, an order, made without previous notice, for the seizure and sale of mortgaged land to pay the mortgage debt, under which the sale cannot take place until the debtor has had notice and opportunity to interpose objections, "exhausting the power of the court quoad the application," although its execution may be stayed on the opposition of the debtor, is subject to appeal, under the practice in that state.[31]

27. 4 Fed. Stat. § 4, p. 397; Chicago, etc., R. Co. *v.* Roberts, 141 U. S. 690, 695, 35 L. Ed. 905.

28. General power to issue writs.—Act of September 24, 1789, c. 20, § 14; 1 Stat. 81, 82; Rev. Stat., § 716; Stockton *v.* Bishop, 2 How. 74, 11 L. Ed. 184; Hardeman *v.* Anderson, 4 How. 640, 11 L. Ed. 1138; Ex parte Milwaukee, etc., R. Co., 5 Wall. 188, 18 L. Ed. 676; Hudson *v.* Parker, 156 U. S. 277, 281, 39 L. Ed. 424. See the titles HABEAS CORPUS; MANDAMUS; PROHIBITION.

In cases over which the federal supreme court possesses neither original nor appellate jurisdiction it cannot grant prohibition or mandamus or certiorari as ancillary thereto. In re Massachusetts, 197 U. S. 482, 488, 49 L. Ed. 845.

Mandamus and supersedeas.—A case being properly in this court by appeal, the court has a right to issue any writ which may be necessary to render its appellate jurisdiction effectual. Accordingly, it will issue the writ of supersedeas if such writ be necessary for that purpose; the circumstances otherwise making it proper. It will issue this writ rather than attain the same end by issuing a mandamus to the court below, in a case where the issuing of a mandamus would control judicial action in a matter apparently one of discretion; as ex gr. the approval or rejection of a bond offered for the court's approval. Ex parte Milwaukee, etc., R. Co., 5 Wall. 188, 18 L. Ed. 676.

29. Ex parte Gordon, 1 Black 503, 506, 17 L. Ed. 134. See the title PROHIBITION.

30. What law governs.—Amis *v.* Smith, 16 Pet. 303, 10 L. Ed. 973.

As far as the decisions of the state courts of Mississippi settle rules of property, they will be properly respected by the supreme court. But when the effect of a state decision is only to regulate the practice of courts, and to determine what shall be a judgment, the supreme court cannot consider themselves bound by such decisions, upon the ground that the laws upon which they are made are local in their character. Amis *v.* Smith, 16 Pet. 303, 10 L. Ed. 973.

The statute of Mississippi, taking away the right to a writ of error, in the case of a forthcoming bond forfeited, can have no influence whatever in regulating writs of error to the circuit courts of the United States. A rule of court, adopting the statute as a rule of practice, would, therefore, be void. Amis *v.* Smith, 16 Pet. 303, 10 L. Ed. 973.

31. Louisiana Code of Practice, arts. 565, 566; Harrod *v.* Voorhies, 16 Louisiana 254; Mitchell *v.* Logan, 34 La. Ann. 998, 1003; Ralston *v.* British & American Mortgage Co., 37 La. Ann. 193.

But the practice or the decisions of that state in this respect cannot control the appellate jurisdiction of this court from the circuit court of the United States, as defined by act of congress.[32]

Effect of Uniformity Act.—While, since the act of 1872, c. 255 (17 Stat. 196, now § 914, Rev. Stat.), the practice, pleadings, and forms and modes of proceedings in civil causes, other than equity and admiralty causes, in the circuit and district courts, must conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, the review of a case in this court is regulated by the acts of congress and not by the laws of the states.[33]

B. Nature, Form and Validity of Judgment as Governing Right of Review—1. In General.—Where no judgment or decision has been given in the inferior court—in short, where there is nothing to appeal from—an appeal will not lie.[34]

A bench warrant is an order of court within the meaning of this rule.[35]

An order of the circuit court, directing a fact to be certified to another court to enable it to proceed to judgment, can hardly be regarded as a judgment, order, or decree, in the legal sense of these terms as used in the act of congress.[36]

Judgment Refusing to Quash Forthcoming Bond.—Regarding a forthcoming bond as part of the process of execution, a refusal to quash the bond is not a judgment of the court, and much less a final judgment; and therefore

32. Rev. Stat., § 691; Luxton *v.* North River Bridge, Co., 147 U. S. 337, 341, 37 L. Ed. 194; Fleitas *v.* Richardson, 147 U. S. 538, 545, 37 L. Ed. 272.

33. Effect of uniformity act.—Boogher *v.* New York Life Ins. Co., 103 U. S. 90, 95, 26 L. Ed. 310.

In Boogher *v.* New York Life Ins. Co., 103 U. S. 90, 26 L. Ed. 310, the court expressed great doubt whether under the act of 1872, c. 255 (17 Stat. 196, now § 914, Rev. Stat.), providing that the practice, pleadings, and forms and modes of proceedings in civil causes, other than equity and admiralty causes, in the circuit and district courts, must conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding, existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held, cases tried in the circuit courts by a referee, in states where such practice exists, can be reviewed here.

The doubt we have is whether the act of 1872 enlarged the existing modes of subjecting cases to review here. There is no express provision of that kind, and on its face the act is confined to the practice, pleadings, and modes of proceedings in the circuit and district courts. Any allusion to a review here seems to have been studiously avoided. Boogher *v.* New York Life Ins. Co., 103 U. S. 90, 96, 26 L. Ed. 310.

34. Nature, form and validity of judgment as governing right of review in general.—Ex parte Virginia, 100 U. S. 339, 342, 25 L. Ed. 676.

It is said in Co. Litt., 288, b, that a writ of error lieth when a man is grieved by an error in the foundation, proceeding, judgment, or execution in a suit. But it is added in the same authority, "without a judgment, or an award in the nature of a judgment, no writ of error doth lie." And the court say, in the case of Boyle *v.* Zacharie, 6 Pet. 635, 648, 8 L. Ed. 532: "If, therefore, there is an erroneous award of execution, not warranted by the judgment, or erroneous proceedings under the execution, a writ of error will lie to redress the grievance." McCargo *v.* Chapman, 20 How. 555, 15 L. Ed. 1021.

This court cannot acquire jurisdiction of a cause through an order of a circuit court directing its transfer to this court, though such transfer be authorized by the express provision of an act of congress. Such provision must be regarded as an attempt, inadvertently made, to give to this court a jurisdiction withheld by the constitution. In such a case, a notice to docket and dismiss, must be denied, and this court will certify its opinion to the circuit court, for information, in order that it may proceed with the trial of the cause. "An appellate jurisdiction necessarily implies some judicial determination, some judgment, decree, or order of an inferior tribunal, from which an appeal has been taken. But in this case there had been no such order, judgment, or decree in the circuit court; and there was no subsisting decree in the district court, from which an appeal could be taken." The Alicia, 7 Wall. 571, 573, 19 L. Ed. 84.

35. Ex parte Virginia, 100 U. S. 339, 342, 25 L. Ed. 676.

36. Van Ness *v.* Van Ness, 6 How. 62, 68, 12 L. Ed. 344.

no writ of error lies in such a case.[37] Whatever may be the defects, or illegality of the final process, no error can be assigned in the supreme court on a writ of error for that cause. The remedy, according to the modern practice, is by motion in the court below to quash the execution.[38]

The refusal to quash an execution is not, in the sense of the common law, a judgment, much less a final judgment; it is a mere interlocutory order. Even at common law, error only lies from a final judgment; and by the express provisions of the judiciary act of 1789, a writ of error lies to this court, only in cases of final judgments.[39]

Order Granting Stay of Proceedings.—A writ of error does not lie to an order of the court below, granting an indefinite stay of proceedings, upon suggestions of the attorney for the United States, in a case to which the United States is not party. It is not a judgment; and a writ of error at common law, as well as by statute, lies only to a final judgment.[40]

Requisites and Validity of Judgment.—Mere imperfections and informalities in the judgment below, do not necessarily affect its appealability.[41] Where a decree was obtained by fraud, still if in form correct, it is sufficient as against the appellee to sustain the appeal, correct the error, and dispose of the case.[42]

Appeal from Void Judgments and Decrees.—A decree of the circuit court entered under the supervision and by the direction of the judge of the United States sitting in the circuit court, is a decree of the circuit court, good until reversed or otherwise vacated, and from such decree an appeal may be taken, although the district judge may have had no right to a vote.[43]

2. Decision Must Be Exercise of Judicial Power.—**In General.**—Judgments, to be the subject of review by this court, must be rendered by a court in the exercise of judicial power, and which this court has the power to compel the lower court to execute.[44] Congress cannot impose upon this court the exercise of appellate jurisdiction over the decisions of a court not vested with the judicial power of the United States.[45] Accordingly, where a judgment if ren-

37. Amis *v.* Smith, 16 Pet. 303, 10 L. Ed. 973, citing Boyle *v.* Zacharie, 6 Pet. 635, 646, 8 L. Ed. 527, 532.

38. Amis *v.* Smith, 16 Pet. 303, 10 L. Ed. 973.

39. Boyle *v.* Zacharie, 6 Pet. 635, 648, 8 L. Ed. 527, 532.

40. Livingston *v.* Dorgenois, 7 Cranch 577, 3 L. Ed. 444.

41. Where the judgment of the inferior court is not merely interlocutory, but is final, and goes to the whole merits, on which an execution could issue, although no judgment was given upon the rejoinder of nul tiel record as to costs in a former suit. Held: That although the judgment was imperfect and informal, yet a writ of error would lie on it. Wilson *v.* Daniel, 3 Dall. 401, 1 L. Ed. 655.

42. United States *v.* Gomez, 3 Wall. 752, 18 L. Ed. 212.

Where a record brought regularly to this court, on a writ of error and appeal bond which operates as a supersedeas, shows a judgment quite intelligible and possible, and where a return to a certiorari issued, without prejudice, long after the transcript was filed here and not long before the case was heard, showed that that judgment had been set aside as improvidently entered, and that one with alterations of a very material character had been substituted for it, this court held, "under the circumstances," that the first judgment was the one which it was called on to re-examine. Edwards *v.* Elliott, 21 Wall. 532, 22 L. Ed. 487, citing Generes *v.* Bonemer, 7 Wall. 564, 19 L. Ed. 227; Avedano *v.* Gay, 8 Wall. 376, 19 L. Ed. 422; Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678; Hozey *v.* Buchanan, 16 Pet. 215, 10 L. Ed. 941; Kanouse *v.* Martin, 15 How. 198, 210, 14 L. Ed. 467; Cheong-Kee *v.* United States, 3 Wall. 320, 326, 18 L. Ed. 72; Noonan *v.* Bradley, 12 Wall. 121, 129, 20 L. Ed. 279.

43. Baker *v.* Power, 124 U. S. 167, 31 L. Ed. 382, citing Rodd *v.* Heartt, 17 Wall. 354, 21 L. Ed. 627.

44. Decision must be exercise of judicial power.—United States *v.* Ferreira, 13 How. 40, 52, 14 L. Ed. 42; In re Sanborn, 148 U. S. 222, 37 L. Ed. 429; Ex parte Zellner, 9 Wall. 244, 247, 19 L. Ed. 665.

45. Gordon *v.* United States, 117 U. S., appx., 697; United States *v.* Ritchie, 17 How. 525, 15 L. Ed. 236; Hayburn's Case, 2 Dall. 409, 1 L. Ed. 436; United States *v.* Ferreira, 13 How. 40, 14 L. Ed. 42; In re Sanborn, 148 U. S. 222, 37 L. Ed. 429; Grisar *v.* McDowell, 6 Wall. 363, 18 L. Ed. 863; Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047; United States *v.* Coe, 155 U. S. 76, 39 L. Ed. 76; United States *v.* Duell, 172

dered by this court would not have the sanction that attends the exercise of judicial power, in its legal or constitutional sense, the appeal will be dismissed

U. S. 576, 43 L. Ed. 559, citing Murray *v.* Hoboken, etc., Co., 18 How. 272, 15 L. Ed. 372.

The action of congress confirming a private land claim in New Mexico, as recommended for confirmation by the surveyor general of that territory, is not subject to judicial review. Tameling *v.* United States Freehold, etc., Co., 93 U. S. 644, 23 L. Ed. 998.

What is exercise of judicial power.—"It cannot, we think, be seriously disputed that the question whether fraud has or has not been committed in presenting or prosecuting a demand or claim before a tribunal having authority to allow or disallow it is peculiarly judicial in its nature, and that in ascertaining the facts material in such an inquiry no means are so effectual as those employed by or in a court of justice." La Abra Silver Min. Co. *v.* United States, 175 U. S. 423, 459, 44 L. Ed. 223.

"In allowing the counsel fee to the district attorney the court acted in its judicial capacity, and such allowance, being a judicial act of a court of competent jurisdiction, was not subject to the re-examination and reversal of the attorney general. United States *v.* O'Grady, 22 Wall. 641, 22 L. Ed. 772; Butterworth *v.* Hoe, 112 U. S. 50, 67, 28 L. Ed. 656; Hayburn's Case, 2 Dall. 409, 410, 1 L. Ed. 436, note a." United States *v.* Waters, 133 U. S. 208, 213, 33 L. Ed. 594.

Territorial court of Florida.—Congress, by two acts passed in 1823 and 1824 (3 Stat. at Large 768, and 6 Stat. at Large 569), directed the judge of the territorial court of Florida to receive, examine, and adjudge all cases of claims for losses, and report his decisions, if in favor of the claimants, together with the evidence upon which they were founded, to the secretary of the treasury, who, on being satisfied that the same was just and equitable, within the provisions of the treaty, should pay the amount thereof; and by an act of 1849 (9 Stat. at Large, p. 788), congress directed the judge of the district court of the United States for the northern district of Florida to receive and adjudicate certain claims in the manner directed by the preceding acts. From the award of the district judge, an appeal does not lie to this court. As the treaty itself designated no tribunal to assess the damages, it remained for congress to do so by referring the claims to a commissioner according to the established practice of the government in such cases. His decision was not the judgment of the court, but a mere award, with a power to review it, conferred upon the secretary of the treasury. United States *v.* Ferreira, 13 How. 40, 14 L. Ed. 42.

Court of claims.—"Congress could not authorize or require this court to express an opinion on a case in which its judicial power could not be exercised, and when its judgment would not be final and conclusive upon the rights of the parties. 'The award of execution,' Chief Justice Taney said, 'is a part, and an essential part, of every judgment passed by a court exercising judicial power. It is no judgment, in the legal sense of the term, without it. Without such an award, the judgment would be inoperative and nugatory, leaving the aggrieved party without a remedy. It would be merely an opinion, which would remain a dead letter, and without any operation upon the rights of the parties, unless congress should at some future time sanction it, and pass a law authorizing the court to carry its opinion into effect. Such is not the judicial power confided to this court in the exercise of its appellate jurisdiction; yet it is the whole power that the court is allowed to exercise under this act of congress.' La Abra Silver Mining Co. *v.* United States, 175 U. S. 423, 457, 44 L. Ed. 223, citing In re Sanborn, 148 U. S. 222, 226, 37 L. Ed. 429; Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 483, 38 L. Ed. 1047." Gordon *v.* United States, 2 Wall. 561, 17 L. Ed. 921.

This subject came, for the first time, before this court in the case of Gordon *v.* United States, 2 Wall. 561, 17 L. Ed. 921, wherein it was held that, as the law then stood, no appeal would lie from the court of claims to this court. The reasons for this conclusion are stated in the opinion of Chief Justice Taney, reported in the appendix to 117 U. S. 697, and interesting as his last judicial utterance. Briefly stated, the court held, that as the so-called judgments of the court of claims were not obligatory upon congress or upon the executive department of the government, but were merely opinions which might be acted upon or disregarded by congress or the departments, and which this court had no power to compel the court below to execute, such judgments could not be deemed an exercise of judicial power, and could not, therefore, be revised by this court.

A similar question arose in this court as early as 1794, in the case of the United States *v.* Yale Todd, an abstract of which case appears in a note by Chief Justice Taney to the later case of the United States *v.* Ferreira, 13 How. 40, 52, 14 L. Ed. 42, and wherein it was held that an act of congress conferring powers on the judges of the circuit court to pass upon the rights of applicants to be placed upon the pension lists, and to report their findings to the secretary of war, who had the right to revise such findings, was not an

for want of jurisdiction and without any determination of the rights of the parties.[46]

No appeal will lie from the decision of a board not a court under the constitution, and the law prescribing an appeal from their decision would be unconstitutional.[47]

Limitations of Rule.—Though no appeal can be allowed from the decision of a tribunal which is not a court under the constitution, yet if the appellate court is not confined to a mere re-examination of a case as heard and decided by such tribunal, but hears the case de novo, upon the papers and testimony which had been used before the board, the rule is otherwise, because in such case the suit in the appellate court is to be regarded as an original proceeding, and the removal of the transcript, papers, and evidence into it from the board of commissioners being but a mode of providing for the institution of the suit in that court.[48] Since the passage of the act of March 17, 1866, 14 Stat. 9, the tribunal designated by the act of congress to ascertain the compensation which claimants of property taken for the purposes indicated in the act of 1882 were entitled to receive, has exercised "all the functions of a court," from whose judgment appeals regularly lie to this court.[49]

act conferring judicial power, and was, therefore, unconstitutional.

The case of the United States *v.* Ferreira, 13 How. 40, 52, 14 L. Ed. 42, was that of an appeal from the district court of the United States for the district of Florida. The judge of that court had acted in pursuance of certain acts of congress, directing the judge to receive, examine and adjust claims for losses suffered by Spaniards by reason of the operations of the American army in Flordia. It was decided that the judge's decision was not the judgment of the court, but a mere award, with a power to review it conferred upon the secretary of the treasury, and that from such an award no appeal could lie to this court.

46. District of Columbia *v.* Eslin, 183 U. S. 62, 46 L. Ed. 85, reaffirmed in District of Columbia *v.* Barnes, 187 U. S. 638, 47 L. Ed. 344, citing Gordon *v.* United States, 117 U. S., appx., 697; Hayburn's Case, 2 Dall. 409, 1 L. Ed. 436; United States *v.* Ferreira, 13 How. 40, 14 L. Ed. 42; In re Sanborn, 148 U. S. 222, 37 L. Ed. 429; Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047.

47. United States *v.* Ritchie, 17 How 525, 533, 15 L. Ed. 236, citing American Ins. Co. *v.* Canter, 1 Pet. 511, 7 L. Ed. 242; Benner *v.* Porter, 9 How. 235, 13 L. Ed. 119; United States *v.* Ferreira, 13 How. 40, 14 L. Ed. 42.

Board of commissioners.—By an act of congress passed on the 3d of March, 1851, (9 Stat. at L. 631), provision was made for the appointment of a board of commissioners to settle private land claims in California, and for the transfer of a case decided by them to the district court of the United States for California, by way of appeal. This law was constitutional. The board of commissioners was not a court, under the constitution, invested with judicial powers; but the commencement of the suit in the district court, when transferred there, must be regarded as an original proceeding. The district court could hear additional evidence to that which was before the board of commissioners. United States *v.* Ritchie, 17 How. 525, 15 L. Ed. 236, reaffirmed in Fremont *v.* United States, 17 How. 542, 15 L. Ed. 241.

48. United States *v.* Ritchie, 17 How. 525, 533, 15 L. Ed. 236.

Proceedings to obtain a patent for mineral lands.—A judgment rendered in a proceeding under § 2326 of the Revised Statutes, to obtain a patent for mineral lands of the United States, which requires of any person desiring to contest the claimant's right, to file his claim in the land office, and further declares that it shall be the duty of the adverse claimant to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession, is subject to review in this court, because it is apparent that the statute requires a judicial proceeding in a competent court. "What is a competent court is not specifically stated, but it undoubtedly means a court of general jurisdiction, whether it be a state court or a federal court; and as the very essence of the trial is to determine rights by a regular procedure in such court, after the usual methods, which rights are dependent on the laws of the United States, we see no reason why, if the amount in controversy is sufficient in a case tried in a court of the United States, or the proper case is made on a writ of error to a state court, the judgment may not be brought to this court for review, as in other similar cases. Belk *v.* Meagher, 104 U. S. 279, 26 L. Ed. 735." Chambers *v.* Harrington, 111 U. S. 350, 351, 28 L Ed. 452.

49. United States *v.* Klein, 13 Wall. 128, 145, 20 L. Ed. 519; United States *v.* Jones, 119 U. S. 477, 30 L. Ed. 440; Gordon *v.* United States, 117 U. S., appx., 697; Great

California Land Case.—The proceeding in the district court of the United States in a California land case, on an appeal from the board of land commissioners, is an original suit, and the whole case is open.[50]

3. Decisions of Special Tribunals.—Where a decision is made by a special tribunal, with full powers to examine and decide, if there is no provision for an appeal to any other jurisdiction, the decision is final within the law.[51]

4. Judgments by Default and Decrees Pro Confesso.—A judgment by default is interlocutory or final. When the action sounds in damages, as covenant, trover, trespass, etc., it is only interlocutory, that the plaintiff ought to recover his damages, leaving the amount of them to be afterwards ascertained.[52] But where the amount of the judgment is entered by the calculation of the clerk, no further steps being necessary, by a jury or otherwise, to ascertain the amount, the judgment is final.[53]

A decree pro confesso is as binding and conclusive as a decree rendered in a most solemn manner, and concludes the defendant so far, at least, as the defendant is supported by the allegations in the bill, taking the same to be true.[54] But a decree on a bill taken pro confesso may be attacked on appeal, if not confined to the matter of the bill.[55] Where a decree is entered upon an order taking a bill in equity as confessed by defendants for want of an answer, without objection, the only question for the consideration of this court on appeal is whether the allegations of the bill are sufficient to support the decree.[56] Where a bill is

Falls Mfg. Co. *v.* Attorney General, 124 U. S. 581, 599, 31 L. Ed. 527.

50. Grisar *v.* McDowell, 6 Wall. 363, 364, 18 L. Ed. 863, citing United States *v.* Ritchie, 17 How. 525, 533, 15 L. Ed. 236.

51. Foley *v.* Harrison, 15 How. 433, 488, 14 L. Ed. 761.

An act of congress of August, 3d, 1846, provided that the commissioner of the general land office be authorized to determine upon principles of equity and justice as recognized in courts of equity, and in accordance with equitable rules and regulations, to be settled by the secretary of the treasury, the attorney general and commissioner, all cases of suspended entries now existing in said land offices, and to adjudge in what cases patents shall issue upon the same. It was held, that a decision made by this special tribunal, with full powers to examine and decide, is final for which no appeal will lie because there is no provision made for an appeal in any other jurisdiction. Foley *v.* Harrison, 15 How. 433, 14 L. Ed. 761; United States *v.* Ferreira, 13 How. 40, 14 L. Ed. 42.

Under the pre-emption act of May 29th, 1830, conferring certain rights upon settlers upon public lands, on proof of settlement or improvement being made to the satisfaction of the register and receiver, agreeably to the rules prescribed by the commissioner of the general land office, it was held that if the register and receiver acted within their powers, their decision must be considered final, because by the act constituting the register and receiver no appeal was given. Lytle *v.* Arkansas, 9 How. 314, 13 L. Ed. 153.

52. Judgments by default and decrees pro confesso.—1 Tidd, Pr., 568. Clements *v.* Berry, 11 How. 398, 409, 13 L. Ed. 745.

53. Clements *v.* Berry, 11 How. 398, 409, 13 L. Ed. 745.

54. Thompson *v.* Wooster, 114 U. S. 104, 29 L. Ed. 105, citing 1 Smith's Ch. Pract. 153.

After the entry of a decree pro confesso and whilst it stands unrevoked, the defendants are absolutely barred and precluded from alleging anything in derogation, or in opposition to the decree and they are equally barred and precluded from questioning its correctness here on appeal, unless on the face of the bill it appears manifest that it is erroneous and improperly granted. On appeal it is irregular to question the allegations of a bill. "If anything appears in those allegations themselves going to show that the decree was erroneous, of course it is assignable for error; but any attempt to introduce facts not embraced in those allegations, for the purpose of countervailing the decree, is manifestly improper." Thompson *v.* Wooster, 114 U. S. 104, 114, 29 L. Ed. 105.

55. Ohio Central R. Co. *v.* Central Trust Co., 133 U. S. 83, 33 L. Ed. 561.

56. Masterson *v.* Howard, 18 Wall. 99 21 L. Ed. 764.

A railroad company, whose road, property and franchises have been sold under a decree for the foreclosure of a mortgage entered on a bill taken pro confesso, may prosecute an appeal from the final decree distributing the proceeds of the sale and adjudging a balance still due the mortgage creditors. Ohio Central R. Co. *v.* Central Trust Co., 133 U. S. 83, 33 L. Ed. 561, citing Williamette Mfg. Co. *v.* Bank of British Columbia, 119 U. S. 191, 197, 30 L. Ed. 384; Memphis, etc., R. Co. *v.* Railroad Commissioners, 112 U. S. 609, 619, 28 L. Ed. 837.

taken as confessed by one of two defendants before a decree is made dismissing the bill, on demurrer, as to the other defendant, the latter can appeal from the decree, because the decree is final as to him, although it does not dispose of the case as to his codefendant.[57]

5. Orders Disbarring Attorneys.—An appeal does not lie to this court from an order of the district court disbarring an attorney. The remedy of the party, if any, is by mandamus.[58]

6. Consent Decrees.—Courts of chancery generally hold that from a decree by consent no appeal lies.[59] Although that rule has not prevailed in this court under the terms of the acts of congress regulating its appellate jurisdiction, yet a decree, which appears by the record to have been rendered by consent, is always affirmed, without considering the merits of the cause. A fortiori, neither party can deny its effect as a bar of a subsequent suit on any claim included in the decree.[60]

7. Judgment or Decree Pro Forma.—Ordinarily an appeal or writ of error will not lie from a judgment or decree rendered pro forma for the purpose of an appeal.[61]

8. Judgments Awarding Peremptory Mandamus.—A writ of error will lie from this court upon judgments of the circuit court awarding a peremptory mandamus, if the matter in controversy is of sufficient value.[62]

9. Judgments or Decrees in Ancillary Proceedings.—The final decree or judgment rendered in an ancillary proceeding where the property of another has

57. Stewart *v.* Masterson, 131 U. S. 151, 32 L. Ed. 114.

58. Orders disbarring attorneys.—Ex parte Robinson, 19 Wall. 513, 22 L. Ed. 205. See the title ATTORNEY AND CLIENT.

59. Consent decrees.—2 Dan. Ch. Pract. ch. 32, § 1; Nashville, etc., R. Co. *v.* United States, 113 U. S. 261, 266, 28 L. Ed. 971; Livingston *v.* Woodworth, 15 How. 546, 14 L. Ed. 809; Doss *v.* Tyack, 14 How. 298, 14 L. Ed. 428.

An appeal will not be dismissed upon the ground that the decree from which it was taken was rendered by consent; but no errors will be considered here which were in law waived by such consent. A recital in the decree that it was assented to by the solicitor of one of the parties is equivalent to a direct finding that he had authority to do what he did, and, so far as the question is one of fact only, is binding upon this court on appeal. Pacific R. Co. *v.* Ketchum, 101 U. S. 289, 25 L. Ed. 932.

Consent decree for account.—Where consent is given to a decree for an account, the defendant is not thereby precluded from objecting to the master's report on the ground that it goes beyond the order for taking the account. Livingston *v.* Woodworth, 15 How. 546, 14 L. Ed. 809.

60. Nashville, etc., R. Co. *v.* United States, 113 U. S. 261, 266, 28 L. Ed. 971.

A consent decree in a circuit court may be appealed from. Pacific R. Co. *v.* Ketchum, 101 U. S. 289, 25 L. Ed. 932.

61. Judgment or decree pro forma.—United States *v.* Gleeson, 124 U. S. 255, 31 L. Ed. 421.

Where a decree in admiralty was rendered in the circuit court upon an appeal from the district court, said decree being given pro forma because the presiding judge had been of counsel for one of the parties, this court has jurisdiction to try and determine the case. Steamer Oregon *v.* Rocca, 18 How. 570, 15 L. Ed. 515, Justices Daniel and Catron, dissenting.

Appeals from court of claims.—On appeal by the United States from a judgment of the court of claims against them for less than three thousand dollars, rendered pro forma, against the opinion of that court, and for the purpose of an appeal, this court, upon objection taken in behalf of the United States to the irregularity of the actions of the court below, reverses the judgment, and remands the case for further proceedings according to law. "It is true that there are cases in the books, in which appeals from judgments of the court of claims, appearing to have been rendered pro forma, but no objection being taken on that ground, have been considered and decided upon the merits. Twenty Per Cent. Cases, 20 Wall. 179, 181, 22 L. Ed. 339, and 9 C. Cl. 103, 105, 302, 314; United States *v.* Martin, 94 U. S. 400, 22 L. Ed. 128, and 10 C. Cl. 276; United States *v.* Driscoll, 96 U. S. 421, 24 L. Ed. 847, and 13 C. Cl. 15, 40; United States *v.* Fisher, 109 U. S. 143, 27 L. Ed. 885, and 15 C. Cl. 323." United States *v.* Gleeson, 124 U. S. 255, 31 L. Ed. 421, explaining United States *v.* Stone, 14 Pet. 524, 10 L. Ed. 572.

62. Judgments awarding peremptory mandamus.—United States *v.* Addison, 22 How. 174, 16 L. Ed. 304, citing Columbian Ins. Co. *v.* Wheelright, 7 Wheat. 534, 5 L. Ed. 516.

been taken under process issued against a defendant, is reviewable by appeal or writ of error, according to the nature of the case.[63]

10. Judgments in Summary Proceedings—a. *In General.*—As a general rule no appeal or writ of error lies in a proceeding that is in its nature summary and special.[64] A contest between a judgment in circuit court, and a judgment in state court as to priority of payment, arising upon rules, is not such judgment as this court can re-examine.[65]

b. *Judgments on Motions.*—It has long been settled that decisions of a court, founded on motions of a certain description, are not subject to a writ of error.[66] The judgment or order of the court on a summary motion, or on a question submitted to the court below on a motion collateral to the record on the suggestion of a third party, is not re-examinable on a writ of error issued on the judgment with which it may happen to be connected, because the decision of that court is final and conclusive.[67] An appeal does not lie from an order of the court below, denying a motion in a pending suit, to permit a person to intervene and become a party thereto; "for that was only a motion in the cause, and not an independent suit in equity appealable here."[68] Where land was sold under an execution, and the money arising therefrom about to be distributed amongst creditors by an order of the circuit court, a controversy between the creditors as to the priority of their respective judgments cannot be brought to this court, either by appeal or writ of error.[69] Where different parties claimed a fund in the hands of the marshal, which had arisen from sales under an execution, a judgment of the circuit court on rules as to whom the money should be paid, is not such a judgment as can be re-examined in this court.[70]

c. *Judgment Awarding Peremptory Mandamus.*—But a writ of error will lie under the 22d section of the act of 1789, from the judgment of a court awarding a peremptory mandamus, notwithstanding the summary form of the proceedings and the nature of the decision.[71]

11. Judgments in Habeas Corpus Proceedings.[72]—With all the strictness upon the subject in the English courts, we are not aware of any case there in which it has been held that a writ of error would not lie from the judgment of a court of record, deciding, upon the return of the habeas corpus, that the warrant under which the party was held was sufficient in law to authorize his arrest and detention.[73]

63. Judgments or decrees in ancillary proceedings.—Krippendorf *v.* Hyde, 110 U. S. 276, 287, 28 L. Ed. 145.

64. Judgments in summary proceedings in general.—Railroad Co. *v.* Church, 19 Wall. 62, 22 L. Ed. 97.

65. Bayard *v.* Lombard, 9 How. 530, 13 L. Ed. 245; Curtis *v.* Petitpain, 18 How. 109, 15 L. Ed. 280.

66. Judgments on motions.—Bayard *v.* Lombard, 9 How. 530, 551, 13 L. Ed. 245.

67. Bayard *v.* Lombard, 9 How. 530, 551, 13 L. Ed. 245; Curtis *v.* Petitpain, 18 How. 109, 15 L. Ed. 280.

68. Ex parte Cutting, 94 U. S. 14, 22, 24 L. Ed. 49.

69. Judgment on summary motion or collateral question according to the practice in Pennsylvania.—Where land was sold under an execution, and the money arising therefrom is about to be distributed amongst creditors by an order of the circuit court, it was held, that under the peculiar practice of the courts of Pennsylvania, that a controversy between the creditors as to priority of their respective judgments cannot be brought to this court either by appeal or writ of error. The persons complaining should file their bill in equity, or state an issue in due legal form, with proper parties, setting forth the merits of their respectve claims, if they intend to prosecute an appeal or writ of error to this court. But if they submit the question on which their claim depends to the court below on a motion collateral to the record, the decision of that court is final and conclusive, and cannot be reviewed by this court. Bayard *v.* Lombard, 9 How. 530, 13 L. Ed. 245.

70. Curtis *v.* Petitpain, 18 How. 109, 15 L. Ed. 280, citing Bayard *v.* Lombard, 9 How. 530, 13 L. Ed. 245.

71. Judgment awarding peremptory mandamus.—Columbian Ins. Co. *v.* Wheelright, 7 Wheat. 534, 5 L. Ed. 516; Kendall *v.* United States, 12 Pet. 524, 9 L. Ed. 1181, cited and approved in Holmes *v.* Jennison, 14 Pet. 540, 565, 10 L. Ed. 579.

72. See post, "Orders and Decrees at Chambers," IV, C, 4, e; "Orders in Habeas Corpus Proceedings," IV, C, 4, w, (6).

73. Holmes *v.* Jennison, 14 Pet. 540, 10 L. Ed. 579, 591.

12. Proceeding Must Be a Case at Law or in Equity.—There can be no appeal to the supreme court of the United States in any proceeding which does not constitute a suit or action.[74]

C. Finality of Decision as Governing Right of Review—1. Introductory.—It is often a vexatious and doubtful question what decrees and decisions are final, and what are interlocutory, within the meaning of these acts of congress. One who carefully examines the decisions of the supreme court upon this question cannot fail to be impressed with the truth of the remark made by Mr. Justice Brown in delivering the opinion of that court in McGourkey *v.* Railway Co., 146 U. S. 536, 545, 13 Sup. Ct. 172, when he said, "The cases, it must be conceded, are not altogether harmonious."[75]

2. Necessity for Finality—a. *In General.*—No point is better settled in this court, than that an appeal or writ of error may be prosecuted only from a final judgment or decree. The cases are numerous where appeals have been dismissed, because the decree of the circuit court was not final.[76] And it was

74. Proceedings must be a case at law or in equity.—Pacific, etc., Co. *v.* United States, 187 U. S. 447, 47 L. Ed. 253; Pacific, etc., Co. *v.* United States, 187 U. S. 454, 47 L. Ed. 256.

A proceeding in the district court of Alaska by petition to obtain a license for vessels and salmon canneries under the act of March 3, 1899, in which the appellant protests against the payment of licenses, and in which the court enters an order directing the issue of the license and overruling and denying the protest, is not a suit or action in which a final decree or judgment is rendered, from which the petitioner can appeal to the supreme court. Pacific, etc., Co. *v.* United States, 187 U. S. 447, 47 L. Ed. 253; Pacific, etc., Co. *v.* United States, 187 U. S. 454, 47 L. Ed. 256.

75. Probably no question of equity practice has been the subject of more frequent discussion in this court than the finality of decrees. It has usually arisen upon appeals taken from decrees claimed to be interlocutory, but it has occasionally happened that the power of the court to set aside such a decree at a subsequent term has been the subject of dispute. The cases, it must be conceded, are not altogether harmonious. See McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 544, 36 L. Ed. 1079, opinion of Mr. Justice Brown.

76. Necessity for finality in general.—Barnard *v.* Gibson, 7 How. 651, 657, 12 L. Ed. 857, 860; Wheeler *v.* Harris, 13 Wall. 51, 20 L. Ed. 531; United States *v.* Fossat, 21 How. 446, 16 L. Ed. 186; Ex parte National Enameling Co., 201 U. S. 156, 160, 50 L. Ed. 707; In re Grossmayer, 177 U. S. 48, 50, 44 L. Ed. 665; McCollum *v.* Howard, 154 U. S. App. 577, 19 L. Ed. 638; Thompson *v.* Butler, 95 U. S. 694, 695, 24 L. Ed. 540; Masterson *v.* Herndon, 10 Wall. 416, 19 L. Ed. 953; Luxton *v.* North River Bridge Co., 147 U. S. 337, 341, 37 L. Ed. 194.

"We feel very confident no case has been decided by this court, when the question of the finality of a decree or judgment has been brought to its notice, in which the distinction between final and interlocutory decrees has not been regarded as it was meant to be by the legislation of congress, and as it was understood by the courts in England and in this country, before congress acted upon the subject." Beebe *v.* Russell, 19 How. 283, 284, 15 L. Ed. 668, opinion of Mr. Justice Wayne.

It has been the object of this court at all times, though an accidental deviation may be found, to restrict the cases which have been brought to this court, either by appeal or by writ of error, to those in which the rights of the parties have been fully and finally determined by judgments or decrees in the court below, whether they were cases in admiralty, in equity, or common law. Beebe *v.* Russell, 19 How. 283, 15 L. Ed. 668.

Appellate jurisdiction of this court in writs of error under the twenty-second section of the judiciary act, is confined to final judgments by the express words of the section, and of course the writ of error should be addressed to the final judgment. All the forms of a writ of error furnished to the clerks of the circuit courts are to that effect, and those clerks have no right to change the form without the sanction at least of two justices of this court. Barton *v.* Forsyth, 5 Wall. 190, 193, 18 L. Ed. 545.

Cases cannot be brought to this court upon appeal in parcels. We must have the whole of a case or none. The court below must settle all the merits before we can accept jurisdiction. Appeals will lie, as has been frequently held, when nothing remains to be done except to enforce and give effect to what has been decreed, but until all the rights of the parties have been finally passed upon and settled, this cannot be the condition of a cause. Nothing must be left below when an appeal is taken but to execute the decree. Crosby *v.* Buchanan, 23 Wall. 420, 453, 22 L. Ed. 138.

The supreme court, in the exercise of its ordinary appellate jurisdiction, can take

held that this rule applied as well to appeals from district to circuit courts, as to appeals to this court.[77]

The provision of the judiciary act of 1789 limiting the appellate jurisdiction of this court to final judgments and decrees in the cases specified, in respect to writs of error, was only declaratory of the well-settled and ancient rule of English practice. At common law no writ of error could be brought except on a final judgment.[78]

Petition for Writ of Habeas Corpus.—An appeal may lie, and in many courts often does lie, from a merely interlocutory order. As, for example, on a petition for a writ of habeas corpus setting forth that a party is in custody under the indictment in the district court charging him with violation of the constitution or the laws of the United States.[79]

Necessity for Finality as to All Parties.—The court below cannot send up the case unless all the matters between all the parties to the record have been finally disposed of. The case is not to be sent up in fragments by a succession of writs of error; and any neglect in the observance of the rule exposes the judgment to a reversal on error in the appellate court. According to the practice of this court the judgment cannot be reversed on account of the error, but the case must be dismissed for want of jurisdiction, and remanded to the court below, to be proceeded in and finally disposed of.[80]

cognizance of no case until a final judgment or decree shall have been made in the inferior court. Though the merits of the cause may have been substantially decided; while anything, though merely formal, remains to be done, this court cannot pass upon the subject. If, from any intermediate stage in the proceedings, an appeal might be taken to the supreme court, the appeal might be repeated to the great oppression of parties. So if this court might interpose by way of mandamus, in the progress of a cause, and order a judgment or decree, a writ of error might be brought to the judgment, or an appeal prayed from the decree, and a judgment or decree, entered in pursuance of the mandamus, might be afterwards reversed. Such a proceeding would subvert our whole system of jurisprudence. Life, etc., Ins. Co. *v.* Adams, 9 Pet. 573, 9 L. Ed. 234.

"**It is of great importance to the due administration of justice,** and is in furtherance of the manifest intention of the legislature, in giving appellate jurisdiction to this court upon final decrees only, that causes should not come up here in fragments upon successive appeals. It would occasion very great delays and oppressive expenses. We have already had occasion to advert to this subject in the cases of The Santa Maria, 10 Wheat. 431, 6 L. Ed. 359; The Palmyra, 10 Wheat. 502, 6 L. Ed. 376; Chace *v.* Vasquez, 11 Wheat. 429, 6 L. Ed. 511." Canter *v.* American Ins. Co., 3 Pet. 318, 7 L. Ed. 692.

It is the settled practice of this court, and the same in the King's Bench in England, that the writ will not lie until the whole of the matters in controversy in the suit below are disposed of. The writ itself is conditional and does not authorize the court below to send up the case, unless all the matters between the parties to the record have been determined. The cause is not to be sent up in fragments. Holcombe *v.* McKusick, 20 How. 552, 15 L. Ed. 1020.

Case distinguished.—The case of Michoud *v.* Girod, 4 How. 503, 11 L. Ed. 1076, was an interlocutory decree in the circuit court, and which case, being appealed, was heard and decided by this court. But, from the report, there appears to have been no exception taken to the appeal, and it may be presumed to have escaped the notice of the court. Cited in Craighead *v.* Wilson, 18 How. 199, 15 L. Ed. 332.

77. Mordecai *v.* Lindsay, 19 How. 199, 15 L. Ed. 624.

78. McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893, citing Bac. Ab. Error, A. 2, reaffirmed in Chicago, etc., R. Co. *v.* Roberts, 141 U. S. 690, 35 L. Ed. 905.

Under the judiciary act of 1789 and other acts embodied in the Revised Statutes, the appellate jurisdiction of this court from the circuit court of the United States was limited to final judgments at law, and final decrees in equity or admiralty. Acts of September 24, 1789, c. 20, §§ 13, 22, 1 Stat. 81, 84; March 3, 1803, c. 40, 2 Stat. 244; Rev. Stat., §§ 691, 692. American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 378, 37 L. Ed. 486.

79. Ex parte Virginia, 100 U. S. 339, 25 L. Ed. 676.

80. United States *v.* Girault, 11 How. 22, 13 L. Ed. 587.

By the laws of Mississippi, where a joint action is brought upon a bond or note, the case must be finally disposed of in the court below, with respect to all the parties upon the record, before

b. *Under Circuit Court of Appeals Act.*—This court has no jurisdiction by direct appeal under § 5 of the act of March 3, 1891, c. 517, 26 Stat. 826, until the final determination of the case in the court below, although the word "final" is omitted from the act.[81]

Certiorari to Circuit Court of Appeals.—This court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause.[82]

c. *What Law Governs.*—Moreover the statutes or practice in the court below allowing a review of interlocutory decisions, cannot govern this court in revising their decisions.[83]

Hence, the practice or the decisions of the state of Louisiana cannot control the appellate jurisdiction of this court from the circuit court of the United States, as defined by act of congress.[84]

Form of Judgment.—The forms of verdicts and judgments, it is true, are not controlled, even in Louisiana, by the state law, but there must be some variation from the form of a judgment as at common law to render it appropriate to the form of the process adopted in that circuit. Common-law suits as well as suits in equity are commenced in that court by petition. Therefore, where it is called a judgment in the record and treated as such by the court and the parties, the writ of error will not be dismissed because of the informality of the judgment.[85]

it is carried up to the appellate court, otherwise it is in error. United States *v.* Girault, 11 How. 22, 13 L. Ed. 587.

81. Under circuit court of appeals act.—McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893, reaffirmed in Chicago, etc., R. Co. *v.* Roberts, 141 U. S. 690, 35 L. Ed. 905; Lubin *v.* Edison, 195 U. S. 624, 49 L. Ed. 349; Wirgman *v.* Persons, 196 U. S. 636, 49 L. Ed. 629; Farmers' Bank *v.* Roselle, 172 U. S. 641, 43 L. Ed. 1180; Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179; Hurlbut Land, etc., Co. *v.* Truscott, 165 U. S. 719, 41 L. Ed. 1185; Reaves *v.* Oliver, 168 U. S. 704, 42 L. Ed. 1212; Perea *v.* Perea de Harrison, 195 U. S. 623, 49 L. Ed. 349; International Trust Co. *v.* Weeks, 193 U. S. 667, 48 L. Ed. 839; Johnson *v.* Thomas, 197 U. S. 619, 49 L. Ed. 909; Shoesmith *v.* Boot & Shoe Mfg. Co., 198 U. S. 582, 49 L. Ed. 1172; Wishkah Boom *v.* United States, 202 U. S. 613, 50 L. Ed. 1171; Smith *v.* Iverson, 203 U. S. 586, 51 L. Ed. 329.

In McLish *v.* Roff, 141 U. S. 661, 665, 35 L. Ed. 893, it was observed by Mr. Justice Lamar: "From the very foundation of our judicial system the object and policy of the acts of congress in relation to appeals and writs of error (with the single exception of the provision in the act of 1875 in relation to cases of removal, which was repealed by the act of 1887), have been to save the expense and delays of repeated appeals in the same suit, and to have the whole case and every matter in controversy in it decided in a single appeal." The circuit courts of appeals are governed by the same principles. Kingman & Co. *v.* Western Mfg. Co., 170 U. S. 675, 680, 42 L. Ed. 1192, reaffirmed in International Trust Co. *v.* Weeks, 193 U. S. 667, 48 L. Ed. 839.

82. American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 378, 37 L. Ed. 486.

83. What law governs.—In England a writ of error may be brought upon an interlocutory decree or order; and until a decision is obtained upon the writ, the proceedings of the court below are stayed. But here the words of the act, which allow a writ of error, allow it only in the case of a final judgment. Rutherford *v.* Fisher, 4 Dall. 22, 1 L. Ed. 724.

The statutes of Minnesota have provided for an appeal from the district to the supreme court, on an interlocutory order affecting the merits (Stat. Minn., p. 414, § 7); it was, therefore, properly taken to the supreme court of the territory. But that practice cannot govern this court in revising the judgment of the court below. Holcombe *v.* McKusick, 20 How. 552, 15 L. Ed. 1020.

An appeal will lie to the supreme court of Louisiana, from any interlocutory or incidental order, made in the progress of the cause, which might produce irreparable injury. Levy *v.* Fitzpatrick, 15 Pet. 167, 10 L. Ed. 699.

84. Rev. Stat., § 691; Luxton *v.* North River Bridge Co., 147 U. S. 337, 341, 37 L. Ed. 194; Fleitas *v.* Richardson, 147 U. S. 538, 545, 37 L. Ed. 272.

85. Denial of petition in nature of audita querela.—The appellee filed his petition in the circuit court of the United States averring that he was the holder of a large amount of bonds and coupons, secured by mortgage executed by the appellant. He prayed for executory process. Execution was awarded, and the appellant was ordered to pay the amount

3. Statement of General Rules or Tests—a. *In General.*—The most general rule is that a decree is not final where something yet remains for the court below to do.[86] In other words, no judgment or decree is final which does not terminate the litigation between the parties. Therefore, a writ of error or an appeal of such a judgment or decree will be dismissed.[87] So, also, if the judgment is not one which disposes of the whole case on its merits, it is not final.[88] But where the whole law of a case before a circuit court, is settled by a decree, and nothing remains to be done, unless a new application shall be made at the foot of the decree, the decree is a final one, so far as respects a right of appeal.[89]

of said bonds and coupons. The appellant failing to pay on demand, the railroad and its appurtenances were sold by the marshal, and the appellee became the purchaser. The appellant then filed his petition in the said court, in the nature of an audita querela—averring that the award of execution had been made without notice; that the executory process, as recognized by the practice of Louisiana, could not be enforced in the courts of the United States; and that the appellee's claim could only be enforced on the equity side of the court. The record showed the following entry: "The court having duly considered the 'petition and exhibits submitted by the petitioner in this cause, and being satisfied that the prayer thereof cannot be granted, it is ordered and decreed that the said petition be dismissed with costs.' Judgment rendered June 14th, 1869. Judgment signed June 18th, 1869. E. H. Durell, Judge." On motion to dismiss the writ of error, held, that this was sufficiently formal, and that it was a final judgment to which a writ of error would lie. New Orleans, etc., R. Co. *v.* Morgan, 10 Wall. 256, 19 L. Ed. 892.

86. Statement of general rules or tests in general.—Bronson *v.* Railroad Co., 2 Black 524, 531, 17 L. Ed. 359.

87. St. Clair County *v.* Lovingston, 18 Wall. 628, 21 L. Ed. 813; Moore *v.* Robbins, 18 Wall. 588, 21 L. Ed. 758.

A decree cannot be said to be final until the court has completed its adjudication of the cause. Green *v.* Fisk, 103 U. S. 518, 519, 26 L. Ed. 486.

A judgment was entered on a promissory note drawn by Kelly and others in favor of Lea and others, in the circuit court of Alabama. Afterwards, Kelly, the appellee, filed a bill on the equity side of the court, for the purpose of being relieved from the judgment at law obtained against him and two other persons, on the promissory note. The bill alleged fraud in the plaintiffs in the suit, and that the complainant had no notice of the suit, and had not authorized an appearance, or filed any plea in the same. The bill prayed for a perpetual injunction of proceedings on the judgment, and for general relief. The injunction was granted; and afterwards, on the appearance of two of the plaintiffs in the suit at law, the circuit court decreed, that, on the condition that the complainant, Kelly, appear and plead to the merits of the case, waiving the question of jurisdiction, and pay costs of the suit at law, and the proceedings in equity, a new trial be awarded to the complainant. Two of the plaintiffs in the suit at law, who had appeared to the bill, appealed to the supreme court, seeking to reverse this decree. Held, that the decree of the circuit court was merely interlocutory; and was not a final decree for which an appeal could be taken. Lea *v.* Kelly, 15 Pet. 213, 10 L. Ed. 715.

Where it is ordered that when a certified amount decreed the complainant has been ascertained by the court in special term, the complainant shall have execution as at law in such respective amounts, with interest thereon from such respective days of highest market value, until the amount due from the appellant has been ascertained, such order or decree is not final and appealable. Follansbee *v.* Ballard Paving Co., 154 U. S. 651, 25 L. Ed. 802.

88. Bostwick *v.* Brinkerhoff, 106 U. S. 3, 27 L. Ed. 73; Young *v.* Smith, 15 Pet. 287, 10 L. Ed. 741.

89. French *v.* Shoemaker, 12 Wall. 86, 20 L. Ed. 270, citing Forgay *v.* Conrad, 6 How. 201, 202, 12 L. Ed. 404; Thomson *v.* Dean, 7 Wall. 342, 19 L. Ed. 94; Curtiss' Commentaries, § 188; Beebe *v.* Russell, 19 How. 283, 15 L. Ed. 668.

When a decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree. Beebe *v.* Russell, 19 How. 283, 15 L. Ed. 668.

Where an order appealed from finally disposed of the suit, which was instituted against the receiver by permission of the court, it is a final judgment or decree in that matter. Farlow *v.* Kelly, 131 U. S. 201, 26 L. Ed. 427.

A decree may be final although it does not in terms dismiss a cross bill, where there is a statement contained in the decree that the equity of the case is with the complainant, because this by necessary implication disposes of the cross bill as effectually as it does of the answer

The rule as it is most usually found stated is that a judgment or decree to be final, within the meaning of that term as used in the acts of congress giving this court jurisdiction on appeals and writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree it had already rendered.[90] The principle on which the rule

filed by the appellant to the original bill of complainant. French *v.* Shoemaker, 12 Wall. 86, 20 L. Ed. 270.

90. Whiting *v.* Bank of United States, 13 Pet. 6, 10 L. Ed. 33; Forgay *v.* Conrad, 6 How. 201, 12 L. Ed. 404; Craighead *v.* Wilson, 18 How. 199, 15 L. Ed. 332; Beebe *v.* Russell, 19 How. 283, 15 L. Ed. 668; Bronson *v.* Railroad Co., 2 Black 524, 17 L. Ed. 359; Thomson *v.* Dean, 7 Wall. 342, 19 L. Ed. 94; St. Clair County *v.* Lovingston, 18 Wall. 628, 21 L. Ed. 813; Parcels *v.* Johnson, 20 Wall. 653, 22 L. Ed. 410; Railroad Co. *v.* Swasey, 23 Wall. 405, 22 L. Ed. 136; Crosby *v.* Buchanan, 23 Wall. 420, 22 L. Ed. 138; Board of Comm'rs *v.* Lucas, 93 U. S. 108, 23 L. Ed. 822; Bostwick *v.* Brinkerhoff, 106 U. S. 3, 27 L. Ed. 73; Lodge *v.* Twell, 135 U. S. 232, 34 L. Ed. 153; Dainese *v.* Kendall, 119 U. S. 53, 30 L. Ed. 305; Bank of Rondout *v.* Smith, 156 U. S. 330, 39 L. Ed. 441; Kingman & Co. *v.* Western Mfg. Co., 170 U. S. 675, 679, 42 L. Ed. 1192; Guarantee Co. *v.* Mechanics' Savings Bank, etc., Co., 173 U. S. 582, 43 L. Ed. 818; Wabash R. Co. *v.* Tourville, 179 U. S. 322, 45 L. Ed. 210; Bowker *v.* United States, 186 U. S. 135, 139, 46 L. Ed. 1090, reaffirmed in Smith *v.* Iverson, 203 U. S. 586, 51 L. Ed. 329; Macfarland *v.* Brown, 187 U. S. 239, 246, 47 L. Ed. 159; Mower *v.* Fletcher, 114 U. S. 127, 128, 29 L. Ed. 117; Benjamin *v.* Dubois, 118 U. S. 46, 30 L. Ed. 52; Meagher *v.* Minnesota Thresher Mfg. Co., 145 U. S. 608, 611, 36 L. Ed. 834; St. Louis, etc., R. Co. *v.* Southern Exp. Co., 108 U. S. 24, 27 L. Ed. 638; Winthrop Iron Co. *v.* Meeker, 109 U. S. 180, 27 L. Ed. 898; Thomson *v.* Dean, 7 Wall. 342, 19 L. Ed. 94; Green *v.* Green, 90 U. S. 486, 490, 23 L. Ed. 75; Stoval *v.* Banks, 10 Wall. 583, 19 L. Ed. 1063; Washington, etc., R. Co. *v.* Bradleys, 7 Wall. 575, 583, 19 L. Ed. 274; Elliott *v.* Sackett, 108 U. S. 132, 27 L. Ed. 678; Wabash, etc., Canal Co. *v.* Beers, 1 Black 54, 17 L. Ed. 41; Grant *v.* Phœnix Ins. Co., 106 U. S. 429, 431, 27 L. Ed. 237; Ex parte Norton, 108 U. S. 237, 242, 27 L. Ed. 709; Parsons *v.* Robinson, 122 U. S. 112, 30 L. Ed. 1122; Burlington, etc., R. Co. *v.* Simmons, 123 U. S. 52, 31 L. Ed. 73; Keystone Iron Co. *v.* Martin, 132 U. S. 91, 32 L. Ed. 275; McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 36 L. Ed. 1079; Perkins *v.* Fourniquet, 6 How. 206, 12 L. Ed. 406; Pulliam *v.* Christian, 6 How. 209, 12 L. Ed. 408.

In Benjamin *v.* Dubois, 118 U. S. 46, 30 L. Ed. 52, a suit was instituted against an executor to recover money in his hands given by the will to two legatees who resided in the District of Columbia. The defense set up in this suit was that the testator's domicil was not in the district at the time of his death but in Missouri. The finding of the court below was simply upon this question of domicil, and no decree was rendered as to the payment of any money, which was the only purpose of the suit. This court held, that the decree was not final within the meaning of the following rule laid down in Bostwick *v.* Brinkerhoff, 106 U. S. 3, 27 L. Ed. 73: "The rule is well settled and of long standing that a judgment or decree to be final, within the meaning of that term as used in the acts of congress giving this court jurisdiction on appeals or writs of error, must terminate the litigation between the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the judgment or decree which had been rendered."

Dissolution of injunction.—A decree of the court of appeals of the District of Columbia reversing a decree of the supreme court of the district dissolving a preliminary injunction, which made a complete disposition of the controversy, so that all that was left for the supreme court of the district was the ministerial duty of entering a final injunction in the language of the preliminary order, with the proviso that it should operate until such time in the future as the defendant should voluntarily withdraw from business in the district; is clearly a final decree. Chesapeake, etc., Tel. Co. *v.* Manning, 186 U. S. 238, 46 L. Ed. 1144, citing and approving Board of Comm'rs *v.* Lucas, 93 U. S. 108, 23 L. Ed. 822; Bostwick *v.* Brinkerhoff, 106 U. S. 3, 27 L. Ed. 73; Mower *v.* Fletcher, 114 U. S. 127, 29 L. Ed. 117.

Decrees fixing railroad rates.—Where the controversy is about the right of an express company to compel a railway company to do its express business on the payment of lawful charges, a decree that requires the carriage, and fixes the compensation to be paid and adjudges costs against the railway company, and awards execution, is final, although the decree does not definitely settle what these charges should be for all time. "Inasmuch as the rates properly chargeable for transportation vary according to circumstances, and what was reasonable when the decree was rendered may not

rests is applicable where the appeal is from the decree of an intermediate appellate court.[91]

In chancery, a decree is interlocutory whenever an inquiry as to a matter of law or fact is directed, preparatory to a final decision.[92]

Where Further Orders Necessary to Enforce Decrees.—A decree which finally determines the entire controversy litigated between the parties, leaving nothing to be done but to carry it into execution, is final, although the fund is brought into court for its final distribution as decreed, where it is not to be held pending the ascertainment of the principles upon which it should be distributed.[93] But where matters within the pleading have been left undetermined, and the cause has been retained for the purpose of thereafter passing on them and for the entry of a further decree, the decree entered is not final.[94] Accord-

always continue to be so, leave is given the parties to apply for a modification of what has been ordered in that particular if they, or either of them, shall desire to do so. In effect the decree requires the railway company to carry for reasonable rates, and fixes the time being the maximum of what will be reasonable." St. Louis, etc., R. Co. *v.* Southern Express Co., 108 U. S. 24, 29, 27 L. Ed. 638; Missouri, etc., R. Co. *v.* Dinsmore, 108 U. S. 30, 27 L. Ed. 640.

91. Macfarland *v.* Brown, 187 U. S. 239, 246, 47 L. Ed. 159.

92. Beebe *v.* Russell, 19 How. 283, 15 L. Ed. 668.

Decrees in suits for specific performance.—A., in 1812, made a deed to V. conveying to him valuable estates, V. by a separate instrument, agreeing that if A. would, within five years, pay to him a certain sum ($14,500), he would convey to A.'s children, then infants, a part of this estate, and convey also to them a part of certain other estates. Soon afterwards V. acknowledged that A. had paid to him a large part ($11,600) of the money to be paid. On proceedings in equity many years afterwards, in the circuit court of the United States, the children, now become of age, prayed for—1st. A cancellation of the deed by A., as having been fraudulently procured by V. 2d. That if this would not be decreed, then, on payment by the children of the balance with interest, for a specific performance by V. of his contract to convey the two parts of the estates which he had agreed to convey, if $14,500 were paid in five years. 3d. If the court would make neither of these decrees, then that it would decree that V. should refund with interest the $11,600 purchase money that had been paid to him. The circuit court in 1853 refused to decree a cancellation of A.'s deed, refused also to decree that V. should specifically perform his agreement to convey; but as to the return of the $11,600 purchase money paid, the court said that it could not pass on that matter, proper parties not being before the court, and made no decree about it. Proper parties came in, and after hearing, the court refused to order a return of the purchase money, and, finally, A. D. 1872, dismissed the bill by A.'s children. Held, that no "final decree" in the sense of the statute which authorized appeals from the circuit court to this court in the case of final decrees in equity was made in 1853, nor indeed before 1872; and that the decree then entered brought up the whole case; that is to say, brought up the question of cancellation, the question of specific performance, and the question of return of purchase money. Crosby *v.* Buchanan, 23 Wall. 420, 22 L. Ed. 138.

93. Lewisburg Bank *v.* Sheffey, 140 U. S. 445, 35 L. Ed. 493, citing Hill *v.* Chicago, etc., R. Co., 140 U. S. 52, 35 L. Ed. 331.

The subject was much considered and many cases referred to and classified and the distinctions indicated, in Keystone Iron Co *v.* Martin, 132 U. S. 91, 33 L. Ed. 275. It is there shown that where the entire subject matter of a suit is disposed of by a decree, the mere fact that accounts remain to be adjusted and the bill is retained for that purpose, does not deprive the adjudication of its character as a final and appealable decree. Lewisburg Bank *v.* Sheffey, 140 U. S. 445, 452, 35 L. Ed. 493.

It is true, as pointed out by Mr. Justice Field in Hill *v.* Chicago, etc., R. Co., 140 U. S. 52, 35 L. Ed. 331, that an appeal may be taken from a decree in an equity cause, notwithstanding it is merely in execution of a prior decree in the same suit, for the purpose of correcting errors which may have originated in the subsequent proceeding. This was so held in Chicago, etc., R. Co. *v.* Fosdick, 106 U. S. 47, 80, 27 L. Ed. 47, and was the rule sanctioned and adopted in Forgay *v.* Conrad, 6 How. 201, 12 L. Ed. 404, and Blossom *v.* Milwaukee, etc., R. Co., 1 Wall. 655, 17 L. Ed. 673. An appeal will lie from such decrees according to the nature of the subject matter and the rights of the parties affected. Lewisburg Bank *v.* Sheffey, 140 U. S. 445, 452, 35 L. Ed. 493.

94. Covington *v.* Covington Nat. Bank, 185 U. S. 270, 46 L. Ed. 906; McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 36

ingly, where the decree appoints a receiver, directs a sale, and orders an accounting, but what is left to be done is something more than a mere ministerial execution of a decree as rendered; the decree is interlocutory and not final, even though it settles the equities of the bill.[95]

Want of notice or ignorance of the proceedings may have the effect of rendering a decree interlocutory which would otherwise be final.[97]

b. *Effect of Motion to Vacate Judgment or Decree.*—Where the court, at the same term and before the consummation of an appeal, on its own motion or on the motion of either party, sets aside a judgment or decree or signifies an intention to reconsider it, the judgment does not become final for the purposes of an appeal until the order of the court to that effect is entered of records.[98]

L. Ed. 1079; Thomson *v.* Dean, 7 Wall. 342, 19 L. Ed. 94; Dainese *v.* Kendall, 119 U. S. 53, 30 L. Ed. 305; Ex parte Norton, 108 U. S. 237, 27 L. Ed. 709; St. Louis, etc., R. Co. *v.* Southern Express Co., 108 U. S. 24, 27 L. Ed. 638; Grant *v.* Phœnix Ins. Co., 106 U. S. 429, 27 L. Ed. 237; Beebe *v.* Russell, 19 How. 283, 15 L. Ed. 668; Bostwick *v.* Brinkerhoff, 106 U. S. 3, 27 L. Ed. 73; Craighead *v.* Wilson, 18 How. 199, 15 L. Ed. 332; Green *v.* Fisk, 103 U. S. 518, 26 L. Ed. 486; Railroad Co. *v.* Swasey, 23 Wall. 405, 22 L. Ed. 136.

"Matters within the pleadings having been left undetermined and the cause having been retained for the purpose of thereafter passing on them and for the entry of a further decree, the decree entered was not final. McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 545, 546, 36 L. Ed. 1079, and cases cited. As a necessary result this court cannot adjudicate upon the contention respecting that portion of the issue which was actually determined by the circuit court, because a decree of a circuit court upon the merits can be reviewed here only by appeal, which cannot be taken until after a final decree has been made disposing of the whole cause. The case is not to be brought here in fragments by successive appeals." Covington *v.* Covington Nat. Bank, 185 U. S. 270, 277, 46 L. Ed. 906, citing Southern R. Co. *v.* Postal Tel., etc., Co., 179 U. S. 641, 644, 45 L. Ed. 355.

Where, in an action on fidelity bonds of a deceased defaulting officer of a bank, the court decreed that the surety was liable, but that the liability was secondary to that of a deceased's estate, and retained the case for the purpose of an accounting of collaterals deposited by deceased for the bank's reimbursement and for the fixing of the surety's ultimate liability, "whatever that may be," such decree is not final, within 26 Stat. 826, c. 517, § 6, and hence no appeal can be prosecuted therefrom to the circuit court of appeals. Guarantee Co. *v.* Mechanics' Savings Bank, etc., Co., 173 U. S. 582, 43 L. Ed. 818.

The appellee filed a bill seeking to enjoin the threatened assessment and collection by the defendants below (appellants here) of municipal taxes under the authority of an act of the general assembly of Kentucky approved March 21, 1900. The relief sought was based upon the grounds that the act was discriminatory and impaired the obligation of a contract which was res adjudicata. The circuit court enjoined the assessment and collection of taxes for the years prior to March 21, 1900, not upon the consideration of the questions of contract or res adjudicata, but solely upon the question of discrimination. So far as any taxes subsequent to March 21, 1900 were concerned, they were not disposed of; but the decree reserved for future determination the right of complainant below to enjoin the collection of a municipal tax for 1900, and subsequent years. It was held, that this was not a final decree from which an appeal to the supreme court of the United States would lie. Covington *v.* Covington Nat. Bank, 185 U. S. 270, 46 L. Ed. 906.

A decree of the court of appeals of the District of Columbia reversing the decree of the court below and which contemplates and requires further proceedings, is not a final decree although it passes upon the merits of the case. Clark *v.* Roller, 199 U. S. 541, 50 L. Ed. 300.

95. Craighead *v.* Wilson, 18 How. 199, 15 L. Ed. 332; Young *v.* Smith, 15 Pet. 387, 10 L. Ed. 741; Keystone Iron Co *v.* Martin, 132 U. S. 91, 33 L. Ed. 275; Lodge *v.* Twell, 135 U. S. 232, 34 L. Ed. 153.

Thus, a decree setting aside a fraudulent conveyance, appointing a receiver, ordering a sale, and enjoining the defendants from disposing of any of the property or its proceeds; that the receiver be directed to sell the property, and pay whatever sum may be due at the time of the sale, holding the balance subject to the order of the court, is not a final decree, because what is left to be done is something more than the mere ministerial execution of the decree as rendered. Lodge *v.* Twell, 135 U. S. 232, 34 L. Ed. 153.

97. Leadville Coal Co. *v.* McCreery, 141 U. S. 475, 35 L. Ed. 824; Fleitas *v.* Richardson, 147 U. S. 538, 545, 37 L. Ed. 272; Levy *v.* Fitzpatrick, 15 Pet. 167, 10 L. Ed. 699.

98. Effect of motion to vacate judgment or decree.—Washington, etc., R. Co.

c. *Effect of Motion for New Trial.*—A judgment is not final so that the jurisdiction of the appellate court may be invoked while it is still under the control of the trial court through the pendency of a motion for new trial.[99]

d. *Decrees Subject to Future Modifications and Directions.*—In Daniels' Chancery Practice, vol. 2, p. 641, 642, the effect of allowing the privilege of making applications to the court for modifications and directions, is stated to be no alteration of the final nature of the decree. Says the author: "A decree with such a liberty reserved is still a final decree, and, when signed and enrolled, may be pleaded in bar to another suit for the same matter."[1]

e. *Decrees with Superadded Reservations.*—A decree may be final although leave is given either party to apply, at the foot of the decree, for such further order as may be necessary to the due execution of the same, or as may be required in relation to any matter not finally determined by it, where it is apparent that such reservation was superadded to the decree as a precaution, and not because the court did not regard the whole issue between the parties as determined by the decree.[2]

f. *Contingent or Conditional Decrees.*—An order which grants certain relief upon the party's complying with conditions specified in the order, and provides that, if the conditions are not complied with, the relief shall be denied, is not a final decree, and is not appealable.[3]

v. Bradleys, 7 Wall. 575, 19 L. Ed. 274; Doss *v.* Tyack, 14 How. 298, 14 L. Ed. 428; Wheeler *v.* Harris, 13 Wall. 51, 20 L. Ed. 531.

A motion made during the term to set aside a judgment suspends the operation of that judgment, so that it does not take final effect for the purposes of a writ of error until the motion is disposed of. Memphis *v.* Brown, 94 U. S. 715, 24 L. Ed. 244

Where a motion to rescind a decree is made at the same term, the decree does not become final until the motion is heard and decided. Washington, etc., R. Co. *v.* Bradleys, 7 Wall. 575, 19 L. Ed. 274, citing Brockett *v.* Brockett, 2 How. 238, 241, 11 L. Ed. 251.

99. Effect of motion for new trial.—Kingman & Co. *v.* Western Mfg. Co., 170 U. S. 675, 680, 42 L. Ed. 1192, reaffirmed in International Trust Co. *v.* Weeks, 193 U. S. 667, 48 L. Ed. 839.

It is true that a writ of error does not lie from this court or the courts of appeals to review an order denying a motion for a new trial, nor can error be assigned on such an order because the disposition of the motion is discretionary; but the court below while such a motion is pending has not lost its jursdiction over the case, and, having power to grant the motion, the judgment is not final for the purpose of taking out the writ. Kingman & Co. *v.* Western Mfg. Co., 170 U. S. 675, 680, 42 L. Ed. 1192, reaffirmed in International Trust Co. *v.* Weeks, 193 U. S. 667, 48 L. Ed. 839.

1. Decrees subject to future modifications and directions.—Stoval *v.* Banks, 10 Wall. 583, 587, 19 L. Ed. 1036.

In Mills *v.* Hoag, 7 Paige 19, it was said that "a decree is not the less final in its nature, because some future orders of the court may possibly become necessary to carry such final decree into effect." Approved in Stoval *v.* Banks, 10 Wall. 583, 587, 19 L. Ed. 1036.

A decree which adjudges a certain sum of money to be due from an administrator to each of the distributees of his intestate's estates, and awards execution to collect it, is a final decree. An added direction that the defendant be allowed, as payment to each of the distributees, the amount of any note held by him against them, and also that the several shares of the parties to whom the estate is awarded, shall be subject to ratable deduction for fees yet unpaid for the collection of notes belonging to the administrator, does not make the decree less final; especially when it does not appear that the administrator held any notes against any of the distributees, or that there were any unpaid fees. Stoval *v.* Banks, 10 Wall. 583, 19 L. Ed. 1036.

2. Decrees with superadded reservations.—French *v.* Shoemaker, 12 Wall. 86, 20 L. Ed. 270.

In Winthrop Iron Co. *v.* Meeker, 109 U. S. 180, 27 L. Ed. 898, it was held, that where a decree decides the right to the property in contest, and the party is immediately entitled to have it carried into execution, it is a final decree, although the court below retains possession of so much of the bill as may be necessary for adjusting accounts between the parties, the court remarking that such a case was different from a suit by a patentee to establish his patent and recover for infringement, because there the money recovered was a part of the subject matter of the suit. Followed in McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 546, 36 L. Ed. 1079.

3. Contingent or conditional decrees.

g. *Where Decree Is Final Only as to Some of the Parties*—(1) *In General.*—A decree may be final as to some of the parties without being final as to other parties to the cause when it completely disposes of their rights.[4] And this is true whether they were original parties to the cause, or are merely interveners.[5]

(2) *Dismissal as to Some of the Defendants Only.*—The general rule is that an order retaining or dismissing parties defendant, who are charged to be jointly liable to the complainant in the suit, is not appealable.[6] Thus, where a bill in equity is dismissed as to some of the defendants, but is still pending and undetermined as to the others, such decree is not final and appealable.[7] The

—Jones *v.* Craig, 127 U. S. 213, 215, 32 L. Ed. 147.

4. Where decree is final only as to some of the parties in general.—Stewart *v.* Masterson, 131 U. S. 151, 32 L. Ed. 114; Hill *v.* Chicago, etc., R. Co., 140 U. S. 52, 35 L. Ed. 331.

A suit was brought against several parties who were alleged to be interested in certain contracts and transactions out of which the claim of the complainants arose. A decree dismissing a bill as to certain of the defendants and ordering it to be retained for the purpose of determining the liability of certain other defendants for the amount of money due under a certain contract specifically named, was held by the court to be final as to the defendants dismissed, and it was held that the controversy left was a severable matter, which did not concern them. Hill *v.* Chicago, etc., R. Co., 140 U. S. 52, 35 L. Ed. 331.

In prize case—Disposition of claims of some libelants.—Where several libels were filed in a district court seeking to condemn as prize of war large quantities of cotton and other property captured on the interior waters of the United States, a decree disposing of the claims of one libelant, leaving nothing to be litigated between him and the United States, was final, although it did not dispose of the claims of the other libelants. Withenbury *v.* United States, 5 Wall. 819, 18 L. Ed. 613.

5. Gumbel *v.* Pitkin, 113 U. S. 545, 547, 28 L. Ed. 1128.

A decree in a suit filed for the purpose of foreclosing a railroad mortgage, that the claim of an intervening creditor of an interest in certain locomotives in the possession of the receiver was just and entitled to priority over debts secured by the mortgage, is a final decree; and it cannot be vacated by the court of its own motion after the expiration of the term at which it was rendered. Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207, 34 L. Ed. 97.

Decree denying confirmation of mortgage foreclosure sale.—At a sale foreclosing a railway, a bid was made, but no further proceedings were there had. Thereafter the bidder was made a party to the cause and came into court by petition and prayed for the confirmation of the sale. The decree of the court denying the relief prayed was final as to him. Blossom *v.* Milwaukee, etc., R. Co., 1 Wall. 655, 17 L. Ed. 673.

6. Dismissal as to some of the defendants only.—United States *v.* Girault, 11 How. 22, 32, 13 L. Ed. 587; Hohorst *v.* Packet Co., 148 U. S. 262, 263, 37 L. Ed. 443; Bank of Rondout *v.* Smith, 156 U. S. 330, 39 L. Ed. 441.

A decree in a patent infringement suit against a single defendant, which, in addition to granting an injunction as to the claims of the patent held to be infringed, and sending the cause to a master for an accounting, dismissed the bill as to the claims held invalid and those found not to be infringed, is not, as to such dismissal, a final decree from which complainants can appeal. Ex parte National Enameling, etc., Co., 201 U. S. 156, 50 L. Ed. 707, following Hohorst *v.* Packet Co., 148 U. S. 262, 37 L. Ed. 443, and distinguishing Forgay *v.* Conrad, 6 How. 201, 12 L. Ed. 404; Hill *v.* Chicago, etc., R. Co., 140 U. S. 52, 35 L. Ed. 331.

Where record on appeal from dismissal as to one party shows no final decree as to others.—On an appeal from a decree of dismissal, it appeared that a bill had been filed in the circuit court of the United States against a foreign corporation and other defendants, citizens of the United States, for the infringement of letters patent. The bill was dismissed as to the foreign corporation, but, so far as appeared from the record of the appeal from the judgment of dismissal, the cause was still pending and undetermined as to the other defendants. The court held that such decree of dismissal was not a final one, from which an appeal could be prosecuted. Hohorst *v.* Packet Co., 148 U. S. 262, 37 L. Ed. 443, reaffirmed in Nash *v.* Harshman, 149 U. S. 263, 37 L. Ed. 727, and cited in In re Atlantic City R. Co., 164 U. S. 633, 635, 41 L. Ed. 579.

7. Hohorst *v.* Packet Co., 148 U. S. 262, 37 L. Ed. 443, followed in Nash *v.* Harshman, 149 U. S. 263, 37 L. Ed. 727; Bank of Rondout *v.* Smith, 156 U. S. 330, 39 L. Ed. 441; Smith *v.* Iverson, 203 U. S. 586, 51 L. Ed. 329; Ex parte National Enameling Co., 201 U. S. 156, 50 L. Ed. 707, distinguishing Hill *v.* Chicago, etc., R. Co., 140 U. S. 52, 35 L. Ed. 331.

Where there are several defendants to a suit in equity, and all of them file an-

same rule is applicable to an appeal in admiralty,[8] and in equity.[9]

Limitations of and Exceptions to General Rule.—There are cases, however, in equity in which a decree, disposing of every ground of contention between the parties, except as to the ascertainment of an amount in a matter separable from the other subjects of controversy, and relating only to some of the defendants, may be treated as final, though retained for the determination of such severable matter.[10] Where there is a joint liability, if the decree is final as to one of the joint parties, the codefendant may appeal from the decree, although it does not dispose of the case as to him but only as to a coparty.[11] Another exception is that the dismissal of a petition of intervention after a consideration of such petition on the merits is final.[12] So, also, where a bill is taken

swers except one, and he demurs to the bill, a judgment sustaining the demurrer as to such party and dismissing the bill, is not final and appealable. Bank of Rondout *v.* Smith, 156 U. S. 330, 39 L. Ed. 441, distinguishing Hill *v.* Chicago, etc., R. Co., 140 U. S. 52, 35 L. Ed. 331.

8. Dayton *v.* United States, 131 U. S., appx. lxxx, 18 L. Ed. 169; Hohorst *v.* Packet Co., 148 U. S. 262, 265, 37 L. Ed. 443.

9. Frow *v.* De La Vega, 15 Wall. 552, 554, 21 L. Ed. 60; Hohorst *v.* Packet Co., 148 U. S. 262, 265, 37 L. Ed. 443.

In Shaw *v.* Quincy Min. Co., 145 U. S. 444, 36 L. Ed. 768, a bill was filed against the mining company and others in the circuit court of the United States for the Southern District of New York, and service of subpœna was made upon the secretary of the company. The company appeared specially and moved for an order to set aside the service, which was granted, whereupon complainant applied to this court by petition for writ of mandamus to the judges of the circuit court to command them to take jurisdiction against the company upon the bill. The ground on which our jurisdiction was invoked was the inadequacy of any other remedy, and it was argued that as the cause could proceed as to the other defendants, no final judgment could be entered upon the order of the circuit court, and no appeal taken therefrom. Hohorst *v.* Packet Co., 148 U. S. 262, 266, 37 L. Ed. 443.

In United States *v.* Girault, 11 How. 22, 32, 13 L. Ed. 587, which was a writ of error to review a judgment rendered by the circuit court of the United States in Mississippi in favor of some of the defendants only, in an action on a bond, leaving the suit undisposed of as against one defendant, this court would not reverse the judgment according to the practice in Mississippi, but dismissed the writ of error. Hohorst *v.* Packet Co., 148 U. S. 262, 264, 37 L. Ed. 443.

In Frow *v.* De La Vega, 15 Wall. 552, 21 L. Ed. 60, it was held, that a final decree on the merits cannot be made separately against one of several defendants upon a joint charge against all, where the case is still pending as to the others. It is true that there a default had been entered with a decree pro confesso against one of several defendants, and a final decree had been made absolute against him, whereupon the court proceeded to try the issues made by the answers of the other defendants and dismissed complainant's bill; but this attitude of the case illustrated and required the application of the general rule. Hohorst *v.* Packet Co., 148 U. S. 262, 265, 37 L. Ed. 443.

10. Hill *v.* Chicago, etc., R. Co., 140 U. S. 52, 35 L. Ed. 331; Hohorst *v.* Packet Co., 148 U. S. 262, 265, 37 L. Ed. 443; Nash *v.* Harshman, 149 U. S. 263, 37 L. Ed. 727.

In Hill *v.* Chicago, etc., R. Co., 140 U. S. 52, 35 L. Ed. 331, where a suit was brought against several parties who were alleged to be interested more or less in certain contracts and transactions out of which the claim of the complainant arose, a decree dismissing the bill as to certain of the defendants, and ordering it to be retained for the purpose of determining the liability of certain other defendants for an amount of money due under a certain contract specifically named, was held to be appealable because it was final as to the defendants dismissed, and the controversy left was a severable matter, which did not concern them.

In Withenbury *v.* United States, 5 Wall. 819, 18 L. Ed. 613, several libels were filed for the condemnation, as prize of war, of large quantities of cotton and other property. These libels were consolidated, and various claims were interposed in the consolidated suit for portions of the property, and among them the claim of Withenbury & Doyle. An order was made dismissing this claim, with costs, while the suit remained pending and the cotton and its proceeds undisposed of. The supreme court held, that this order was appealable, because it completely determined the whole matter in controversy between these claimants and the United States, and was final as to all the parties to that severable controversy.

11. Withenbury *v.* United States, 5 Wall. 819, 18 L. Ed. 613; Blossom *v.* Milwaukee, etc., R. Co., 1 Wall. 655, 17 L. Ed. 673.

12. Dismissal of petition of intervention final.—Savannah *v.* Jesup, 106 U. S.

as confessed by one of two defendants before a decree is made dismissing the bill, on demurrer, as to the other defendant, the latter can appeal from the decree, because the decree is final as to him, althought it does not dispose of the case as to his codefendant.[13]

h. *Failure to Dispose of Severable Matters.*—The finality of a decree is not affected by the fact that there was left to be determined a further severable matter in which the appellant parties had no interest.[14] But this rule does not apply to cases where the liability of the defendants is alleged to be joint, or to a case in which there is but a single defendant.[15]

i. *Orders Disposing of Matters Arising Subsequent to Principal Decree.*—The doctrine that, after a decree which disposes of a principal subject of litigation and settles the rights of the parties in regard to that matter, there may subsequently arise important matters requiring the judicial action of the court in relation to the same property and some of the same rights litigated in the main suit, making necessary substantive and important orders and decrees in which the most material rights of the parties may be passed upon by the court, and which, when they partake of the nature of final decisions of those rights, may be appealed from, is well established by the decisions of this court.[16]

j. *Decrees Disposing of Collateral Matters.*—A decree, to be a final one, within the meaning of the act of congress, providing for appeals to the supreme court, need not necessarily be one that disposes of all the issues presented in the case finally, but may include a final determination in collateral matters.[17] But col-

563, 27 L. Ed. 276; Gumbel *v.* Pitkin, 113 U. S. 545, 547, 28 L. Ed. 1128; Fosdick *v.* Schall, 99 U. S. 235, 25 L. Ed. 339; Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207, 34 L. Ed. 97.

Where, on a bill to foreclose a mortgage, a municipal corporation was allowed to intervene, setting up a claim for taxes on the property to be sold, a petition to intervene was considered by the court upon the merits and by its order dismissed. Such order of dismissal was held to be a final decree as to the intervener. Savannah *v.* Jesup, 106 U. S. 563, 27 L. Ed. 276.

Dismissal of petition of intervener in attachment.—An order dismissing, on the merits, a petition by which a third party intervenes in attachment proceedings, asserting a prior lien on the property attached, is final as to him. Gumbel *v.* Pitkin, 113 U. S. 545, 547, 28 L. Ed. 1128.

13. Stewart *v.* Masterson, 131 U. S. 151, 32 L. Ed. 114.

14. Failure to dispose of severable matters.—Todd *v.* Daniel, 16 Pet. 521, 10 L. Ed. 1054; Forgay *v.* Conrad, 6 How. 201, 12 L. Ed. 404; Witherbury *v.* United States, 5 Wall, 819, 18 L. Ed. 613; Germain *v.* Mason, 12 Wall. 259, 20 L. Ed. 392; Milner *v.* Meek, 95 U. S. 252, 24 L. Ed. 444; Hill *v.* Chicago, etc., R. Co., 140 U. S. 52, 35 L. Ed. 331.

15. Ex parte National Enameling, etc., Co., 201 U. S. 156, 50 L. Ed. 707, following Hohorst *v.* Packet Co., 148 U. S. 262, 37 L. Ed. 443, and distinguishing Hill *v.* Chicago, etc., R. Co., 140 U. S. 52, 35 L. Ed. 331; Bank of Rondout *v.* Smith, 156 U. S. 330, 39 L. Ed. 441.

16. Orders disposing of matters arising subsequent to principal decree.—Blossom *v.* Milwaukee, etc., R. Co., 1 Wall. 655, 17 L. Ed. 673; Forgay *v.* Conrad, 6 How. 201, 12 L. Ed. 404; Fosdick *v.* Schall, 99 U. S. 235, 25 L. Ed. 339; Williams *v.* Morgan, 111 U. S. 684, 28 L. Ed. 559; Burnham *v.* Bowen, 111 U. S. 776, 28 L. Ed. 596; Farmers' Loan & Trust Co., 129 U. S. 206, 213, 32 L. Ed. 656.

An order of a circuit court of the United States, in a suit in equity for the foreclosure of a mortgage upon the property of a railroad company, that the receiver of the mortgaged property may borrow money and issue certificates therefor to be a first lien upon it, made after final decree of foreclosure, and after appeal therefrom to this court, and after the filing of a supersedeas bond, establishes, if unreversed, the right of the holders of the certificates to priority of payment over the mortgage bondholders, and is a final decree from which an appeal may be taken to this court. Farmers' Loan & Trust Co., 129 U. S. 206, 32 L. Ed. 656.

17. Decrees disposing of collateral matters.—Bronson *v.* Railroad Co., 2 Black 524, 530, 17 L. Ed. 359; Central Trust Co *v.* Grant Locomotive Works, 135 U. S 207, 34 L. Ed. 97; Trustees *v.* Greenough, 105 U. S. 527, 26 L. Ed. 1157; Hinckley *v.* Gilman, etc., R. Co., 94 U. S. 467, 24 L. Ed. 166.

The term "final decision" in the statute providing for appeals to the supreme court under consideration does not mean necessarily such decisions or decrees only which finally determine all the issues presented by the pleadings; that, while these are undoubtedly final decisions, the terms are not limited to them, but also apply to a final determination of a collateral matter distinct from the general subject of litiga-

lateral matters which arise after final judgment, that are only antecedent and ancillary to another suit, are not reviewable.[18]

k. *Supplemental Decree in Execution of the Original Decree.*—Decrees that are merely orders in execution of the previous decrees of the court, are final and appealable, for the purpose of correcting orders which originate in them. But when such decrees are dependent upon the decree, to execute which they were rendered, they are vacated by its reversal; in which case the appeal which brings them into review will be dismissed for want of a subject matter on which to operate.[19] But it has been held, that an order of sale in execution of an original decree is not a final decree, on which an appeal will lie.[20] Likewise, an order

tion, affecting only the parties to the particular controversy, and finally settles that controversy. It would seem, also, that the importance of this collateral matter should be considered. Terry *v.* Sharon, 131 U. S. 40, 46, 33 L. Ed. 94.

The right of a mortgagee to appeal from a decree, with which he is dissatisfied, cannot be suspended by cross bills between other parties contesting matters with which the mortgagee has no concern. Bronson *v.* Railroad Co., 2 Black 524, 17 L. Ed. 359.

In Williams *v.* Morgan, 111 U. S. 684, 28 L. Ed. 559, an order fixing the amount of the compensation of receivers in a suit to foreclose a mortgage on a railroad while the main suit was still pending was held to be appealable, because it was final in its nature, and was made in a matter distinct from the general subject of litigation, a matter by itself, which affected only the parties to the particular controversy, and those whom they represented.

In a suit to compel a railway company to do an express company's business on the payment of lawful charges, a decree which requires the carriage, and fixes the compensation to be paid, is final although a supplemental order is made after the decree for the settlement of accounts which accrued pending the suit. Such matters do not enter into the merits of the case. All such matters relate to the administration of the cause, and the accounts to be settled under the present order of the same general character as those of a receiver who holds property awaiting the final disposition of the suit. They are incidents of the main litigation, but not necessarily a part of it. St. Louis, etc., R. Co. *v.* Southern Exp. Co., 108 U. S. 24, 27 L. Ed. 638; Missouri, etc., R. Co. *v.* Dinsmore, 108 U. S. 30, 27 L. Ed. 640.

18. The refusal of the district court to grant a certificate of reasonable cause is not a matter which can be reviewed in the circuit court or in this court. It is only from final judgments that a writ of error lies from the district to the circuit court, or from the latter court to the supreme court. The granting or the refusal to grant the certificate is not a final judgment in the sense of the statute which allows writs of error. The certificate, when granted, is no part of the original case. It is a collateral matter which arises after final judgment. It is granted to protect the person at whose instance the seizure was made, should an action of trespass be brought against him by the claimant for the wrongful seizure of the latter's property. The granting of the certificate of reasonable cause is, therefore, only antecedent and ancillary to another suit, and is not a final judgment in the case in which it is given. It is not final or effectual for any purpose unless certain facts subsequent to the judgment are shown, namely, the immediate return to the claimant or his agent of the property seized in the original suit. United States *v.* Abatoir Place, 106 U. S. 160, 161, 27 L. Ed. 128.

19. Supplemental decree in execution of the original decree.—Forgay *v.* Conrad, 6 How. 201, 12 L. Ed. 404; Blossom *v.* Milwaukee, etc., R. Co., 1 Wall. 655, 17 L. Ed. 673; Butterfield *v.* Usher, 91 U. S. 246, 23 L. Ed. 318; Trustees *v.* Greenough, 105 U. S. 527, 26 L. Ed. 1157; Hinckley *v.* Gilman, etc., R. Co., 94 U. S. 467, 24 L. Ed. 166; Hovey *v.* McDonald, 109 U. S. 150, 27 L. Ed. 888.

An appeal may be taken from a decree in an equity case, notwithstanding it is merely in execution of a prior decree in the same suit, for the purpose of correcting errors, which may have originated in a subsequent proceeding. Lewisburg Bank *v.* Sheffey, 140 U. S. 450, 452, 35 L. Ed. 496, citing Hill *v.* Chicago, etc., R. Co., 140 U. S. 52, 35 L. Ed. 331; Chicago, etc., R. Co. *v.* Fosdick, 106 U. S. 47; Forgay *v.* Conrad, 6 How. 201, 12 L. Ed. 404; Blossom *v.* Milwaukee, etc., R. Co., 1 Wall. 655, 17 L. Ed. 673.

An appeal will lie from decrees that are mere orders in the execution of the previous decrees of the court according to the nature of their subject matter and the rights of the parties affected over an objection that they are not final. Chicago, etc., R. Co. *v.* Fosdick, 106 U. S. 47, 27 L. Ed. 47, citing Forgay *v.* Conrad, 6 How. 201, 12 L. Ed. 404; Blossom *v.* Milwaukee, etc., R. Co., 1 Wall. 655, 17 L. Ed. 673.

20. McMicken *v.* Perin, 20 How. 133, 15 L. Ed. 857, citing Keene *v.* Whittaker, 13 Pet. 459, 10 L. Ed. 246.

directing process to issue to carry into execution a final decree already rendered, is not such a final order or decree in a case as is contemplated by the judiciary act of 1789.[21]

1. *Entry and Signing of Judgment or Decree.*—A judgment or decree does not become final for the purposes of an appeal until it is actually entered.[22]

Entry Nunc Pro Tunc.—Though a decree have been entered "as" of a prior date—the date of an order settling apparently the terms of a decree to be entered thereafter—the rights of the parties in respect to an appeal are determined by the date of the actual entry, or of the signing and filing of the final decree.[23]

Unsigned Judgments in Louisiana.—A judgment, before it is signed by the judge, is not a final judgment on which the writ of error may issue for its reversal. Without the action of the judge, the plaintiffs can take no step. They can neither issue execution on the judgment, nor reverse the proceedings by writ of error. This is in accordance with the settled practice in Louisiana.[24]

4. Particular Judgments, Orders and Decrees Considered—a. *Judgments or Orders of Quashal.*—A refusal to quash an execution or to quash a forthcom-

Where a decree of the circuit court is affirmed on appeal to this court, and the cause remanded to the circuit court to be carried into effect, an order for attachment by the circuit court against defendant to enforce the original decree, is not a final decree on which an appeal can be sustained. McMicken *v.* Perin, 20 How. 133, 15 L. Ed. 857.

Supplemental decree of sale in execution of original decree.—An original decree was made in the circuit court of Rhode Island at June term, 1834, and an appeal was taken to January term, 1835, of the supreme court. This appeal was dismissed at January term, 1837, on the motion of the counsel for the appellees, without an examination or decision on the merits of the cause. At the November term of the circuit court, the defendants prayed and were allowed a second appeal to the supreme court; which appeal had not been yet entered on the docket of the supreme court. The circuit court afterwards proceeded to order execution of the decree of 1834, and the defendant appealed to the supreme court from this decree. Held, that the decree of execution is not a final decree in the contemplation of the act of congress, from which an appeal lies. Carr *v.* Hoxie, 13 Pet 460, 10 L. Ed. 247.

21. Real estate being sold under a regular proceeding of the circuit court, an order of the same court awarding process to put the purchaser in possession, is not a decree from which the tenant can appeal to this court. If the tenant had an agreement with the purchaser, which gave him the right to remain in possession, his remedy was a bill for an injunction, in which a final decree could be passed and an appeal legally taken. Callan *v.* May, 2 Black 541, 17 L. Ed. 281.

22. Entry and signing of judgment or decree.—Silsby *v.* Foote, 20 How. 290, 15 L. Ed. 822; Green *v.* Van Buskirk, 3 Wall. 448, 18 L. Ed. 245.

In Wheeler *v.* Harris, 13 Wall. 51, 56, 20 L. Ed. 531, this court approved the practice of entering decrees in form before taking appeals to this court, citing Rubber Co. *v.* Goodyear, 6 Wall. 153, 156, 18 L. Ed. 762; Silsby *v.* Foote, 20 How. 290, 15 L. Ed. 822.

On appeal to the circuit court from a decree in the district court for the payment of money, the circuit court affirmed the judgment of the district court with costs to be taxed, from which affirmance the respondent took an appeal here. After the appeal here, another decree was rendered by the circuit court, in which, after reciting the former decree and taxation of costs, it was decreed in form that the appellee have judgment against the appellant for the amount decreed, together with costs, amounting to the sum of $5,444. On motion to dismiss this last appeal, on the ground of a former one pending in the same case, held, that under the circumstances, the first decree was not a final decree; and that it was the first appeal and not the second which should be dismissed. Wheeler *v.* Harris, 13 Wall. 51, 20 L. Ed. 531.

23. Rubber Co. *v.* Goodyear, 6 Wall. 153, 18 L. Ed. 762.

24. Yznaga Del Valle *v.* Harrison, 93 U. S. 233, 23 L. Ed. 892, following Life, etc., Ins. Co. *v.* Wilson, 8 Pet. 291, 303, 8 L. Ed. 949.

The district judge of Louisiana refused to sign the record of a judgment rendered in a case by his predecessor in office. By the law of Louisiana, and the rule adopted by the district court, the judgment, without the signature of the judge, cannot be enforced. It is not a final judgment, on which a writ of error may issue, for its reversal. Without the action of the judge the plaintiffs can take no step in the case. They can neither issue execution on the judgment nor reverse the proceedings by writ of error. Life, etc., Ins. Co. *v.* Wilson, 8 Pet. 291, 8 L. Ed. 949.

ing bond is not a final judgment to which a writ of error will lie.[25]

b. *Decision in Injunction Proceedings*—(1) *In General.*—No appeal lies to this court from an order of the circuit court, granting or refusing an injunction, until after final decree.[26] This court has repeatedly decided that a decree upon a motion to dissolve an injunction in the course of a chancery cause, and where the bill is not finally disposed of, is not such a final decree as can be re-examined in this court, under the terms of the 25th section of the judiciary act of September 24, 1789.[27]

Decree Perpetuating Injunction.—An appeal to the supreme court does not lie from a decree of the circuit court making an injunction perpetual, and leaving some matters of account open for further consideration, upon which the parties went on to take further proof. The decree perpetuating the injunction was not a final decree.[28]

25. Judgments or orders of quashal.—United States *v.* Abatoir Place, 106 U. S. 160, 27 L. Ed. 128, citing Boyle *v.* Zacharie, 6 Pet. 635, 646, 8 L. Ed. 527, 532; Pickett *v.* Legerwood, 7 Pet. 144, 8 L. Ed. 638; Smith *v.* Trabue, 9 Pet. 47, 9 L. Ed. 30; Evans *v.* Gee, 14 Pet. 1, 10 L. Ed. 327; Amis *v.* Smith, 16 Pet. 303, 10 L. Ed. 973; Morsell *v.* Hall, 13 How. 212, 14 L. Ed. 117; McCargo *v.* Chapman, 20 How. 555, 15 L. Ed. 1021; Gregg *v.* Forsyth, 2 Wall. 56, 17 L. Ed. 782; Barton *v.* Forsyth, 5 Wall. 190, 18 L. Ed. 545.

The refusal to quash an execution is not, in the sense of the common law, a judgment, much less a final judgment; it is a mere interlocutory order. Even at common law, error only lies from a final judgment; and by the express provisions of the judiciary act of 1789, a writ of error lies to this court, only in cases of final judgments. Boyle *v.* Zacharie, 6 Pet. 635, 648, 8 L. Ed. 527, 532.

An order to the circuit court quashing and vacating a writ of replevin is such a final judgment as is subject to review here on a writ of error. Ex parte Baltimore, etc., R. Co., 108 U. S. 566, 27 L. Ed. 78.

Order quashing inquisition in condemnation proceeding.—In conformity with the charter of the Chesapeake and Ohio Canal Company, an inquisition, issued at the instance of the company by a justice of the peace in the county of Washington, District of Columbia, addressed to the marshal of the district, was executed and returned to the circuit court of the county of Washington, estimating the value of the lands mentioned in the warrant, and all the damages the owners would sustain by cutting the canal through the land, at one thousand dollars. Certain objections being filed to the inquisition, the court quashed the same, and a writ of error was brought on this judgment. Held, the order or judgment in quashing the inquisition in this case, is not final. The law authorizes the court, "at its discretion, as often as may be necessary, to direct another inquisition to be taken." The order or judgment, therefore, quashing the inquisition, is in the nature of an order setting aside a verdict, for the purpose of awarding a venire facias de novo. Chesapeake, etc., Canal Co. *v.* Union Bank, 8 Pet. 259, 8 L. Ed. 937.

Regarding a forthcoming bond as a part of the process of execution, a refusal to quash the bond is not a judgment of the court, and much less is it a final judgment; and, therefore, no writ of error lies in such a case. Amis *v.* Smith, 16 Pet. 303, 10 L. Ed. 973, 977, citing Boyle *v.* Zacharie, 6 Pet. 635, 646, 8 L. Ed. 527, 532.

26. Dissolution of injunction where bill retained.—Hentig *v.* Page, 102 U. S. 219, 26 L. Ed. 159; Keystone Iron Co. *v.* Martin, 132 U. S. 91, 33 L. Ed. 275; Lodge *v.* Twell, 135 U. S. 232, 34 L. Ed. 153; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 378, 37 L. Ed. 486.

27. McCollum *v.* Eager, 2 How. 61, 11 L. Ed. 179; Gibbons *v.* Ogden, 6 Wheat. 448, 5 L. Ed. 302; Verden *v.* Coleman, 18 How. 86, 15 L. Ed. 272; Young *v.* Grundy, 6 Cranch 51, 3 L. Ed. 149; Hiriart *v.* Ballon, 9 Pet. 156, 9 L. Ed. 85; Moses *v.* The Mayor, 15 Wall. 387, 390, 21 L. Ed. 176; Thomas *v.* Woodridge, 23 Wall. 283, 288, 23 L. Ed. 135.

Injunction mere incident to principal relief.—Where a suit was brought in the circuit court by assignees in bankruptcy, praying that a transfer of personal property by the bankrupt to A. be decreed to be fraudulent, that their title thereto be declared to be perfect, and that A. be enjoined from prosecuting an action therefor then pending in a state court, and the circuit court, after due notice, awarded a preliminary injunction, and an order is asked here for a mandamus commanding the judge who granted the injunction to set it aside. Held, that the circuit court having jurisdiction of the suit, an error, if one was committed, can only be reviewed here after a final decree shall have been passed in that court. Ex parte Schwab, 98 U. S. 240, 25 L. Ed. 105.

28. Brown *v.* Swann, 9 Pet. 1, 9 L. Ed. 29.

Injunction to Judgment.—A decree enjoining a judgment at law taxing a sum which remained to be ascertained with precision, is not final, to permit an appeal from it.[29]

Injunction against Sale under Trust Deed.—A decree ordering an injunction, previously granted to restrain a sale under a deed of trust, to be dissolved, and directing a sale according to the deed of trust, and the bringing of the proceeds into court, is a final decree.[30]

(2) *Writ of Error to State Court.*—A decree of the highest court of a state, which, merely dissolving an injunction granted in an inferior court, leaves the whole case to be disposed of on its merits, is not a "final decree," and therefore, does not come within the 25th section of the judiciary act of 1789 or the 2d section of the act of 1867, giving revisory powers to this court over final decrees or judgments rendered in certain cases in such highest court.[31] A decree of the highest court of equity of a state, affirming the decretal order of an inferior court of equity of the same state, refusing to dissolve an injunction granted on the filing of the bill, is not a final decree within the 25th section of the judiciary act of 1789, ch. 20, from which an appeal lies to this court.[32]

(3) *Under Circuit Court of Appeals Act.*—A decree of the circuit court of appeals reversing an order of the circuit court granting a preliminary injunction, may be reviewed in this court on writ of certiorari issued to the circuit court of appeals, notwithstanding the decree is not final, where the record presents the whole case to that court in such wise as might properly have been finally disposed of in terms by its decree.[33]

c. *Judgments Awarding or Refusing to Award Writs.*—A judgment refusing a writ of venditioni exponas is not a final judgment to which a writ of error will lie.[34]

Writ of Possession.—Nor is an order of court awarding a purchaser of land at a judicial sale a writ of habere facias possessionem.[35]

But an order awarding a peremptory writ of mandamus is a final judgment and subject to review.[36]

Judgment Awarding Writ of Restitution.—On the other hand judgments awarding, or refusing to award or setting aside writs of restitution in actions of ejectment, are not final judgments to which a writ of error will lie.[37]

29. Brown *v.* Swann, 9 Pet. 1, 9 L. Ed. 29.

30. Railroad Co. *v.* Bradleys, 7 Wall. 575, 19 L. Ed. 274.

31. Writ of error to state court.—Moses *v.* The Mayor, 15 Wall. 387, 21 L. Ed. 176.

32. Gibbons *v.* Ogden, 6 Wheat. 448, 5 L. Ed. 302.

33. Under circuit court of appeals act.—Harriman *v.* Northern Securities Co., 197 U. S. 244, 49 L. Ed. 739, citing Mast, etc., Co. *v.* Stover Mfg. Co., 177 U. S. 495, 44 L. Ed. 856; Castner *v.* Coffman, 178 U. S. 168, 183, 44 L. Ed. 1021. See ante, "Under Circuit Court of Appeals Act," III, E.

34. Judgments awarding or refusing to award writs.—United States *v.* Abatoir Place, 106 U. S. 160, 27 L. Ed. 128, citing Boyle *v.* Zacharie, 6 Pet. 635, 646, 8 L. Ed. 527, 532; Pickett *v.* Legerwood, 7 Pet. 144, 8 L. Ed. 638; Smith *v.* Trabue, 9 Pet. 47, 9 L. Ed. 30; Evans *v.* Gee, 14 Pet. 1, 10 L. Ed. 327; Amis *v.* Smith, 16 Pet. 303, 10 L. Ed. 973; Morsell *v.* Hall, 13 How. 212, 14 L. Ed. 117; McCargo *v.* Chapman, 20 How. 555, 15 L. Ed. 1021; Gregg *v.* Forsyth, 2 Wall. 56, 17 L. Ed. 782; Barton *v.* Forsyth, 5 Wall. 190, 18 L. Ed. 545.

35. Writ of possession.—Callan *v.* May, 2 Black 541, 17 L. Ed. 281.

36. Davies *v.* Corbin, 112 U. S. 36, 28 L. Ed. 627, citing Riggs *v.* Johnson County, 6 Wall. 166, 18 L. Ed. 768.

37. Judgment awarding writ of restitution.—United States *v.* Abatoir Place, 106 U. S. 160, 27 L. Ed. 128, citing Boyle *v.* Zacharie, 6 Pet. 635, 646, 8 L. Ed. 532, 627; Pickett *v.* Legerwood, 7 Pet. 144, 8 L. Ed. 638; Smith *v.* Trabue, 9 Pet. 47, 9 L. Ed. 30; Evans *v.* Gee, 14 Pet. 1, 10 L. Ed. 327; Amis *v.* Smith, 16 Pet. 303, 10 L. Ed. 973; Morsell *v.* Hall, 13 How. 212, 14 L. Ed. 117; McCargo *v.* Chapman, 20 How. 555, 15 L. Ed. 1021; Gregg *v.* Forsyth, 2 Wall. 56, 17 L. Ed. 782; Barton *v.* Forsyth, 5 Wall. 190, 18 L. Ed. 545.

The judicial act authorizes the supreme court to issue writs of error to bring up any final judgment or decree in a civil action or suit in equity, depending in the circuit court, etc. But, a judgment awarding a writ of restitution in an action of ejectment, where, in the execution of a writ of habere facias possessionem, the sheriff had improperly turned a person

d. *Judgments by Divided Court.*—A judgment rendered upon an equal division of opinion among the judges is final and reviewable by this court. The fact of division does not impair the conclusive force of the judgment, though it may prevent the decision from being authority in other cases upon the question involved. The judgment is that of the entire court, and is as binding in every respect as if rendered upon the concurrence of all the judges.[38]

e. *Orders and Decrees at Chambers*—(1) *In General.*—Decrees in equity, in order that they may be re-examined in this court, must be final decrees rendered in term time, as contradistinguished from mere interlocutory decrees or orders which may be entered at chambers, or, if entered in court, are still subject to revision at the final hearing.[39] In short, an appeal does not lie from an order made by a judge at chambers.[40] Where in a suit for the foreclosure of a mortgage, a petition is addressed to one of the judges praying that a writ of assistance be recalled, it was held, that an order denying the motion or petition is not a final decree in a "case in equity."[41]

(2) *Error to State Court.*—As a writ of error from this court can only go to the highest court of a state, it follows by analogy that it will not lie to review the order of a judge at chambers.[42]

(3) *Habeas Corpus Proceedings.*—An appeal will not lie from an order of a circuit judge at chambers denying an application for a writ of habeas corpus, because it is not final.[43] But although the original order was made at chambers, yet if the final order overruling the return of the sheriff and discharging the prisoner from custody was a decision of the circuit court, an appeal will lie to this court.[44]

out of possession, is not a final judgment in a civil action; it is no more than the action of a court on its own process, which is submitted to its own discretion. This court takes no jurisdiction in such a case. Smith *v.* Trabue, 9 Pet. 47, 9 L. Ed. 30.

Error does not lie to a refusal of the circuit court to award a writ of restitution in ejectment. "The order is not considered a final judgment within the meaning of the judiciary act." Gregg *v.* Forsyth, 2 Wall. 56, 17 L. Ed. 782, citing Smith *v.* Trabue, 4 Pet. 47, 9 L. Ed. 30.

A judgment awarding a writ of restitution, in an action of ejectment, where, in the execution of a writ of habere facias possessionem, the sheriff had improperly turned a person out of possession, is not a final judgment in a civil action within the meaning of the judiciary act which authorized the supreme court to issue writs of error to bring up any final judgment or decree in a civil action or suit in equity, pending in the circuit court. It is no more than the action of a court on its own process, which is submitted to its own discretion. Smith *v.* Trabue, 9 Pet. 47, 9 L. Ed. 30; Barton *v.* Forsyth, 5 Wall. 190, 18 L. Ed. 545.

38. Judgments by divided court.—Hartman *v.* Greenhow, 102 U. S. 672, 26 L. Ed. 271, citing Lessieur *v.* Price, 12 How. 59, 13 L. Ed. 893; Durant *v.* Essex Co., 7 Wall. 107, 19 L. Ed. 154; S. C., 101 U. S. 555, 25 L. Ed. 961.

39. Orders and decrees at chambers in general.—Morgan *v.* Thornhill, 11 Wall. 65, 81, 20 L. Ed. 60.

40. Hentig *v.* Page, 102 U. S. 219, 26 L. Ed. 159.

41. Hentig *v.* Page, 102 U. S. 219, 26 L. Ed. 159.

42. Error to state court.—McKnight *v.* James, 155 U. S. 685, 687, 39 L. Ed. 310.

43. Habeas corpus proceedings.—Lambert *v.* Barrett, 157 U. S. 697, 39 L. Ed. 865, citing Rev. Stat., §§ 763, 764; Act of March 3, 1885, c. 353, 23 Stat. 437; Carper *v.* Fitzgerald, 121 U. S. 87, 30 L. Ed. 882; In re Lennon, 150 U. S. 393, 37 L. Ed. 1120; McKnight *v.* James, 155 U. S. 685, 39 L. Ed. 310.

Orders in habeas corpus proceedings.—An appeal does not lie to this court from an order of the circuit judge of the United States, sitting as a judge and not as a court, discharging a prisoner brought before him on a writ of habeas corpus, for the reason that the act of March 3, 1885, c. 353, 23 Stat. 437, gave an appeal to this court in habeas corpus cases only from the final decision of a circuit court; and Rule 34 did not make his decision as judge a decision of the court, the purpose of that rule being to regulate appeals to the circuit court from the final decision of any court, justice, or judge inferior to that court, as well as appeals from the final decision of such circuit court to the supreme court. McKnight *v.* James, 155 U. S. 685, 687, 39 L. Ed. 310; Carper *v.* Fitzgerald, 121 U. S. 87, 30 L. Ed. 882; Lambert *v.* Barrett, 157 U. S. 697, 700, 39 L. Ed. 865.

44. Harkrader *v.* Wadley, 172 U. S. 148, 43 L. Ed. 399, citing In re Palliser, 136 U. S. 257, 34 L. Ed. 514, and distinguish-

f. *Judgments, Orders and Decrees of Dismissal and Nonsuit*—(1) *Judgments of Dismissal*—aa. *In General.*—A decree dismissing a bill with costs is final and appealable, although no judgment for costs is entered,[45] and although it may be merely interlocutory so far as it grants relief on a cross bill.[46]

bb. *Dismissal of Cross Bill.*—The rule in the United States courts is that a decree dismissing a cross bill or cross complaint is not final because the original bill and the cross bill constitute one suit. In other words, the cross bill is a proceeding to procure a complete determination of matters already in litigation.[47]

ing Carper *v.* Fitzgerald, 121 U. S. 87, 30 L. Ed. 882.

It is, indeed, true, as was decided in Carper *v.* Fitzgerald, 121 U. S. 87, 30 L. Ed. 882, that no appeal lies to this court from an order of a circuit judge of the United States, and not as a court, discharging the prisoner before him on a writ of habeas corpus. But this record discloses that, while the original order was made at chambers, the final order, overruling the return of the sheriff and discharging the prisoner from custody, was the decision of the circuit court at a stated term, and therefore the case falls within In re Palliser, 136 U. S. 257, 262, 34 L. Ed. 514. Harkrader *v.* Wadley, 172 U. S. 148, 162, 43 L. Ed. 399.

45. Judgments of dismissal in general.—Fowler *v.* Hamill, 139 U. S. 549, 35 L. Ed. 266.

It seems that a decree of the circuit court of appeals affirming a decree of a circuit court dismissing an appeal to remove a cloud upon the title to real property, which the parties claimed on the grants, is a final decree. Stevenson *v.* Fain, 195 U. S. 165, 49 L. Ed. 142, 25 Sup. Ct. Rep. 6.

Where property has been taken possession of by a marshal under a writ of attachment, and a claimant intervenes by petition laying claim to the goods seized, an order dismissing the petition for intervention is a final judgment as to that issue, and it is reviewable here by writ of error. Likewise the order distributing the proceeds of the sale is final as it disposes of the fund. Gumbel *v.* Pitkin, 113 U. S. 545, 28 L. Ed. 1128.

46. Elliott *v.* Sackett, 108 U. S. 132, 27 L. Ed. 678.

47. Dismissal of cross bill.—Ayres *v.* Carver, 17 How. 591, 15 L. Ed. 179; Ex parte Railroad Co., 95 U. S. 221, 24 L. Ed. 355; Ayers *v.* Chicago, 101 U. S. 184, 25 L. Ed. 838; Winters *v.* Ethell, 132 U. S. 207, 32 L. Ed. 339; Wheeling, etc., Bridge Co. *v.* Wheeling Bridge Co., 138 U. S. 287, 34 L. Ed. 967.

"Any decision or decree in the proceedings upon a cross bill is not a final decree in the suit, and therefore not the subject of an appeal to this court." Ayres *v.* Carver, 17 How. 591, 15 L. Ed. 179; Ex parte South, etc., Alabama R. Co., 95 U. S. 221, 24 L. Ed. 355.

The original and cross bill constitute one suit, consequently any decision or decree in the proceedings upon the cross bill is not a final decree in the suit, and not the subject of an appeal to this court. The decree, whether maintaining or dismissing the bill, disposes of a proceeding simply incidental to the principal matter in litigation, and can only be reviewed on an appeal from the final decree disposing of the whole case. Ex parte Railroad Co., 95 U. S. 221, 24 L. Ed. 355, citing Ayers *v.* Carver, 17 How. 591, 15 L. Ed. 179.

Where a bill prays for an injunction to restrain a defendant from interfering with a mining claim which the plaintiff by contract had licensed the defendant to work, and also prays for an accounting from the defendant for ore taken by the latter from the mine, and the defendant files a cross complaint praying for a specific performance by the plaintiff of the contract to convey, and the court at the same time that it grants the injunction and orders an accounting before a referee, dismisses the cross complaint, which judgment is affirmed on appeal to the highest court of the state, it was held that such judgment was not final or appealable. Nor does it make any difference that the decree dismisses the cross bill of the defendants. The filing of the cross bill is not the institution of a separate suit, but grows out of the original bill. Winters *v.* Ethell, 132 U. S. 207, 32 L. Ed. 339, following Keystone Iron Co. *v.* Martin, 132 U. S. 91, 33 L. Ed. 275.

The complainant sought to establish an equitable title to large tracts of public lands in Mississippi; having offered to comply, as he alleges, with the law providing for the entry and purchase at private sale of the several tracts, but was prevented from making the entries and obtaining the necessary certificates by the illegal and unwarranted acts of the register and receiver at the land office. The bill is filed against the defendants, who had subsequently entered and paid for the land, obtained the necessary certificates, and upon which patents have since been issued. The defendants are alleged to be very numerous, and the court below dispensed with the necessity of making all of them parties; and directed that their interests should be represented by seven of them, on whom process was directed to be served. After answer served, two of these defendants filed a cross bill, setting

An appeal from the final decree disposing of the whole cause brings up all the proceedings for re-examination, and the party aggrieved by any determination in respect to the cross bill has an opportunity to review any interlocutory decree rendered on his cross bill, as in the case of any other interlocutory proceedings in the cause.[48]

cc. *Dismissal of Libel or Cross Libel.*—Generally speaking, the same principles apply to cross libels as to cross bills.[49] Accordingly, the decree of a district court of the United States dismissing a cross libel in an admiralty suit is not a final judgment and cannot be brought to the supreme court of the United States for review under § 5 of the judiciary act of March 3, 1891.[50]

(2) *Judgments of Nonsuit.*—It is true that a plaintiff, who appears by the record to have voluntarily become nonsuit, cannot sue out a writ of error.[51] But in the case of a compulsory nonsuit, it is otherwise; and a plaintiff, against whom a judgment of nonsuit has been rendered without his consent and against his objection, is entitled to relief by writ of error.[52]

g. *Refusal to Enter Exoneretur on Bail Bond.*—The refusal to enter an exoneretur on a bail bond, is not a final judgment to which a writ of error will lie.[53]

up title to the lands in dispute paramount to that of their codefendants, and asked a decree to that effect, which cross bill the court below, on demurrer, dismissed. Held, that the decree on the cross bill, of the court below, is not a final decree in the suit, and not the subject of an appeal to this court. The appeal is therefore dismissed for want of jurisdiction. The decree disposes of a proceeding simply incidental, and can only be reviewed on appeal from the final decree disposing of the whole case. Ayres *v.* Carver, 17 How. 591, 15 L. Ed. 179.

Ayres v. Carver explained.—"It was long ago held, that a decree dismissing a cross bill in equity could not be considered, standing alone, as a final decree in the suit, and was not the subject of an independent appeal to this court under the judiciary act of 1789; and that it could only be reviewed on an appeal from a final decree disposing of the whole case. Ayres *v.* Carver, 17 How. 591, 15 L. Ed. 179; Ex parte Railroad Co., 95 U. S. 221, 24 L. Ed. 355. It is argued that Ayres *v.* Carver, is distinguishable from the case at bar because the twenty-second section of the judiciary act of 1789, under which the appeal in that case was taken, provided in terms for the revision of final decrees, whereas no specific mention is made of final decrees or judgments in § 5 of the judiciary act of 1891. But that difference was specifically disposed of in McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893, as not affecting the principle that the decree must be final in order to be appealable." Bowker *v.* United States, 186 U. S. 135, 139, 46 L. Ed. 1090, reaffirmed in Smith *v.* Iverson, 203 U. S. 586, 51 L. Ed. 329.

48. Ayres *v.* Carver, 17 How. 591, 15 L. Ed. 179; Ex parte Railroad Co., 95 U. S. 221, 225, 24 L. Ed. 355.

49. Dismissal of libel or cross libel.—Bowker *v.* United States, 186 U. S. 135, 139, 46 L. Ed. 1090, reaffirmed in Smith *v.* Iverson, 203 U. S. 586, 51 L. Ed. 329.

50. Bowker *v.* United States, 186 U. S. 135, 138, 46 L. Ed. 1090, reaffirmed in Smith *v.* Iverson, 203 U. S. 586, 51 L. Ed. 329, following Ayres *v.* Carver, 17 How. 591, 15 L. Ed. 179.

A decree ordering a libel to stand dismissed if not amended within 10 days, is a final decree and appealable, where within that time the party prosecutes an appeal and thus elects to waive the right to amend. The Three Friends, 166 U. S. 1, 41 L. Ed. 897.

51. Judgments of nonsuit.—United States *v.* Evans, 5 Cranch 280, 3 L. Ed. 101; Evans *v.* Phillips, 4 Wheat. 73, 4 L. Ed. 516; Central Transp. Co. *v.* Pullman Palace Car Co., 139 U. S. 24, 39, 35 L. Ed. 55.

A writ of error will not lie on a judgment of nonsuit. Evans *v.* Phillips, 4 Wheat. 73, 4 L. Ed. 516.

52. Doe *v.* Grymes, 1 Pet. 469, 7 L. Ed. 224; Central Transp. Co. *v.* Pullman Palace Car Co., 139 U. S. 24, 39, 35 L. Ed. 55.

The granting of a nonsuit by the circuit court, because in its opinion the plaintiff had given no evidence sufficient to maintain his action, was in accordance with the law and practice of Pennsylvania prevailing in the courts of the United States held within that state, and is subject to the revision of this court on writ of error. Central Transp. Co. *v.* Pullman Car Co., 139 U. S. 24, 35 L. Ed. 55; Meehan *v.* Valentine, 145 U. S. 611, 618, 36 L. Ed. 835, cited in Coughran *v.* Bigelow, 164 U. S. 301, 308, 41 L. Ed. 442.

53. Refusal to enter exoneretur on bail bond.—United States *v.* Abatoir Place, 106 U. S. 160, 27 L. Ed. 128, citing Boyle *v.* Zacharie, 6 Pet. 635, 8 L. Ed. 527; Pickett *v.* Legerwood, 7 Pet. 144, 8 L. Ed. 638; Smith *v.* Trabue, 9 Pet. 4, 9 L. Ed. 30; Evans *v.* Gee, 14 Pet. 1, 10 L. Ed. 327; Amis *v.* Smith, 16 Pet. 303, 10 L. Ed. 973;

h. *Decrees in Forcclosure Proceedings*—(1) *In General.*—It has also been many times decided that a decree of sale in a foreclosure suit, which settles all the rights of the parties and leaves nothing to be done but to make the sale and pay out the proceeds, is a final decree for the purposes of an appeal.[54]

The reason is that in such a case the sale is the execution of the decree of the court, and simply enforces the rights of the parties as finally adjudicated.[55]

Morsell *v.* Hall, 13 How. 212, 14 L. Ed. 117; McCargo *v.* Chapman, 20 How. 555, 15 L. Ed. 1021; Gregg *v.* Forsyth, 2 Wall. 56, 17 L. Ed. 782; Barton *v.* Forsyth, 5 Wall. 190, 18 L. Ed. 545.

54. Decrees in foreclosure proceedings in general.—Ray *v.* Law, 3 Cranch 179, 2 L. Ed. 404; Whiting *v.* Bank of the United States, 13 Pet. 16, 10 L. Ed. 33; Bronson *v.* Railroad Co., 2 Black 524, 17 L. Ed. 359; Green *v.* Fisk, 103 U. S. 518, 26 L. Ed. 486; Grant *v.* Phœnix Ins. Co., 106 U. S. 429, 431, 27 L. Ed. 237; Beebe *v.* Russell, 19 How. 283, 15 L. Ed. 668; Chicago, etc., R. Co. *v.* Fosdick, 106 U. S. 47, 70, 27 L. Ed. 47; Forgay *v.* Conrad, 6 How. 201, 12 L. Ed. 404; Railroad Co. *v.* Swasey, 22 Wall. 405, 22 L. Ed. 136; Marin *v.* Lalley, 17 Wall. 14, 17, 21 L. Ed. 596.

A decree of foreclosure and sale of mortgaged premises is a final decree, and the defendant is entitled to his appeal without waiting for the return and confirmation of the sale by a decretal order, upon the ground that the decree of foreclosure and sale is final as to the merits, and that the ulterior proceedings are but a mode of executing the original decree. Whiting *v.* Bank of United States, 13 Pet. 6, 16, 10 L. Ed. 33; Bronson *v.* Railroad Co., 2 Black 524, 17 L. Ed. 359; French *v.* Shoemaker, 12 Wall. 86, 98, 20 L. Ed. 270.

A decree of foreclosure of a mortgage, and of a sale, are to be considered as the final decree in the sense of a court of equity; and the proceedings on the decree are a mode of enforcing the rights of the creditor, and for the benefit of the debtor. The original decree of foreclosure is final on the merits of the controversy. If a sale is made after such a decree, the defendant not having appealed as he had a right to do, the rights of the purchaser would not be overthrown or invalidated even by a reversal of the decree. Whiting *v.* Bank of United States, 13 Pet. 6, 16, 10 L. Ed. 33, citing Ray *v.* Law, 3 Cranch 179, 2 L. Ed. 404.

In First Nat. Bank *v.* Shedd, 121 U. S. 74, 30 L. Ed. 877, there was a decree of sale absolutely and without reserve, which could be carried into execution at once, and when a purchaser acquired title under it, he would have held as against all the parties to the suit, no matter what might be the rulings on the other questions in the case which were reserved for further adjudication. The language of the decree, as shown at page 84, was to the effect "that the whole property be sold as an entirety, * * * and that upon a confirmation of the sale the purchaser be entitled to a conveyance freed and discharged of the lien of the mortgages, receiver's certificates, costs, expenses, etc." Such a decree was surely final for the purposes of an appeal within the rule as stated in Forgay *v.* Conrad, 6 How. 201, 12 L. Ed. 404. Burlington, etc., R. Co. *v.* Simmons, 123 U. S. 52, 55, 31 L. Ed. 73.

In Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207, 34 L. Ed. 97, certain decrees were set aside at a subsequent term of the court of its own motion. The decrees "determined the ownership of the locomotives and the right to their possession; they were essential to the operation of the roads by the receiver, and should be purchased by him; that certain designated amounts should be paid for the rentals and the purchase price, which amounts were made a charge upon the earnings, * * * and that the amounts should be paid by the receiver." Apparently there was no reference at all to a master for an accounting, and the decrees were held to be final.

An order of the circuit court, on a bill to foreclose a mortgage, ascertaining—in intended execution of a mandate from this court—the amount of interest due on the mortgage, directing payment within one year, and providing for an order of sale in default of payment, is a "decree" and "a final decree," so far as that any person aggrieved by supposed error in finding the amount of interest, or in the court's below having omitted to carry out the entire mandate of this court, may appeal. Appeal is a proper way in which to bring the matter before this court. Railroad Co. *v.* Soutter, 2 Wall. 440, 17 L. Ed. 860, citing Perkins *v.* Fourniquet, 14 How. 328, 330, 14 L. Ed. 441.

Compensation to trustees.—A decree in equity foreclosing a mortgage, and allowing compensation to the trustees and receivers under the mortgage for their services, is final in its nature. Williams *v.* Morgan, 111 U. S. 684, 28 L. Ed. 559.

55. Green *v.* Fisk, 103 U. S. 518, 520, 26 L. Ed. 486.

In the case of Whiting *v.* Bank of United States, 13 Pet. 6, 15, 10 L. Ed. 33, it was held that a decree of foreclosure and sale of mortgaged premises was a final decree, and the defendant entitled to his appeal without waiting for the return and confirmation of the sale by a decretal order. And this decision is placed by the court upon the ground, that the decree of foreclosure and sale was final upon the

Matters Distinct from General Subject of Litigation.—Decrees in a suit for the foreclosure of a mortgage, upon matters distinct from the general subject of litigation, namely, the foreclosure of the mortgage, are final in their nature, and therefore not subject to be vacated by the court of its own motion at a subsequent term.[56]

A decree in a foreclosure suit, fixing the compensation to be paid to the trustees under a mortgage from the fund realized from the sale, is a final decree as to that matter.[57]

A decree upon an intervening petition in a suit for the foreclosure of a mortgage, in respect to certain cars used by a railroad company under a contract with the manufacturer, is final, when there is a fund in court.[58]

(2) *Decree in Suit to Restrain Foreclosure of Mortgage.*—A decree of court refusing to grant a petition by an assignee in bankruptcy filed to set aside as fraudulent conveyances of real estate of the debtor made before the bankruptcy and a mortgage put upon the same by the owner after the sale, and to restrain the foreclosure of the mortgage, is final for the purposes of an appeal.[59]

(3) *Executory Process in Louisiana.*—The order of seizure and sale called "executory process," made in Louisiana when the mortgage "imports a confession of judgment," is in substance a decree of foreclosure and sale, and therefore a "final decree;" especially when made after objections have been made and heard.[60] On the other hand, an order made in the circuit court of the United States for the district of Louisiana, in executory process, without previous notice, for the seizure and sale of mortgaged land to pay the mortgage debt, under which the sale cannot take place until the debtor has had notice and opportunity to interpose objections, must be considered as interlocutory only and not a final decree, and the appeal will be dismissed for want of jurisdiction.[61]

merits, and the ulterior proceedings but a mode of executing the original decree. The same rule of construction was acted on in the case of Michoud *v.* Girod, 4 How. 503, 11 L. Ed. 1076; Forgay *v.* Conrad, 6 How. 201, 203, 12 L. Ed. 404.

A decree for the sale of mortgaged premises is a final decree from which an appeal lies. The grounds of this decision are that when the mortgage is foreclosed and a sale ordered, the merits of the controversy are finally settled and the subsequent proceedings are simply a means of executing the decree. Ray *v.* Law, 3 Cranch 179, 2 L. Ed. 404; Whiting *v.* Bank of United States, 13 Pet. 6, 15, 10 L. Ed. 33; Bronson *v.* Railroad Co., 2 Black 524, 17 L. Ed. 359.

56. Matters distinct from general subject of litigation.—Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207, 34 L. Ed. 97, citing McMicken *v.* Perin, 20 How. 133, 15 L. Ed. 857.

57. Williams *v.* Morgan, 111 U. S. 684, 28 L. Ed. 559.

58. Fosdick *v.* Schall, 99 U. S. 235, 25 L. Ed. 339.

59. Decree in suit to restrain foreclosure of mortgage.—Ex parte Norton, 108 U. S. 237, 27 L. Ed. 709.

Where a bill is filed by an assignee in bankruptcy to set aside the proceedings for the foreclosure of the mortgage, and obtain a conveyance of the mortgaged property, but the court refused to set aside a conveyance but ordered the sale to go on, and that the proceeds, after the mortgage is satisfied, be paid to the assignee, the decree is final and appealable, because it determines every question in dispute between the parties, and leaves nothing to be done but to complete the sale under the proceedings in the state court for foreclosure, and hand over to the assignee the surplus money. Ex part Morton, 108 U. S. 237, 27 L. Ed. 709.

60. Executory process in Louisiana.—Marin *v.* Lalley, 17 Wall. 14, 21 L. Ed. 596, citing Ray *v.* Law, 3 Cranch 179, 180, 2 L. Ed. 404; Whiting *v.* Bank of United States, 13 Pet. 6, 15, 10 L. Ed. 33; Bronson *v.* Railroad Co., 2 Black 524, 17 L. Ed. 359.

In Louisiana, upon nonpayment of a mortgage debt, the mortgage creditor may apply to a judge at chambers or in court, and obtain from him an order of seizure and sale, when the mortgage imports a confession of judgment. A code of practice requires a three days' notice to be given to the debtor, and the judge is required to examine and decide whether the instrument unites all the requisites of the law necessary to authorize this summary proceeding. It was held, that the decision of the judge in such case is a judgment or decree, and an appeal lies from it; for it may be erroneously made on evidence not warranting the issuing of the executory process. It is in substance a decree of foreclosure and sale. Marin *v.* Lalley, 17 Wall. 14, 21 L. Ed. 596.

61. Fleitas *v.* Richardson, 147 U. S. 538,

(4) *Limitations of General Rule.*—If, however, the decree of foreclosure and sale leaves the amount due upon the debt to be determined, and the property to be sold, ascertained and defined, it is not final.[62] A like result follows if it merely determines the validity of the mortgage, and, without ordering a sale, directs the case to stand continued for further decree upon the coming in of the master's report.[63]

37 L. Ed. 272, following Levy *v.* Fitzpatrick, 15 Pet. 167, 10 L. Ed. 699, and distinguishing Marin *v.* Lalley, 17 Wall. 14, 21 L. Ed. 596.

The mortgagees, in Louisiana, filed in the circuit court their petition, stating the nonpayment of the debt due on their mortgage, and that, by the laws of Louisiana, the mortgage imports a confession of judgment, and entitles them to executory process, which they prayed for. Without any process requiring the appearance of the mortgagors, one of whom resided out of the state, the judge ordered the executory process to issue. Two of the defendants who were residents in the state, prosecuted a writ of error on this order to the supreme court of the United States. Held, that the order for executory process was not a final judgment of the circuit court, on which a writ of error could issue. Levy *v.* Fitzpatrick, 15 Pet. 167, 10 L. Ed. 699, distinguished in Marin *v.* Lalley, 17 Wall. 14, 18, 21 L. Ed. 596, and followed in Fleitas *v.* Richardson (No. 1.), 147 U. S. 538, 37 L. Ed. 272.

62. Limitations of general rule.—Railroad Co. *v.* Swasey, 23 Wall. 405, 22 L. Ed. 136; Grant *v.* Phœnix Ins. Co., 106 U. S. 429, 27 L. Ed. 237; McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 545, 36 L. Ed. 1079.

In Railroad Co. *v.* Swasey, 23 Wall. 405, 22 L. Ed. 136, it was held that "to justify such a sale, without consent, the amount due upon the debt must be determined. * * * Until this is done the rights of the parties are not all settled. Final process for the collection of money cannot issue until the amount to be paid or collected by the process, if not paid, has been adjudged." In this the court but followed the principle acted on in Barnard *v.* Gibson, 7 How. 651, 12 L. Ed. 857; Crawford *v.* Points, 13 How. 11, 14 L. Ed. 29; Humiston *v.* Stainthorp, 2 Wall. 106, 17 L. Ed. 905; Grant *v.* Phœnix Ins. Co., 106 U. S. 429, 431, 27 L. Ed. 237.

A decree of foreclosure and sale, which leaves the property to be sold unidentified, and the amount due undetermined, and refers the case to a master to point out the property and to fix the amount, is not a final decree. Railroad Co. *v.* Swasey, 23 Wall. 405, 410, 22 L. Ed. 136.

A decree of foreclosure and sale is not "final" in the sense which allows an appeal from it so long as the amount due upon the debt must be determined, and the property to be sold ascertained and defined. Hence, a decree is not "final" in such sense, where the court by an interlocutory order declares that certain shares in a railroad held by a state, are pledged for the payment of certain interest bearing bonds of the state and the interest on them; and that the plaintiff and others whom he represents, as holders of such bonds, are entitled to have their respective proportions of the stock, or so much thereof as may be necessary, sold in order to pay the interest which is due to them; and orders a master to take an account of such unpaid interest and of what will be due by a day named, and also of the proportion of stock that may be equitably applicable to the payment of said interest found due to each plaintiff, and make report to the court. And orders further that unless by a day named it be made to appear to the court that the state has levied and provided for the collection of a tax sufficient to pay, or have otherwise secured the payment of, its arrears of interest, then so much of the stock of the state in the road, apportioned to the plaintiff and those he represents as may be necessary to pay off and discharge said arrears of interest, shall be sold to the highest bidder for cash. And after giving directions as to the manner in which a sale is to be made, at the end of all adds: "And this cause is held for further directions." This is but an interlocutory order announcing the opinion which the court has formed as to the rights of the parties, and the principles of the decree it would finally render, leaving the entry of the final decree in form to be made when the amount due has been ascertained and an apportionment of the stock made. Railroad Co. *v.* Swasey, 23 Wall. 405, 22 L. Ed. 136. See Porter *v.* Pittsburg Bessemer Steel Co., 120 U. S. 649, 30 L. Ed. 830.

63. Burlington, etc., R. Co. *v.* Simmons, 123 U. S. 52, 31 L. Ed. 73; Parsons *v.* Robinson, 122 U. S. 112, 30 L. Ed. 1122; McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 545, 36 L. Ed. 1079.

A decree of foreclosure and sale which determines the validity of the mortgage, but without ordering a sale, directs the case to stand continued for further decree upon the coming in of the master's report, is not final. Burlington, etc., R. Co. *v.* Simmons, 123 U. S. 52, 31 L. Ed. 73, distinguishing Parsons *v.* Robinson, 122 U. S. 112, 30 L. Ed. 1122; First Nat. Bank *v.* Shedd, 121 U. S. 74, 30 L. Ed. 877.

In a suit for the foreclosure of certain

The debtor being entitled to notice and hearing before an actual sale of the property, it would seem, upon principle, that the order for a sale must be considered as interlocutory only, and not the final decree in the case, at least when the debtor does, within the time allowed by the Code, come in and contest the validity of the proceedings.[64]

i. *Order Certifying Finding upon Issue to Jury.*—Where an issue has been directed to a jury, an order certifying the finding of the jury is not final and appealable.[65]

deeds of trust in the nature of mortgages to secure the payment of money, the decree does not order a sale of the property. It overrules the defense of the appellant as set forth in his cross bill, and declares that the appellee is the holder and owner of the debt secured by the deeds of trust, but refers the case to an auditor to ascertain the amount due upon the debt, the amount due certain judgment and lien creditors, the existence and priorities of liens. It is true the court finds the amount due the appellee largely exceeds the value of the property, but this is only a foundation for the order appointing the receiver. It was held that such a decree is not final and appealable within the meaning of the rule that a decree to be final must terminate the litigation of the parties on the merits of the case, so that if there should be an affirmance here, the court below would have nothing to do but to execute the decree as it was already rendered. Grant *v.* Phœnix Ins. Co., 106 U. S. 429, 27 L. Ed. 237, distinguishing Forgay *v.* Conrad, 6 How. 201, 12 L. Ed. 404.

Where A. agreed to sell and convey to B. a tract of land subject to an incumbrance owned by C., upon an agreement that B. would assume C.'s debts, and B. not understanding his agreement to be such, brought a suit for reformation, and C. on his own application is made a party to the suit and files a cross bill for a foreclosure of the incumbrance, a decree dismissing the suit for reformation but directing a foreclosure against B. is final as against and may be appealed from by him. Elliott *v.* Sackett, 108 U. S. 132, 27 L. Ed. 678.

Proceedings were commenced to foreclose a railroad mortgage in which the trustee of the mortgage, the railroad company, and others were respondents, and one bond holder original, and another by intervention, were complainants. A decree was entered that the complainants were entitled to have a sale of the mortgaged property upon a failure of the company to pay an amount to be fixed by reference to a master within a time to be named by the court, and an order of reference was made. The master reported, and a decree of foreclosure was entered in which the trustee was directed to sell the mortgaged property, "at such time and place and in such manner as the court may hereafter determine;" and a reference was ordered to a master to report the extent and amount of the prior liens on the mortgaged property, "full and detailed statements" of the property "subject to the lien of said general mortgage, and "what liens, if any, are upon the several properties" of the railroad company, "junior to said general mortgage and the order of their priority." Held, that this was not a final decree, which terminated the litigation between the parties on the merits of the case, and that the appeal must be dismissed. "That 'a decree of sale in a foreclosure suit, which settles all the rights of the parties and leaves nothing to be done but to make the sale and pay out the proceeds, is a final decree for the purposes of an appeal' is no longer an open question in this court. Grant *v.* Phœnix Ins. Co., 106 U. S. 429, 431, 27 L. Ed. 237, and cases there cited. Here, however, there is as yet no decree of sale." Parsons *v.* Robinson, 122 U. S. 112, 30 L. Ed. 1122, explained in Burlington, etc., R. Co. *v.* Simmons, 123 U. S 52, 31 L. Ed. 73.

64. McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 545, 547, 549, 36 L. Ed. 1079; Fleitas *v.* Richardson, 147 U. S. 538, 545, 37 L. Ed. 272.

In executory process, according to the Civil Code of Louisiana, in the circuit court of the United States, an order, made without previous notice, for the seizure and sale of mortgaged land to pay the mortgage debt, under which the sale cannot take place until the debtor has had notice and opportunity to interpose objections, is not, at least when he does interpose within the time allowed, a final decree, from which an appeal lies to this court. Fleitas *v.* Richardson, 147 U. S. 538, 37 L. Ed. 272.

65. Order certifying finding upon issue to jury.—Van Ness *v.* Van Ness, 6 How. 62, 12 L. Ed. 344; Brown *v.* Wiley, 4 Wall. 165, 18 L. Ed. 384. These cases reviewed at great length in Ormsby *v.* Webb, 134 U. S. 47, 33 L. Ed. 805.

Where the orphans' court directed an issue to be sent for trial in the circuit court, which issue was, "whether the petitioner was the widow of the deceased or not," and the circuit court proceeded to try the issue, and the jury, under the instructions of the court, found that the petitioner was not the widow, exceptions to these instructions cannot be reviewed by this court on a writ of error. The cer-

j. *Judgments, Orders and Decrees of Affirmance.*—**In General.**—A decree of affirmance, without taxation of costs and without specifying the sum for which it is rendered, is not to be regarded as a final decree.[66]

Error to State Court.—But where the judgment in an inferior state court is final, a judgment in the court of last resort in the state affirming such judgment is also final.[67] It has long been settled that if a cause cannot be taken to the highest court of a state, except by leave of the court itself, a refusal of the court upon proper application made to grant the leave, is equivalent to a judgment of

tificate of the finding of the jury, transmitted by the circuit court to the orphans' court, was not such a final judgment, order, or decree as is included within the statute. After the reception of the certificate, the orphans' court had still to pass a decree in order to settle the rights of the parties. Van Ness *v.* Van Ness, 6 How. 62, 12 L. Ed. 344.

On a plenary proceeding, if either party shall require it, the court will direct an issue or issues to be made up, and sent to a court of law to be tried; and any person conceiving himself aggrieved by any judgment, decree, decision or order, may appeal to the court of chancery, or to a court of law; and in Maryland, the decision of the court to which the appeal is made is final. Nicholls *v.* Hodges, 1 Pet. 562, 7 L. Ed. 263.

The certificate of the finding of a jury on certain issues involving paternity, marriage, and legitimacy, sent from the orphans' court to the supreme court of the district, which certificate of finding is transmitted by the supreme court to the orphans' court, is not such a final judgment, order, or decree as this court can re-examine on error. Nor where the finding of the jury was at special term held by a single judge of the supreme court of the District of Columbia, under instructions by such judge, and a motion for a new trial on exception to such instructions and other grounds has been heard at general term by all the judges and overruled, is such overruling a final judgment, order, or decree, reviewable on writ of error by this court. Brown *v.* Wiley, 4 Wall. 165, 18 L. Ed. 384, following Van Ness *v.* Van Ness, 6 How. 62, 12 L. Ed. 344.

66. Judgments, orders and decrees of affirmance in general.—Wheeler *v.* Harris, 13 Wall. 51, 56, 20 L. Ed. 531.

This court will not take jurisdiction of a judgment shown by the context of the record to be but an order affirming a refusal of a court below to grant a new trial; even though the language of the record of affirmance brought here by the writ of error purports to affirm generally the judgment of a court inferior to the affirming court, and the only judgment, in strict language, in the record of such inferior court, is a general judgment. Sparrow *v.* Strong, 4 Wall. 584, 18 L. Ed. 410.

An order of the circuit court merely affirming the decree of the district court, and nothing more, is not such a decree as the circuit court should render, and is not a final decree from which an appeal lies to this court. "An order affirming a decree in another court is neither in express terms nor by necessary implication a judgment or decree for the amount of the judgment or decree in that court." The Lucile, 19 Wall. 73, 22 L. Ed. 64.

On appeal to the circuit court from a decree in the district court for the payment of money, the circuit court affirmed the judgment of the district court with costs to be taxed, from which affirmance the respondent took an appeal here. After the appeal here, another decree was rendered by the circuit court, in which, after reciting the former decree and taxation of costs, it was decreed in form that the appellee have judgment against the appellant for the amount decreed, together with costs, amounting to the sum of $5,444. On motion to dismiss this last appeal, on the ground of a former one pending in the same case, held, that under the circumstances, the first decree was not a final decree; and that it was the first appeal and not the second which should be dismissed. Wheeler *v.* Harris, 13 Wall. 51, 20 L. Ed. 531.

67. Error to state court.—O'Dowd *v.* Russell, 14 Wall. 402, 20 L. Ed. 857.

Where decree of the inferior state court dismissing the complainants' bill, was "a final decree or judgment;" and that decree having been affirmed by the court of appeals by their refusal to entertain an appeal; and, moreover, the record showing that "there was drawn in question the validity of a statute and authority exercised under the state of Virginia," "on the ground of their being repugnant" to that clause of "the constitution of the United States" which forbids a state to pass "any law impairing the obligation of contracts;" and "the decision of the court being in favor of their validity," there can be no doubt of the jurisdiction of this court to review the decision of the state court. Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. 71, 80, 14 L. Ed. 55, cited in Gregory *v.* McVeigh, 23 Wall. 294, 306, 23 L. Ed. 156; Williams *v.* Bruffy, 102 U. S. 248, 254, 26 L. Ed. 135.

affirmance, and is such a final judgment as may be made the basis of proceedings under the appellate jurisdiction of this court.[68]

k. *Decisions with Respect to Reference*—(1) *Decree Ordering a Reference.*—**Statement of General Rule.**—In accordance with the well-settled rule that a decree which does not dispose of the entire controversy between the parties is not final,[69] it is uniformly held, that if a superior court makes a decree fixing the liability and rights of the parties, and refers the case to a master or subordinate court for a judicial purpose, such, for instance, as a statement of accounts upon which a further decree is to be entered, the decree is not final.[70] In short, it may

68. Richmond, etc., R. Co. *v.* Louisa R. Co., 13 How. 71, 80, 14 L. Ed. 55; Gregory *v.* McVeigh, 23 Wall. 294, 606, 23 L. Ed. 156.

69. See ante, "Statement of General Rules or Tests," IV, C, 3.

70. Craighead *v.* Wilson, 18 How. 199, 15 L. Ed. 332; Beebe *v.* Russell, 19 How. 283, 15 L. Ed. 668; Keystone Iron Co. *v.* Martin, 132 U. S. 91, 33 L. Ed. 275; Lodge *v.* Twell, 135 U. S. 232, 34 L. Ed. 153; McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 36 L. Ed. 1079; Union Life Ins. Co. *v.* Kirchoff, 160 U. S. 374, 40 L. Ed. 461; Hollander *v.* Fechheimer, 162 U. S. 326, 40 L. Ed. 985; California Nat. Bank *v.* Stateler, 171 U. S. 447, 449, 43 L. Ed. 233; Green *v.* Fisk, 103 U. S. 518, 26 L. Ed. 486; Latta *v.* Kilbourn, 150 U. S. 524, 539, 37 L. Ed. 1169; Defer *v.* De May, 168 U. S. 703, 42 L. Ed. 1211; Burlington, etc., R. Co. *v.* Simmons, 123 U. S. 52, 31 L. Ed. 73; Grafton *v.* Paine, 168 U. S. 704, 42 L. Ed. 1212; Darden *v.* Arkansas, 200 U. S. 615, 50 L. Ed. 621; Perkins *v.* Fourniquet, 6 How. 206, 12 L. Ed. 406; Craighead *v.* Wilson, 18 How. 199, 200, 15 L. Ed. 332; West *v.* Smith, 8 How. 402, 413, 12 L. Ed. 1130; United States *v.* Girault, 11 How. 22, 28, 13 L. Ed. 587; Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. 609, 17 L. Ed. 886.

In Crawford *v.* Points, 13 How. 11, 14 L. Ed. 29, a decree was made directing an account. An appeal was taken before the accounting. On a motion to dismiss the appeal, the court say: "The decree is not final. * * * An account is directed to be taken of the rents and profits, etc. While these things remain to be done, the decree is not final, and no appeal from it would lie to this court." Humiston *v.* Stainthorp, 2 Wall. 106, 108, 17 L. Ed. 905, cited and approved in Ex parte National Enameling Co., 201 U. S. 56, 50 L. Ed. 707.

A decree is understood to be interlocutory whenever an inquiry as to matter of law or fact is directed, preparatory to a final decision. 1 New. 322. And we find it stated in the second volume of Perkins' Daniel's Chancery Practice, 1193 "that the most usual ground for not making a perfect decree in the first instance, is the necessity which frequently exists, for a reference to a master of the court, to make inquiries, or take accounts, or sell estates, and adjust other matters which are necessary to be disposed of, before a complete decision can be come to upon the subject matter of the suit." Beebe *v.* Russell, 19 How. 283, 15 L. Ed. 668.

"The reference of a case to a master, to take an account upon evidence, and for the examination of the parties, and to make or not to make allowances affecting the rights of the parties, and to report his results to the court, is not a final decree; because his report is subject to exceptions from either side, which must be brought to the notice of the court before it can be available. It can only be made so by the courts overruling the exceptions, or by an order confirming the report, with a final decree for its appropriation and payment. We have just said the decree is final when ministerial duties are only to be done to ascertain a sum due." Beebe *v.* Russell, 19 How. 283, 286, 15 L. Ed. 668.

A decree in favor of a plaintiff for title and possession of land and improvements, and ordering a reference to a master, is not a final, appealable decree. Grant *v.* Phœnix Ins. Co., 106 U. S. 429, 27 L. Ed. 237.

A decree referring a cause to a master to take an account, upon evidence and examination of parties, and to decide allowances, and report to the court, is not final, and this court has no jurisdiction of an appeal therefrom. The whole controversy has not been determined. Whiting *v.* Bank of United States, 13 Pet. 6, 10 L. Ed. 33; Michoud *v.* Girod, 4 How. 503, 11 L. Ed. 1076; Forgay *v.* Conrad, 6 How. 201, 202, 12 L. Ed. 401; Beebe *v.* Russell, 19 How. 283, 15 L. Ed. 668, reaffirmed in Farrelly *v.* Woodfolk, 19 How. 288, 15 L. Ed. 670.

If the main purpose of the bill is to obtain an account between the parties, and a recovery of the balance that shall be found due, a decree that the complainant is entitled to the accounting, and that the case be referred to a master to state the account, is not final. Latta *v.* Kilbourn, 150 U. S. 524, 539, 37 L. Ed. 1169.

Where the basis of the decree, embracing the equities in the bill, is found, but the distribution among the parties in interest depends upon facts to be reported by the master, until the court shall have acted upon his report and sanctioned it,

be laid down as a general rule that if the court makes a decree fixing the rights and liabilities of the parties, and thereupon refers the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is not final. Craighead *v.* Wilson, 18 How. 199, 15 L. Ed. 332.

"**An account is directed to be taken of the rents and profits of certain lands,** with an option to the appellant to purchase them at a price named in the decree; and in that event he is to be discharged from the account for rents and profits. And, moreover, he is permitted to retain possession of certain slaves, until it should be ascertained whether the other assets of the bankrupt's estate would not be sufficient to pay his debts; and an order to account for their hire and the profits of their labor is suspended in the meantime. While these things remain to be done the decree is not final, and no appeal from it would lie to this court, even if it had been the decree of a circuit court exercising its ordinary equity jurisdiction." Crawford *v.* Points, 13 How. 11, 14 L. Ed. 29.

Trespass for removal of minerals and account.—In the case of the Keystone Iron Co. *v.* Martin, 132 U. S. 91, 33 L. Ed. 275, the bill was in the nature of an action of trespass for removing minerals from the plaintiff's land, and prayed for an injunction restraining the defendant from the commission of further trespasses, and for an account of the quantity and value of the ore taken. The court made a decree perpetually enjoining the defendant from entering upon or removing minerals from the land, and further ordering an account, etc. This was held to be not a final decree from which an appeal could be taken to this court, because it did not dispose of the entire controversy between the parties. This case was referred to with approval in Lodge *v.* Twell, 135 U. S. 232, 34 L. Ed. 153.

A decree of the circuit court, setting aside a deed made by a bankrupt before his bankruptcy; directing the trustees under the deed to deliver over to the assignee in bankruptcy all the property remaining undisposed of in their hands, but without deciding how far the trustees might be liable to the assignee for the proceeds of sales previously made and paid away to the creditors; directing an account to be taken of these last-mentioned sums in order to a final decree, is not such a final decree as can be appealed from to this court. "This decree is final only as to the trust deed. All the matters arising under the trust are referred to a commissioner for a statement of the account, to enable the court to enter a final decree. There is no sale or change of the property ordered which can operate injuriously to the parties." Pulliam *v.* Christian, 6 How. 209, 12 L. Ed. 408, followed in Craighead *v.* Wilson, 18 How. 199, 201, 15 L. Ed. 332.

Account of rolling stock secured by railroad mortgage.—In McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 546, 36 L. Ed. 1079, McGourkey petitioned to be allowed to intervene in a suit to foreclose a mortgage on the rolling stock of a railroad, the petitioner prayed for four distinct reliefs: 1. That the receiver perform all the covenants of the lease, and pay all sums due, etc.; 2. Or that he be directed to deliver to petitioner the rolling stock in order that the same might be sold; 3. That he be directed to file a statement of the number of miles run, and of the sums received for the use of such rolling stock; 4. That it be referred to an examiner to take testimony and report the value of the use of such rolling stock while in custody of the receiver, and that the receiver be directed to pay the amount justly due, etc. The decree followed the general terms of the petition by ordering the rolling stock claimed to be delivered to McGourkey, and referring the case to a special master to determine the rental of the same while used by the receiver; the value of the rolling stock over and above the sums paid by the receiver to the petitioner while the same was in the custody of the receiver; the number of miles run by the receiver; the money received for the use of the same by other roads, the loss, damage, and destruction to the same while in the custody of the receiver; and also to "determine and report upon all questions and matters of difference between said receiver and said McGourkey, growing out of the use and restoration of said cars and locomotives." Held, not a final decree although the court granted the prayer of the petitioner, and turned the property over to him, because of the reference to a master for an accounting. The court said: "While it directed the surrender of the rolling stock in question to the petitioner, it did not purport to pass upon his title to the same, and referred the case to a master, in accordance with the prayer of the bill, to take an account not only of rents and profits and of damage to the rolling stock, but of 'all questions and matters of difference' between the receiver and the petitioner growing out of the use and restoration of the same.' This decree could not be said to be a complete decision of the matters in controversy, or to leave ministerial duties only to be performed, or to direct an accounting merely as an incident to the relief prayed for in the bill."

An order or decree in a patent cause, whether upon preliminary application or

decree is final; but if it refers the case to him for a judicial purpose, as to state an account between the parties upon which a further decree is to be entered, the decree is not final.[71]

Rule in Forgay v. Conrad.—The only case in this court which seems to announce a rule in conflict with this, is Forgay *v.* Conrad. But this ruling has always been regarded as unsatisfactory and the court has attempted in many cases to distinguish and explain it, some of which are set out in the notes.[72]

upon final hearing, granting an injunction and referring the cause to a master for an account of profits and damages, was interlocutory only, and not final, and, therefore, not reviewable on appeal before the final decree in the cause. Acts of September 24, 1789, c. 20, §§ 13, 22, 1 Stat. 81, 84; March 3, 1803, c. 40, 2 Stat. 244; Rev. Stat., §§ 691, 692, 699, 701; Forgay *v.* Conrad, 6 How. 201, 204, 12 L. Ed. 404; Barnard *v.* Gibson, 7 How. 651, 12 L. Ed. 857; Humiston *v.* Stainthorp, 2 Wall. 106, 17 L. Ed. 905; Keystone Iron Co. *v.* Martin, 132 U. S. 91, 33 L. Ed. 275; McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 545, 36 L. Ed. 1079; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 378, 37 L. Ed. 486; Smith *v.* Vulvan Iron Works, 165 U. S. 518, 524, 41 L. Ed. 810.

A decree in chancery, awarding to a patentee a permanent injunction, and for an account of gains and profits, and that the cause be referred to a master to take and state the amount, and to report to the court, is not a final decree, within the meaning of the act of congress allowing an appeal on a final decree to this court. Humiston *v.* Stainthorp, 2 Wall. 106, 17 L. Ed. 905, citing The Palmyra, 10 Wheat. 502, 6 L. Ed. 376; Barnard *v.* Gibson, 7 How. 651, 12 L. Ed. 857; Crawford *v.* Points, 13 How. 11, 14 L. Ed. 29; Craighead *v.* Wilson, 18 How. 199, 15 L. Ed. 332; Beebe *v.* Russell, 19 How. 283, 15 L. Ed. 668.

Where a decree in chancery establishes the validity of a patent and refers the matters to a master to ascertain the amount of damages, and in the meantime the bill is not dismissed, nor is there a decree for costs, the decree is not a final one, from which an appeal will lie to this court, although there is a perpetual injunction granted. Barnard *v.* Gibson, 7 How. 651, 12 L. Ed. 857, approved in Keystone Iron Co. *v.* Martin, 132 U. S. 91, 95, 33 L. Ed. 275; McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 545, 36 L. Ed. 1079; Humiston *v.* Stainthorp, 2 Wall. 106, 17 L. Ed. 905.

To ascertain damages from infringement of patent.—Upon suit brought by plaintiff upon a single patent, in which there were twelve claims, the circuit court found that three of the claims were invalid and nine valid, of which five had been infringed. Reference was made to a master to report the amount of damages and the bill was dismissed as to the claims found invalid and not infringed. Defendants appealed from the decree and plaintiffs also filed cross appeal assigning as errors the rulings adverse to them. The cross appeal was dismissed by the circuit court of appeals. Petition for mandamus to compel that court to take jurisdiction of the cross appeal was denied and it was held that the decree was interlocutory and not final. Ex parte National Enameling, etc., Co., 201 U. S. 156, 50 L. Ed. 707, reaffirmed in Ex parte Automatic Switch Co., 201 U. S. 166, 50 L. Ed. 710, citing Barnard *v.* Gibson, 7 How. 651, 12 L. Ed. 857; Humiston *v.* Stainthorp, 2 Wall. 106, 17 L. Ed. 905; Estey *v.* Burdett, 109 U. S. 633, 637, 27 L. Ed. 1058; McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 36 L. Ed. 1079; Hohorst *v.* Packet Co., 148 U. S. 262, 37 L. Ed. 443; Smith *v.* Vulcan Iron Works, 165 U. S. 518, 41 L. Ed. 810; Forgay *v.* Conrad, 6 How. 201, 205, 12 L. Ed. 404.

Where a prayer for partition of real property is allowed, and the case is referred to a master to proceed to a partition according to law, under direction of the court, such decree is not final and appealable. A decree cannot be said to be final until the court has completed its adjudication of the cause, and here the court must still act judicially in making the partition as ordered. Green *v.* Fisk, 103 U. S. 518, 519, 26 L. Ed. 486.

A motion to dismiss an appeal in a partition suit, because the decree appealed from is not final, will be allowed, where the decree appealed from simply adjudges that the appellees are the owners each of one eighth of the property, and refers the matter to a master to proceed to a partition according to law, under the directions of the court. Green *v.* Fisk, 154 U. S. 668, 26 L. Ed. 486.

Where the circuit court decreed that the complainants were entitled to two-sevenths of certain property, and referred the matter to a master in chancery to take and report an account of it, and then reversed all other matters in controversy between the parties until the coming in of the master's report, this was not such a final decree as can be appealed from to this court. Perkins *v.* Fourniquet, 14 How. 206, 14 L. Ed. 441.

71. Latta *v.* Kilbourn, 150 U. S. 524, 539, 37 L. Ed. 1169, citing McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 544, 36 L. Ed. 1079.

72. Rule in Forgay v. Conrad.—Forgay *v.* Conrad, 6 How. 201, 12 L. Ed. 404, criticised in Barnard *v.* Gibson, 7 How. 651, 657, 12 L. Ed. 857; Ex parte National

Limitations of General Rule.—It may be said in general that if the court makes a decree fixing the rights and liabilities of the parties, and thereupon refers the case to a master for a ministerial purpose only, and no further proceedings in court are contemplated, the decree is final.[73] Reference to the master to take

Enameling, etc., Co., 201 U. S. 156, 163, 50 L. Ed. 707; Forgay's Case explained in Beebe *v.* Russell, 19 How. 283, 287, 15 L. Ed. 668.

Decision in Forgay v. Conrad.—A decree of the court below, that certain deeds should be set aside as fraudulent and void; that certain lands and slaves should be delivered up to the complainant; that one of the defendants should pay a certain sum of money to the complainant; that the complainant should have execution for these several matters; that the master should take an account of the profits of the lands and slaves, and also an account of certain money and notes, and the then said decree concluding as follows, viz: "And so much of the said bill as contains or relates to matters hereby referred to the master for a report is retained for further decree in the premises, and so much of the said bill as is not now, nor has been heretofore, adjudged and decreed upon, and which is not above retained for the purposes aforesaid, be dismissed without prejudice, and that the said defendants do pay the costs," was a final decree within the meaning of the acts of congress, and an appeal from it will lie to this court. Forgay *v.* Conrad, 6 How. 201, 12 L. Ed. 404.

In the very next case, Perkins *v.* Fourniquet, 6 How. 206, 12 L. Ed. 406, where the circuit court decreed that complainants were entitled to two-sevenths of certain property, and referred the matter to a master to take an account of it, the decree was held not to be final.

In Pulliam *v.* Christian, 6 How. 209, 12 L. Ed. 408, a decree setting aside a deed by a bankrupt, directing the trustees under the deed to deliver up to the assignee all the property in their hands, and directing an account to be taken of the proceeds of sales previously made, was also held not to be a final decree.

The case of Forgay *v.* Conrad, 6 How. 201, 12 L. Ed. 404, was an appeal from an interlocutory decree, which was sustained, though objected to. But this decision was made under the peculiar circumstances of that case. The decree was, that certain deeds should be set aside as fraudulent and void; that certain lands and slaves should be delivered up to the complainant; that one of the defendants should pay a certain sum of money to the complainant; that the complainant should have execution for these several matters; that the master should take an account of the profits of the lands and slaves, and also an account of certain money and notes; and then said decree concluded as follows, viz: "And so much of said bill as contains or relates to matters hereby referred to the master for a report, is retained for further decree in the premises." etc., cited in Craighead *v.* Wilson, 18 How. 199, 15 L. Ed. 332.

"In Forgay *v.* Conrad, 6 How. 201, 12 L. Ed. 404, the object of the bill was to set aside sundry deeds for lands and slaves, and for an account of the rents and profits of the property so conveyed. The court entered a decree declaring the deeds fraudulent and void, directing the property to be delivered up to the complainant, directing one of the defendants to pay him $11,000, and 'that the complainant do have execution for the several matters aforesaid.' The decree then directed that the master take an account of the profits. Under the peculiar circumstances of the case the decree was held to be appealable, although, said Chief Justice Taney, 'Undoubtedly it is not final in the strict technical sense of that term.' The opinion was placed largely upon the ground that the decree not only decided the title to the property in dispute, but awarded execution." McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 546, 36 L. Ed. 1079.

"Indeed, the case of Forgay *v.* Conrad has been generally treated as an exceptional one, and, as was said in Craighead *v.* Wilson, 18 How. 199, 202, 15 L. Ed. 332, as made under the peculiar circumstances of that case, and to prevent a loss of the property, which would have been disposed of beyond the reach of an appellate court before a final decree adjusting the account could be entered. A somewhat similar criticism was made of this case in Beebe *v.* Russell, 19 How. 283, 287, 15 L. Ed. 668, wherein it was intimated that the fact that execution had been awarded was the only ground upon which the finality of the decree could be supported." McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 547, 36 L. Ed. 1079.

Forgay v. Conrad approved.—In Thomson *v.* Dean, 7 Wall. 342, 19 L. Ed. 94, the decree directed the defendant to transfer to the plaintiff certain shares of stock, and that an account be taken as to the amount paid and to be paid for the same, and as to dividends accrued. But this was held to be a final decree upon the ground that it changed the property in the stock as absolutely and as completely as could be done by execution on a decree for sale. In this case the court did distinctly approve of Forgay *v.* Conrad, although the decree was put upon the ground that it decided finally the right to the property in contest.

73. Limitations of general rule.—Craighead *v.* Wilson, 18 How. 199, 15 L. Ed. 332; Beebe *v.* Russell, 19 How. 283, 15 L. Ed.

and state an account between the parties as to the compensation during the litigation and up to its final termination relates to matters of administration not involving the merits.[74]

668; McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 545, 36 L. Ed. 1079; Keystone Iron Co. *v.* Martin, 132 U. S. 91, 33 L. Ed. 275; Latta *v.* Kilbourn, 150 U. S. 539, 37 L. Ed. 1169.

Cases reviewed.—The decisions of the supreme court in Forgay *v.* Conrad, 6 How. 201, 204, 12 L. Ed. 404; Thomson *v.* Dean, 7 Wall. 342, 346, 19 L. Ed. 94; Winthrop Iron Co. *v.* Meeker, 109 U. S. 180, 183, 27 L. Ed. 898; and Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207, 34 L. Ed. 97—upon the question whether or not a decree which sets aside conveyances, or directs defendants to convey and surrender property, or determines that the complainants are the owners of certain interests in property, and then refers the case to a master to state and report the accounts between the parties to the suit respecting the use of the property—are difficult to reconcile with its decisions in Perkins *v.* Fourniquet, 6 How. 206, 208, 12 L. Ed. 406; Craighead *v.* Wilson, 18 How. 199, 15 L. Ed. 332; Beebe *v.* Russell, 19 How. 283, 286, 15 L. Ed. 668, and McGourkey *v.* Toledo, etc., Co., 146 U. S. 536, 550, 36 L. Ed. 1079, upon the same question.

When such decree deemed final.—"Even if an account be ordered taken, if such accounting be not asked for in the bill, and be ordered simply in execution of the decree, and such decree be final as to all matters within the pleadings, it will still be regarded as final. Craighead *v.* Wilson, 18 How. 199, 15 L. Ed. 332; Winthrop Iron Co. *v.* Meeker, 109 U. S. 180, 27 L. Ed. 898." McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 546, 36 L. Ed. 1079.

A decree is final which terminates the litigation between the parties on the merits of the case, fixes their rights and liabilities, and leaves nothing to be done but to execute it, although the case may be referred to a master to state an account, or to determine questions incidental to its execution. St. Louis, etc., R. Co. *v.* Southern Express Co., 108 U. S. 24, 29, 27 L. Ed. 638; First Nat. Bank *v.* Shedd, 121 U. S. 74, 30 L. Ed. 877; Hill *v* Chicago, etc., R. Co., 140 U. S. 52, 54, 35 L. Ed. 331.

A decree is final, though the case be referred to a master to execute the decree by a sale of property or otherwise, as in the case of the foreclosure of a mortgage. Ray *v.* Law, 3 Cranch 179, 2 L. Ed. 404; Whiting *v.* Bank of United States, 13 Pet. 6, 10 L. Ed. 33; Bronson *v.* Railroad Co., 2 Black 524, 17 L. Ed. 359; McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 545, 36 L. Ed. 1079.

A decree upon the coming in of the master's report on a bill for specific performance, ascertaining the quantity of land to be conveyed, and the balance of money to be paid, and that the conveyance should be executed on such balance being tendered, is a final decree. Beebe *v.* Russell, 19 How. 283, 15 L. Ed. 668.

In Beebe *v.* Russell, 19 How. 283, 285, 15 L. Ed. 668, the court decreed that the defendants should execute certain conveyances, and surrender possession, and then referred it to a master, to take an account of the rents and profits received by the defendants, with directions as to how the account should be taken. This decree was held not to be final. Mr. Justice Wayne remarking that it might be so "if all the consequential directions depending upon the result of the master's report are contained in the decree so that no further decree of the court will be necessary, upon the confirmation of the report, to give the parties the entire and full benefit of the previous decision of the court;" and that the decree is final when ministerial duties only are to be performed to ascertain the sum due. Practically the same ruling was made in the next case of Farrelly *v.* Woodfolk, 19 How. 288, 15 L. Ed. 670.

In Winthrop Iron Co. *v.* Meeker, 109 U. S. 180, 27 L. Ed. 898, a bill was filed to set aside as fraudulent the proceedings of a stockholders' meeting, and to have a receiver appointed. The decree adjudged that the proceedings of the meeting were fraudulent; that a certain lease executed in accordance with the authority then given was void; that a receiver should be appointed with power to continue the business; and that an account be taken of profits realized from the use of the leased property, and also of royalties upon certain ores mined by the defendants. The court held the decree to be final, because the whole purpose of the suit had been accomplished, and the accounting ordered was only in aid of the execution of the decree, and was not a part of the relief prayed for in the bill, which contemplated nothing more than a rescission of the authority to execute the lease, and a transfer of the management of the company to a receiver. The language of Mr. Justice McLean in Craighead *v.* Wilson, 18 How. 199, 201, 15 L. Ed. 332, was quoted to the effect that the decree was final on "all matters within the pleadings," and nothing remained to be done but to adjust accounts between the parties growing out of the operations of the defendants during the pendency of the suit. The case was distinguished from suits by patentees in the fact that, in such suits, the money recovery is part of the subject matter of the suit.

74. Missouri, etc., R. Co. *v.* Dinsmore, 108 U. S. 30, 27 L. Ed. 640.

(2) *Decision on Report of Referee.*—A decree confirming an auditor's report is final and appealable.[75]

l. *Order Refusing Rehearing.*—An order of the court below refusing a rehearing is not reviewable here, because a petition for rehearing, presented in due season and entertained by the court, prevents the original judgment from taking effect as a final judgment, for the purposes of an appeal or writ of error, until the petition is disposed of.[76]

m. *Judgment Affirming Order of Probate.*—A judgment of the supreme court of the District of Columbia, in general term, affirming a final order of the same court in special term admitting to probate and record a certain writing as the will of the deceased, is final and appealable.[77]

n. *Decision Affecting Pleadings*—(1) *Judgments on Demurrers.*—**In General.**—A judgment sustaining or overruling a demurrer is not a final judgment which can be reviewed by this court.[78] Thus, an order overruling a demurrer

75. Decision on report of referee.—Hovey *v.* McDonald, 109 U. S. 150, 27 L. Ed. 888.

A bill was filed by residuary legatees claiming to receive from the executors their respective proportions of the estate of the testator; on a reference to a master to take an account, the master reported seven thousand seven hundred and ninety-five dollars and twenty-seven cents to be in the hands of the executors, which sum was paid by them into court. The report was referred back to the master, who made his final report, by which he found a further sum in the hands of the executors, exclusive of sundry uncollected debts then outstanding, some bad, and some good. Exceptions were filed to this report, which were disallowed by the court. The circuit court decreed that the report should be accepted, and that the complainants should have execution for the sum reported in the hands of the executors; and as to the residue of the debts due the estate as soon as the same, part of them, should be collected; the amount should be paid into court for distribution, to be made under the direction of the court. Held, that this is an interlocutory, and not a final decree, in the sense of the act of congress; and an appeal from the same cannot be taken. Young *v.* Smith, 15 Pet. 287, 10 L. Ed. 741.

Where, in an original suit in equity instituted in this court to determine the boundary line between states, an order is made appointing commissioners to locate the same, and at the same term the commissioners file a report which is ordered to be confirmed, but it is further ordered "that said commissioners proceed to determine and mark the boundary line between said states throughout its extent, and report thereon to this court, with all convenient speed," it was held, that such order of confirmation is not a final decree deciding and disposing of the whole merits of the cause, and discharging the parties from further attendance, but is interlocutory merely, and therefore may be set aside at a subsequent term. Iowa *v.* Illinois, 151 U. S. 238, 38 L. Ed. 145.

76. Order refusing rehearing.—Texas & Pacific R. Co. *v.* Murphy, 111 U. S. 488, 28 L. Ed. 492, citing Brocket *v.* Brocket, 2 How. 238, 11 L. Ed. 251.

77. Judgment affirming order of probate.—Ormsby *v.* Webb, 134 U. S. 47, 33 L. Ed. 805, following Young *v.* Bank, 4 Cranch 384, 2 L. Ed. 655, and distinguishing Van Ness *v.* Van Ness, 6 How. 62, 12 L. Ed. 344; Brown *v.* Wiley, 4 Wall. 165, 18 L. Ed. 384.

78. Judgments on demurrers.—De Armas *v.* United States, 6 How. 103, 12 L. Ed. 361; Holcombe *v.* McKusick, 20 How. 552, 15 L. Ed. 1020; Miners Bank *v.* United States, 5 How. 213, 12 L. Ed. 121; Teal *v.* Walker, 111 U. S. 242, 246, 28 L. Ed. 415; Jones *v.* Craig, 127 U. S. 213, 32 L. Ed. 147; Bank of Rondout *v.* Smith, 156 U. S. 330, 38 L. Ed. 441.

An order of the district court, sustaining a demurrer to a petition because it was multifarious, and because the names of the persons claiming or in the possession of the land which the petitioner alleged to belong to them were not set forth, was not a final judgment or decree from which an appeal lies to this court. De Armas *v.* United States, 6 How. 103, 12 L. Ed. 361.

Where there was a demurrer to some parts of a replication, and a motion to strike out other parts, still leaving in the replication some essential allegations, a judgment upon the demurrer and motion to strike out was not such a final judgment as can be reviewed by this court. Holcombe *v.* McKusick, 20 How. 552, 15 L. Ed. 1020.

A judgment of a court, sustaining a demurrer under the following circumstances, is not a final judgment which can be reviewed by this court. Information in the nature of a quo warranto, calling upon the president, directors, and company of the Miners' Bank of Dubuque to show by what warrant they claimed the right to use the franchise. Plea, referring to an act of incorporation. Replication, that the act of incorporation had been repealed. Rejoinder, that the repealing law was passed without notice to

to a petition, and directing a jury to be impaneled, is not a final judgment upon which a writ of error will lie.[79]

Demurrer in Abatement.—But where the defendant demurred, and assigned as a reason that the place of abode of the plaintiff, or his right to sue, was not set forth in the declaration, it was demurring in abatement, and the judgment of the court, if the demurrer be overruled, will be final for the plaintiff. "A judgment on a plea in abatement, or on a demurrer to a plea in abatement, is not final, but on a demurrer which contains matter in abatement, it shall be final, because a demurrer cannot partake of the character of a plea in abatement."[80]

(2) *Striking Out Pleadings.*—A judgment upon a motion to strike out pleadings is not such a final judgment as can be reviewed by this court.[81]

(3) *Judgments on Pleas in Abatement.*—**In General.**—The twenty-second section of the judiciary act, now § 1011 of the Revised Statutes, which defines what decrees or judgments in civil actions may be made the subjects of appeals or writ of error, provides, that there shall be no reversal in the supreme court or in a circuit court upon a writ of error, for error in ruling any plea in abatement other than a plea to the jurisdiction of the court.[82] A judgment on a plea in abatement is not final in the sense that it may be reviewed before the final determination of the cause.[83] But a demurrer, being in its own nature a plea to the ac-

the parties, and without any evidence of misuse of the franchise. Demurrer to the rejoinder, joinder in demurrer. Sustaining the demurrer, without any further judgment of the court, did not prevent the parties from continuing to exercise the franchise, and therefore is not a final judgment. The writ of error must, upon motion, be dismissed. Miners' Bank *v.* United States, 5 How. 213, 12 L. Ed. 121.

The defendant having answered over by leave and order of the court, reserving his objection to the overruling of the demurrer, the question whether the demurrer was rightly overruled is open on this writ of error sued out after final judgment against him. Teal *v.* Walker, 111 U. S. 242, 28 L. Ed. 415; Southern Pac. Co. *v.* Denton, 146 U. S. 202, 36 L. Ed. 942; Bauserman *v.* Blunt, 147 U. S. 647, 652, 37 L. Ed. 316.

Error to state court.—This court has no jurisdiction to review by a writ of error the judgment of the highest court of a state reversing the decision of the trial court overruling the demurrer, and directing that it be sustained, where the law of the state prescribing action on demurrer is as follows: "If the demurrer be sustained, the adverse party may amend, if the defect can be remedied by way of amendment, with or without costs, as the court, in its discretion, shall direct," because this is not a final judgment. Clark *v.* Kansas City, 172 U. S. 334, 43 L. Ed. 467, citing and approving Werner *v.* Charleston, 151 U. S. 360, 38 L. Ed. 192, reaffirmed in Rogers *v.* Morgan, 173 U. S. 702, 43 L. Ed. 1185.

79. Chappell *v.* United States, 160 U. S. 499, 40 L. Ed. 510, citing Luxton *v.* North River Bridge Co., 147 U. S. 337, 37 L. Ed. 194; Merritt *v.* Bowdoin College, 167 U. S. 745, 42 L. Ed. 1209.

80. Tyler *v.* Hand, 7 How. 573, 584, 12 L. Ed. 824.

81. Striking out pleadings.—Holcombe *v.* McKusick, 2 How. 552, 15 L. Ed. 1020.

82. Judgments on pleas in abatement.—Piquignot *v.* Pennsylvania R. Co., 16 How. 104, 14 L. Ed. 683; Leitensdorfer *v.* Webb, 20 How. 176, 15 L. Ed. 891.

83. Fitzpatrick *v.* Flannagan, 106 U. S. 648, 27 L. Ed. 211; Stevens *v.* Monongahela Bank, 111 U. S. 197, 28 L. Ed. 399; Piquignot *v.* Pennsylvania R. Co., 16 How. 104, 14 L. Ed. 863; Leitensdorfer *v.* Webb, 20 How. 176, 15 L. Ed. 891.

The judgment on the plea in abatement is not final in the sense that it may be reviewed before the final determination of the cause, but a writ of error upon the final judgment brings up the whole record, and subjects to review all the proceedings in the cause. Fitzpatrick *v.* Flannagan, 106 U. S. 648, 27 L. Ed. 211.

Plea of another suit pending.—Within the meaning of the judiciary act of September 24, 1789, ch. 20, § 22, providing that there shall be no reversal in this court for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court, it was held, that the plea of another action pending is a plea in abatement. Stevens *v.* Monongahela Bank, 111 U. S. 197, 28 L. Ed. 399, citing Piquignot *v.* Pennsylvania R. Co., 16 How. 104, 14 L. Ed. 863.

Attachment.—The laws of the provisional government authorized an attachment against the property of a debtor, in cases in which a party claiming to be a creditor, upon a petition and affidavit, charged that his debtor had fraudulently disposed of his property, so as to hinder, delay, or defraud, his creditors. By the same law, an issue was directed to be tried upon the petition and affidavit of

tion and being even in form a plea to the action, shall not be considered as a plea in abatement, though the special cause alleged for demurring be matter of abatement.[84]

Limitations of General Rule.—The provision of the statutes, that there shall be no reversal in this court upon a writ of error "for error in ruling any plea in abatement, other than a plea to the jurisdiction of the court." Rev. Stat., § 1011, as amended by act of February 18, 1875, c. 80; 18 Stat. 318, which has been part of the judiciary acts of the United States from the beginning, cannot be construed as forbidding the review of a decision, even on a plea in abatement, of any question of the jurisdiction of the court below to render judgment against the defendant, though depending on the sufficiency of the service of the writ.[85]

o. *Orders Remanding Causes Removed from State Courts*—(1) *Prior to the Act of March 3rd, 1875.*—Prior to the act of March 3, 1875, there could be no appeal or writ of error from an order of a circuit court remanding a suit which had been removed to it from a state court, because such an order was not a final judgment or decree in the sense which authorizes an appeal or writ of error.[86]

the plaintiffs; upon which issue, if the finding sustained the petition and affidavit, the plaintiff was authorized to proceed to the proof of his debt; if the finding was against the charge in the petition, the attachment was to be dismissed. These proceedings with reference to the attachment are in their nature proceedings in abatement, and are not final as to the rights of the parties, and therefore cannot be reviewed upon writ of error in this court. Leitensdorfer *v.* Webb, 20 How. 176, 15 L. Ed. 891.

84. Tyler *v.* Hand, 7 How. 573, 585, 12 L. Ed. 824.

A judgment on a plea in abatement, or on a demurrer to a plea in abatement, is not final, but on a demurrer which contains matter in abatement it shall be final, because a demurrer cannot partake of the character of a plea in abatement. Tyler *v.* Hand, 7 How. 573, 584, 12 L. Ed. 824.

Where the defendant demurred, and assigned as a reason that the place of abode of the plaintiff, or his right to sue, was not set forth in the declaration, it was demurring in abatement, and the judgment of the court, if the demurrer be overruled, will be final for the plaintiff. Tyler *v.* Hand, 7 How. 573, 12 L. Ed. 824.

85. Act of September 24, 1789, ch. 20, § 22; 1 Stat. 85; Goldey *v.* Morning News, 156 U. S. 518, 520, 38 L. Ed. 517; Pollard *v.* Dwight, 4 Cranch 421, 2 L. Ed. 666; Harkness *v.* Hyde, 98 U. S. 476, 25 L. Ed. 237; Mexican Central R. Co. *v.* Pinkney, 149 U. S. 194, 37 L. Ed. 699.

86. Prior to the act of March 3rd, 1875.—Gurnee *v.* Patrick County, 137 U. S. 141, 143, 34 L. Ed. 601; Railroad Co. *v.* Wiswall, 23 Wall. 507, 22 L. Ed. 103; Babbitt *v.* Clark, 103 U. S. 606, 609, 26 L. Ed. 507; Turner *v.* Farmers' Loan, etc., Co., 106 U. S. 552, 555, 27 L. Ed. 273. Richmond, etc., R. Co. *v.* Thouron, 134 U. S. 45, 46, 33 L. Ed. 871; German Nat. Bank *v.* Speckert, 181 U. S. 405, 406, 45 L. Ed. 926.

In re Pennsylvania Co., 137 U. S. 451, 34 L. Ed. 738, citing Ex parte Bradstreet, 7 Pet. 634, 8 L. Ed. 810; Railroad Co *v.* Wiswall, 23 Wall. 507, 22 L. Ed. 103, holding that a mandamus would lie to take jurisdiction of and proceed with a case which it wrongfully remanded to the state court.

The order of a circuit court remanding, for want of jurisdiction to hear it, a case removed from a state court into it, is not a "final judgment" in that sense which authorizes a writ of error. The remedy of the party against whose will the suit has been remanded, is by mandamus to compel action, and not by a writ of error to review what has been done. Railroad Co. *v.* Wiswall, 23 Wall. 507, 22 L. Ed. 103, citing Insurance Co. *v.* Comstock, 16 Wall. 258, 270, 21 L. Ed. 493; 1 Chitty's General Practice, 736; Ex parte Bradstreet, 7 Pet. 634, 647, 8 L. Ed. 810; Ex parte Newman, 14 Wall. 152, 165, 20 L. Ed. 877.

Before the act of 1875, c. 137 (18 Stat. 470), it was held that an order by the circuit court remanding a cause was not such a final judgment or decree in a civil action as to give us jurisdiction for its review by writ of error or appeal. The appropriate remedy in such a case was then by mandamus to compel the circuit court to hear and decide. Railroad Co. *v.* Wiswall, 23 Wall. 507, 22 L. Ed. 103; Insurance Co. *v.* Comstock, 16 Wall. 258, 21 L. Ed. 493; Babbitt *v.* Clark, 103 U. S. 606, 609, 26 L. Ed. 507.

Prior to the passage of the act of March 3, 1875, just cited, an appeal or writ of error would not lie to review an order of the circuit court remanding a suit which had been removed because such an order was not a final judgment or decree. This was expressly held in Railroad Co. *v.* Wiswall, 23 Wall. 507, 22 L. Ed. 103, decided at October term, 1874, and it was also ruled that the remedy was by mandamus. Missouri Pac. R. *v.* Fitzgerald, 160 U. S. 556, 580, 40 L. Ed. 536, reaffirmed in Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179.

"Before the act of March 3, 1875, there could be no appeal from an order of the circuit court remanding a suit which had

(2) *Under the Act of March 3rd, 1875.*—But it was provided by the act of March 3, 1875, that the order of a circuit court dismissing or remanding a cause to a state court, should be reviewable by the supreme court on writ of error or appeal as the case might be.[87]

(3) *Under the Act of March 3rd, 1887.*—The act of March 3, 1875, remained in force until the passage of the act of March 3, 1887, by which it was superseded, and the writ of error or appeal upon orders to remand causes to the state courts, was abrogated. The provision of the act of 1887 is as follows: "Whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed."[88] Since the act of March 3, 1887, 24 Stat. 552, c. 373, took effect, no

been removed, because such an order was not a final judgment or decree in the sense which authorizes an appeal or writ of error. Railroad Co. *v.* Wiswall, 23 Wall. 507, 22 L. Ed. 103. That act, however, provided in express terms that 'the order of said circuit court dismissing or remanding said cause to the state court shall be reviewable by the supreme court on writ of error or appeal, as the case may be,' 18 Stat. 470, c. 137, last paragraph of § 5; and under this authority numerous cases have been brought to this court by appeal or writ of error for the review of such orders." Morey *v.* Lockhart, 123 U. S. 56, 57, 31 L. Ed. 68.

87. Under the act of March 3rd, 1875.—Gurnee *v.* Patrick County, 137 U. S. 141, 143, 34 L. Ed. 601; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 580, 40 L. Ed. 536, reaffirmed in Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179; German Nat. Bank *v.* Speckert, 181 U. S. 405, 406, 45 L. Ed. 926; Ayers *v.* Chicago, 101 U. S. 184, 25 L. Ed. 838; Burlington, etc., R. Co. *v.* Dunn, 122 U. S. 513, 517, 30 L. Ed. 1159.

The 5th section of the act of March 3, 1875 (determining the jurisdiction of the circuit courts), provided that the order of the circuit court dismissing or remanding a cause to the state court should be reviewable by the supreme court on writ of error or appeal, as the case might be. 18 Stat. 470, 472, c. 137.

In re Pennsylvania Co., 137 U. S. 451, 453, 34 L. Ed. 738.

Under Sec. 5 of the act of March 3, 1875.—An order of the circuit court dismissing a cause removed into it from a state court on the ground that it did not really and substantially involve or dispute a controversy properly within its jurisdiction, was reviewable by this court on a writ of error. "In making such an order, therefore, the circuit court exercises a legal and not a personal discretion, which must be exerted in view of the facts sufficiently proven, and controlled by fixed rules of law." Barry *v.* Edmunds, 116 U. S. 550, 559, 29 L. Ed. 729.

When the circuit court decided that a controversy has not been lawfully removed from a state court, and remanded the suit on that account, it in effect determined that the controversy involved is not properly within its own jurisdiction. The review of such an adjudication was clearly contemplated by the act of 1875. Babbitt *v.* Clark, 103 U. S. 606, 610, 26 L. Ed. 507.

An order of a circuit court to remand a cause to a state court on the ground that the petition for its removal from that court has not been presented in time was reviewable here either on a writ of error or appeal. And this right applies not only to cases which are remanded because the subject matter of the controversy is not within the jurisdiction of the circuit court but also includes a case where the circuit court decides that the controversy is not properly within its jurisdiction because necessary steps were not taken to get it away from the state court, where it was rightfully pending. Babbitt *v.* Clark, 103 U. S. 606, 26 L. Ed. 507.

But the fifth section of that act provided that if it satisfactorily appeared to the circuit court that a suit had been removed from a state court which did not really and substantially involve a controversy properly within the jurisdiction of the circuit court, it may be remanded, and the order to that effect shall be reviewable by this court "on writ of error or appeal, as the case may be." Babbitt *v.* Clark, 103 U. S. 606, 610, 26 L. Ed. 507.

88. Under the act of March 3, 1887.—24 Stat. ch. 373, 552, 553; In re Pennsylvania Co., 137 U. S. 451, 453, 454, 34 L. Ed. 738; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 580, 40 L. Ed. 536, reaffirmed in Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179.

Under the act of congress approved March 3, 1887, 24 Stat. 552, c. 373, as corrected by the act of August 13, 1888, 25 Stat. 433, c. 866, providing that "Whenever any cause shall be removed from any state court into any circuit court of the United States, and the circuit court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence

appeal or writ of error lies to this court from a decision of a circuit court remanding a cause to a state court which had been removed from it, although the order remanding it was made before that act took effect.[89] This statute was re-enacted August 13, 1888, for the purpose of correcting some mistakes in the enrollment, 25 Stat., c. 866, 433, 435; but the above clause remained without change.[90]

The object of the act of March 3, 1887, was to restrict the jurisdiction of the circuit court and to restrain the volume of litigation, which, through the expansion of federal jurisdiction in respect to the removal of causes, had been pouring into the courts of the United States.[91] Accordingly, it may be regarded as settled that an order of the circuit court remanding a cause cannot be reviewed in this court by any direct proceeding for that purpose.[92] Likewise, if the circuit court remands a cause and the state court thereupon proceeds to final judgment, the action of the circuit court is not reviewable on writ of error to such judgment.[93]

it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed," it was held, that this court has no appellate jurisdiction to review an order of the circuit court remanding the cause to the state court. Chicago, etc., R. Co. *v.* Roberts, 141 U. S. 690, 693, 35 L. Ed. 905, citing Morey *v.* Lockhart, 123 U. S. 56, 58, 31 L. Ed. 68; Railroad Co. *v.* Wiswall, 23 Wall. 507, 22 L. Ed. 103; Richmond, etc., R. Co. *v.* Thouron, 134 U. S. 45, 47, 33 L. Ed. 871.

89. Chicago, etc., R. Co. *v.* Gray, 131 U. S. 396, 32 L. Ed. 212; Burlington, etc., R. Co. *v.* Dunn, 122 U. S. 513, 30 L. Ed. 1159; Richmond, etc., R. Co. *v.* Thouron, 134 U. S. 45, 46, 33 L. Ed. 871; Morey *v.* Lockhart, 123 U. S. 56, 57, 31 L. Ed. 68.

By § 6 of the act of March 3, 1887 (24 Stat. 552, 555, c. 373), as corrected by the act of August 13, 1888 (25 Stat. 433, c. 866), the provision to that effect was repealed, and it was also provided by the act that "no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." Gurnee *v.* Patrick County, 137 U. S. 141, 143, 34 L. Ed. 601.

"Since the act of 1887 took effect, an order of the circuit court remanding a cause to a state court cannot be reviewed by this court under § 693 of the Revised Statutes providing: 'Any final judgment or decree in any civil suit or proceeding before a circuit court * * * wherein the said judges certify, as provided by law, that their opinions were opposed, * * * may be reviewed and affirmed, reversed or modified by the supreme court, on writ of error or appeal, according to the nature of the case, and subject to the provisions of law applicable to other writs of error or appeals in regard to bail and supersedeas,' because there has been no judgment in the suit, and therefore this section does not apply. This was the ground on which an appeal was denied in Railroad Co. *v.* Wiswall, 23 Wall. 507, 22 L. Ed. 103, where it was said: 'The order of the circuit court remanding the cause to the state court is not a final judgment in the action, but a refusal to hear and decide.' No case can be brought up under § 693, until there has been a final judgment or decree in the suit." Morey *v.* Lockhart, 123 U. S. 56, 31 L. Ed. 68.

90. In re Pennsylvania Co., 137 U. S. 451, 454, 34 L. Ed. 738.

By § 6 of the act of March 3, 1887, ch. 373, as re-enacted by the act of August 13, 1888, ch. 866, § 5 of the act of March 3, 1875, ch. 137, was expressly repealed; and by § 2 it was enacted that whenever the circuit court of the United States should decide that a cause had been improperly removed, and order it to be remanded to the state court from which it came, "such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the circuit court so remanding such cause shall be allowed." 24 Stat. 553, 555; 25 Stat. 435, 436. Under that statute, it has been constantly held, that this court has no power to review by appeal or writ of error an order of a circuit court of the United States remanding a case to a state court. German Nat. Bank *v.* Speckert, 181 U. S. 405, 406, 45 L. Ed. 926.

91. Smith *v.* Lyon, 133 U. S. 315, 33 L. Ed. 635; In re Pennsylvania Co., 137 U. S. 451, 34 L. Ed. 738; Fisk *v.* Henarie, 142 U. S. 459, 467, 35 L. Ed. 1080; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 583, 40 L. Ed. 536, reaffirmed in Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179.

92. Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 582, 40 L. Ed. 536, reaffirmed in Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179, citing In re Pennsylvania Co., 137 U. S. 451, 34 L. Ed. 738.

93. Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 582, 40 L. Ed. 536, reaffirmed in Jeske *v.* Cox, 171 U. S. 685, 43

Effect of Repeal on Pending Proceedings.—The proviso in § 6 of the act of March 3, 1887, denying the power to this court to review orders of the circuit court remanding a cause to a state court, "that this act shall not affect the jurisdiction over or disposition of any suit removed from a court of any state or suit commenced in any court of the United States, before the passage hereof," relates only to the jurisdiction of the circuit courts of the United States, and does not confer upon this court jurisdiction over a writ of error from a judgment remanding a cause to a state court, when the suit was begun and removed before the act of 1887, but not remanded until afterwards.[94] The general rule is that if a law conferring jurisdiction is repealed without any reservation as to pending cases, all such cases fall with the law.[95]

Effect of Repeal on Mandamus.—Although the act of March 3, 1887, taking away the right of this court to review orders remanding causes to state courts, in terms only abolishes appeals and writs of error, and does not mention writs of mandamus, and though it is a general rule that the abrogation of one remedy does not affect another, yet it is clearly the intention of congress to make the judgment of the circuit court remanding the cause to the state court final and conclusive. "The general object of the act is to contract the jurisdiction of the federal courts. The abrogation of the writ of error and appeal

L. Ed. 1179; Nelson *v.* Moloney, 174 U. S. 164, 43 L. Ed. 934.

94. Wilkinson *v.* Nebraska, 123 U. S. 286, 31 L. Ed. 152; Gurnee *v.* Patrick County, 137 U. S. 141, 143, 34 L. Ed. 601.

This court cannot review, on appeal or writ of error, the order of a circuit court, remanding a suit which had been removed under the act of 1887 and which was begun, removed and remanded after that act went into effect. Sherman *v.* Grinnell, 123 U. S. 679, 31 L. Ed. 278, following Morey *v.* Lockhart, 123 U. S. 56, 31 L. Ed. 68.

In Morey *v.* Lockhart, 123 U. S. 56, 31 L. Ed. 68, it was held, that this court had no power to review on appeal or writ of error an order of the circuit court remanding a cause to a state court when it was commenced, removed and remanded after the act of March 3, 1887, went into effect. Gurnee *v.* Patrick County, 137 U. S. 141, 143, 34 L. Ed. 601.

In Sherman *v.* Grinnell, 123 U. S. 679, 31 L. Ed. 278, the order to remand was made while the act of March 3, 1875, was in force, but the writ of error was not brought until after the passage of the act of March 3, 1887, and it was held, that this court could not take jurisdiction. Gurnee *v.* Patrick County, 137 U. S. 141, 144, 34 L. Ed. 601.

"The provision of the act of March 3, 1875, c. 137, 18 Stat. 470, giving the jurisdiction to this court to review an order of a circuit court remanding a suit removed from a state court, was repealed by the act of 1887 without any reservation as to pending cases, the proviso in the repealing section having reference 'only to the jurisdiction of the circuit court and the disposition of the suit on its merits.' Wilkinson *v.* Nebraska, ubi supra. As a consequence of this, the repeal operated to take away jurisdiction in cases where the order to remand had been made, but no appeal or writ of error taken, because 'if a law conferring jurisdiction is repealed without a reservation as to pending cases, all such cases fall with the law.' Railroad Co. *v.* Grant, 98 U. S. 398, 401, 25 L. Ed. 231." Sherman *v.* Grinnell, 123 U. S. 679, 680, 31 L. Ed. 278.

The proviso in § 6 of the act of March 3, 1887, 24 Stat. 552, c. 373, concerning the jurisdiction over suits which had been removed from the state court prior to the passage of the act, relates only to the jurisdiction of circuit courts of the United States, and does not confer upon this court jurisdiction over an appeal from a judgment remanding a cause to a state court; but such jurisdiction was expressly taken away by the last paragraph of § 2 of the act, taken in connection with the repeal of § 5 of the act of March 3, 1875, 18 Stat. 470. Wilkinson *v.* Nebraska, 123 U. S. 286, 31 L. Ed. 152.

"**Chief Justice Waite said:** 'It is difficult to see what more could be done to make the action of the circuit court final, for all the purposes of the removal, and not the subject of review in this court. First, it is declared that there shall be no appeal or writ of error in such a case, and then, to make the matter doubly sure, the only statute which ever gave the right of such an appeal or writ of error is repealed.' Morey *v.* Lockhart (1887), 123 U. S. 56, 31 L. Ed. 68. And it was held that the act prohibited a writ of error after that statute took effect to review an order of remand made while the act of 1875 was in force. Sherman *v.* Grinnell (1887), 123 U. S. 679, 31 L. Ed. 278." German Nat. Bank *v.* Speckert, 181 U. S. 405, 406, 45 L. Ed. 926.

95. Gurnee *v.* Patrick County, 137 U. S. 141, 144, 34 L. Ed. 601; Railroad Co. *v.* Grant, 98 U. S. 398, 401, 25 L. Ed. 231.

would have had little effect in putting an end to the question of removal, if the writ of mandamus could still have been sued out in this court. It is true that the general supervisory power of this court over inferior jurisdictions is of great moment in a public point of view, and should not, upon light grounds, be deemed to be taken away in any case. Still, although the writ of mandamus is not mentioned in the section, yet the use of the words 'such remand shall be immediately carried into execution,' in addition to the prohibition of appeal and writ of error, is strongly indicative of an intent to suppress further prolongation of the controversy by whatever process. We are, therefore, of opinion that the act has the effect of taking away the remedy by mandamus as well as that of appeal and writ of error."[96]

When Reviewable under Act of March 3, 1887.—If a case be removed to the circuit court and a motion to remand be made and denied, then after final judgment the action of the circuit court in refusing to remand may be reviewed here on error or appeal.[97] So, also, if the circuit court and the state court go to judgment, respectively, each judgment is open to revision in the appropriate mode.[98]

(4) *Under the Act of February 25, 1889.*—By the act of February 25, 1889 (25 Stat. 693, c. 236), it was provided that in all cases where a final judgment or decree should be rendered in a circuit court of the United States in which there was a question involving the jurisdiction of the court, the party against whom the judgment or decree was rendered should be entitled to an appeal or writ of error to this court, without reference to the amount of such judgment or decree, but where it did not exceed the sum of $5,000, the question of jurisdiction should alone be reviewable.[99] An order remanding a cause from the circuit court of the United States to the state court from which it was removed, is not a final judgment or decree which this court has jurisdiction to review.[1] An order overruling a motion to remand a case to a state court is not a final judgment on the merits.[2] But where the judgment does not exceed $5,000, the case can only come to this court on the question of the jurisdiction of the circuit court.[3]

(5) *Under Circuit Court of Appeals Act.*—And under § 4 and § 5 of the circuit court of appeals act, this court has no jurisdiction to review in error or on appeal, in advance of the final judgment in the cause on the merits, an order of the circuit court of the United States remanding the cause to the state court from which it had been removed to the circuit court.[4]

96. In re Pennsylvania Co., 137 U. S. 451, 454, 34 L. Ed. 738; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 581, 40 L. Ed. 536, reaffirmed in Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179; German Nat. Bank *v.* Speckert, 181 U. S. 405, 408, 45 L. Ed. 926.

97. Graves *v.* Corbin, 132 U. S. 571, 33 L. Ed. 462; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 582, 40 L. Ed. 536, reaffirmed in Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179; In re Pollitz, 206 U. S. 323, 333, 51 L. Ed. 1081.

98. Removal Cases, 100 U. S. 457, 25 L. Ed. 593; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 582, 40 L. Ed. 536, reaffirmed in Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179.

99. Under the act of February 25, 1889.—Gurnee *v.* Patrick County, 137 U. S. 141, 144, 34 L. Ed. 601.

1. Birdseye *v.* Shaeffer, 140 U. S. 117, 35 L. Ed. 402, citing Gurnee *v.* Patrick County, 137 U. S. 141, 34 L. Ed. 601; Richmond, etc., R. Co. *v.* Thouron, 134 U. S. 45, 33 L. Ed. 871; Texas Land, etc., Co. *v.* Scott, 137 U. S. 436, 34 L. Ed. 730; Hurlbut Land, etc., Co. *v.* Truscott, 165 U. S. 719, 41 L. Ed. 1185; Powers *v.* Chesapeake, etc., R. Co., 169 U. S. 92, 98, 42 L. Ed. 673.

2. Bender *v.* Pennsylvania Co., 148 U. S. 502, 37 L. Ed. 537, citing McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893; Chicago, etc., R. Co. *v.* Roberts, 141 U. S. 690, 35 L. Ed. 905; Joy *v.* Adelbert College, 146 U. S. 355, 36 L. Ed. 1003; McDowell *v.* Jordan, 169 U. S. 734, 42 L. Ed. 1215.

3. St. Louis, etc., R. Co. *v.* McBride, 141 U. S. 127, 35 L. Ed. 659, citing 25 Stat. 693, c. 236; McCormick Harvesting Machine Co. *v.* Walthers, 134 U. S. 41, 33 L. Ed. 833.

4. Under circuit court of appeals act.—Illinois Central R. Co. *v.* Brown, 156 U. S. 386, 39 L. Ed. 461, following McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893; Chi-

From Circuit Court of Appeals.—Nor does an appeal or writ of error lie to this court from a circuit court of appeals, under § 6 of that act in advance of final judgment.[5] Under the act of March 3, 1891, ch. 517, § 6, no appeal lies to the supreme court of the United Sates from a judgment of the circuit court of appeals reversing an order of a circuit court of the United States denying a motion to remand a cause to a state court, and directing the circuit court to remand the cause to the state court.[6]

p. *Vacating and Setting Aside Judgment.*—**Judgment on Writ of Error Coram Nobis.**—A judgment on a writ of error coram nobis is not a final judgment to which a writ of error will lie.[7]

q. *Orders for Distribution of Property.*—An order for the distribution of property has been held final for the purposes of an appeal to this court.[8]

r. *Judgments on Rules or Motions.*—**In General.**—The judiciary act of 1789 authorizes the supreme court to issue writs of error to bring up final judgments or decrees in a civil action, etc. The decision of the circuit court upon a rule or motion is not of that character. Such decisions are not final judgments.[9]

cago, etc., R. Co. *v.* Roberts, 141 U. S. 690, 35 L. Ed. 905.

In Chicago, etc., R. *v.* Roberts (1891), 141 U. S. 690, 35 L. Ed. 905, the cases of Morey *v.* Lockhart, 123 U. S. 56, 31 L. Ed. 68, and Richmond, etc., R. *v.* Thouron, 134 U. S. 45, 33 L. Ed. 871, were followed; and it was held that § 5 of the judiciary act of March 3, 1891, ch. 517, giving a writ of error from this court "in any case in which the jurisdiction of the court is in issue," does not authorize a writ of error to review an order of the circuit court, remanding a case for want of jurisdiction, because such order is not a final judgment. German Nat. Bank *v.* Speckert, 181 U. S. 405, 408, 45 L. Ed. 926.

Under the circuit court of appeals act, an order of the circuit court remanding a case to a state court from which it has been removed, is not reviewable by this court. Powers *v.* Chesapeake, etc., R. Co., 169 U. S. 92, 42 L. Ed. 673, citing Gurnee *v.* Patrick County, 137 U. S. 141, 34 L. Ed. 601; In re Pennsylvania Co., 137 U. S. 451, 34 L. Ed. 738; Birdseye *v.* Shaeffer, 140 U. S. 117, 35 L. Ed. 402; Missouri Pac. R. Co. *v.* Fitzgerald, 160 U. S. 556, 40 L. Ed. 536.

5. German Nat. Bank *v.* Speckert, 181 U. S. 405, 409, 45 L. Ed. 926.

6. German Nat. Bank *v.* Speckert, 181 U. S. 405, 45 L. Ed. 926, reaffirmed in Cole *v.* Garland, 183 U. S. 693, 46 L. Ed. 393.

7. Vacating and setting aside judgments.—United States *v.* Abatoir Place, 106 U. S. 160, 27 L. Ed. 128, citing Boyle *v.* Zacharie, 6 Pet. 635, 8 L. Ed. 527, 532; Pickett *v.* Legerwood, 7 Pet. 144, 8 L. Ed. 638; Smith *v.* Trabue, 9 Pet. 4, 9 L. Ed. 30; Evans *v.* Gee, 14 Pet. 1, 10 L. Ed. 327; Amis *v.* Smith, 16 Pet. 303, 10 L. Ed. 973; Morsell *v.* Hall, 13 How. 212, 14 L. Ed. 117; McCargo *v.* Chapman, 20 How. 555, 15 L. Ed. 1021; Gregg *v.* Forsyth, 2 Wall. 56, 17 L. Ed. 782; Barton *v.* Forsyth, 5 Wall. 190, 18 L. Ed. 545.

In the circuit court for the district of Kentucky, a judgment in favor of the plaintiff in an ejectment was entered in 1798, and no proceedings on the same until 1830; when the period of the demise having expired, the court, on motion, and notice to one of the defendants, made an order inserting a demise of fifty years. It having been afterwards shown to the court that the parties really interested in the land when the motion to amend was made had not been noticed of the proceeding, the court issued a writ of error coram vobis, and gave a judgment sustaining the same, and that the order extending the demise should be set aside. From this judgment a writ of error was prosecuted to this court; and it was held that the judgment on the writ of error coram vobis, was not such a judgment as could be brought up by writ of error for decision to this court. Pickett *v.* Legerwood, 7 Pet. 144, 8 L. Ed. 638, following Walden *v.* Craig, 9 Wheat. 576, 6 L. Ed. 164.

8. Orders for Distribution of property.—Savanah *v.* Jesup, 106 U. S. 563, 27 L. Ed. 276.

A decree which adjudges a certain sum of money to be due from an administrator to each of the distributees of his intestate's estate, and awards execution to collect it, is a final decree. An added direction that the defendant be allowed, as payment to each of the distributees, the amount of any note held by him against them, and also that the several shares of the parties to whom the estate is awarded, shall be subject to ratable deduction for fees yet unpaid for the collection of notes belonging to the administrator, does not make the decree less final; especially when it does not appear that the administrator held any notes against any of the distributees, or that there were any unpaid fees. Stoval *v.* Banks, 10 Wall. 583, 19 L. Ed. 1036.

9. Judgments on rules or motions.—Toland *v.* Sprague, 12 Pet. 300, 9 L. Ed.

This rule has been applied to judgments on motions to set aside writs of restitution,[10] to judgments on rules or motions to quash execution,[11] to judgments on motions to strike out pleadings,[12] and to judgments on various other motions, instances of which will be found set out in the footnotes.[13] So, also, a decision

1093; McCargo *v.* Chapman, 20 How. 555, 15 L. Ed. 1021.

"The judiciary act authorizes this court to issue writs of error to bring up a final judgment or decree in a civil action, or suit in equity, etc. The decision of the court upon a rule or motion is not of that character. This point, which is clear upon the words of the law, has been often adjudged in this court; without going farther, it will be sufficient to refer to Boyle *v.* Lacharie, 6 Pet. 635, 8 L. Ed. 527; Smith *v.* Trabue, 9 Pet. 4, 9 L. Ed. 30. In the first of these cases the question is elaborately argued by the court, with a review of authorities, and they come to this conclusion, that they consider all motions of this sort (that is) to quash executions, as addressed to the sound discretion of the court, and as a summary relief, which the court is not compellable to allow. That the refusal to quash is not, in the sense of the common law, a judgment; much less is it a final judgment. It is a mere interlocutory order. Even at common law, error only lies from a final judgment, and by the express provisions of the judiciary act, a writ of error lies to this court only in cases of final judgments." Toland *v.* Sprague, 12 Pet. 300, 331, 9 L. Ed. 1093, 1106.

10. Motion to set aside writ of restitution.—A judgment on a motion made by the plaintiff to set aside a writ of restitution which had been issued in favor of the defendant and to grant a writ of restitution to the plaintiff in a case, is not a final judgment within the terms of the said section; in fact, is but an order of court. Hence, no jurisdiction exists of a writ of error based on such a proceeding. Barton *v.* Forsyth, 5 Wall. 190, 18 L. Ed. 545.

11. Motion to quash execution.—Since the judiciary act of 1789 authorizes this court to revise only final judgments by a writ of error, a decision of the court below, upon a rule or motion to quash an execution, is not of that character. McCargo *v.* Chapman, 20 How. 555, 15 L. Ed. 1021; Boyle *v.* Zacharie, 6 Pet. 635, 8 L. Ed. 527.

It is the settled doctrine of the supreme court of the United States that a writ of error does not lie from the circuit court on a refusal of a motion to quash an execution; such refusal not being a final judgment, under the twenty-second section of the judiciary act of 1789. The opinion of the court on the case of Boyle *v.* Zacharie, 6 Peters 635, 8 L. Ed. 527, cited and affirmed. Evans *v.* Gee, 14 Pet. 1, 10 L. Ed. 327.

All motions to quash executions are addressed to the sound discretion of the court, and as a summary relief which the court is not compellable to allow. The party is deprived of no right by the refusal; and he is at full liberty to redress his grievance by writ of error, or audita querela, or other remedy known to the common law. The refusal to quash is not in the sense of the common law a judgment, much less a final judgment. It is a mere interlocutory order. Even at common law, error only lies from a final judgment; and by the express provisions of the judiciary act of 1789, a writ of error lies to this court only in cases of final judgment. Boyle *v.* Zacharie, 6 Pet. 635, 8 L. Ed. 527.

A writ of error will not lie to a state court to review an order overruling a motion to quash an execution, because it is not a final judgment or decree within the meaning of the federal statutes. Loeber *v.* Schroeder, 149 U. S. 580, 581, 37 L. Ed. 856.

It is well settled that a writ of error will not lie except to review a final judgment or decree of the highest court of the state, and that it will not lie to an order overruling a motion to quash an execution, because a decision upon the rule or motion is not such a final judgment or decree in any suit, as is contemplated by the judiciary acts of the general government. Refusal to quash a writ is not a final judgment. Boyle *v.* Zacharie, 6 Pet. 635, 657, 8 L. Ed. 527; McCargo *v.* Chapman, 20 How. 555, 15 L. Ed. 1021; Early *v.* Rogers, 16 How. 599, 14 L. Ed. 1074; Amis *v.* Smith, 16 Pet. 303, 314, 10 L. Ed. 973; Evans *v.* Gee, 14 Pet. 1, 10 L. Ed. 327; Loeber *v.* Schroeder, 149 U. S. 580, 584, 37 L. Ed. 856.

12. Motion to strike out pleadings.—A judgment upon motion to strike out pleadings is not such a final judgment as can be reviewed by this court. Holcombe *v.* McKusick, 20 How. 552, 15 L. Ed. 1020.

13. Motion to enter exoneretur of bail.—A judgment of a court upon a motion to enter an exoneretur of bail is not the proper subject of a writ of error. Morsell *v.* Hall, 13 How. 212, 14 L. Ed. 117.

Motion to set aside sheriff's return.—A decree of the highest court of a state affirming an order of an inferior court, by which a motion to set aside a sheriff's return to an execution was allowed and an alias execution awarded, is not a "final judgment" within the meaning of the 22d section of the judiciary act, nor within the meaning of the 9th section of the organic act of the territory of Montana, giving appeals from the supreme court

merely on a collateral motion is not such a judgment in the cause as may be brought up to this court upon a writ of error.[14]

Motion to Intervene.—An appeal does not lie from an order of the court below, denying a motion in a pending suit, to permit a person to intervene and become a party thereto.[15]

s. *Judgments Reversing and Remanding Causes*—(1) *In General.*—It has been uniformly held that a judgment of reversal with leave for further proceedings in the court below cannot be brought here on writ of error.[16] Especially is

of the territory to this court. Wells *v.* McGregor, 13 Wall. 188, 20 L. Ed. 538.

The denial of a motion that the master to whom a cause has been referred be directed to proceed no further with his accounting, by reason of an alleged compromise and settlement that had been made by the parties in respect to the matters in dispute, and direction that the cause proceed, is not a final decree from which an appeal will lie. De Liano *v.* Gaines, 131 U. S. appx. ccxiv, 25 L. Ed. 928.

Motion to enter certificate of reasonable cause.—Where there was an information filed in a district court of the United States against a distillery, claiming that it was forfeited to the United States for violation of the revenue laws, and upon the trial the district court, being of opinion that there was no evidence of any violation of the revenue laws, for which the seizure had been made, directed a verdict for him, and judgment was rendered thereon in his favor, whereupon the United States moved the court to enter of record a certificate that there was a reasonable cause of seizure, but the motion was denied, and this decision was affirmed by the circuit court, it was held that no writ of error would lie to this court to reverse the judgment of the circuit court, because the granting or refusing to grant a certificate is not a final judgment in the sense of the statute which allows writs of error. United States *v.* Abatoir Place, 106 U. S. 160, 27 L. Ed. 128.

14. Walden *v.* Craig, 9 Wheat. 576, 6 L. Ed. 164; Pickett *v.* Legerwood, 7 Pet. 144, 8 L. Ed. 638.

A judgment on a writ of error coram nobis is not such a judgment as can be brought up by a writ of error for decision to this court, being a decision merely on a collateral motion. Pickett *v.* Legerwood, 7 Pet. 144, 8 L. Ed. 638.

15. Ex parte Cutting, 94 U. S. 14, 24 L. Ed. 49; Guion *v.* Liverpool, etc., Ins. Co., 109 U. S. 173, 27 L. Ed. 895; Credits Commutation Co. *v.* United States, 177 U. S. 311, 317, 44 L. Ed. 782.

16. Judgments reversing and remanding causes in general.—Brown *v.* Union Bank, 4 How. 465, 11 L. Ed. 1058; Pepper *v.* Dunlap, 5 How. 51, 12 L. Ed. 46; Tracy *v.* Holcombe, 24 How. 426, 16 L. Ed. 742; Moore *v.* Robbins, 18 Wall. 588, 21 L. Ed. 758; McComb *v.* Commissioners of Knox County, 91 U. S. 1, 23 L. Ed. 185; Davis *v.* Crouch, 94 U. S. 514, 24 L. Ed. 281; Bostwick *v.* Brinkerhoff, 106 U. S. 3, 27 L. Ed. 73; Hurlbut Land, etc., Co. *v.* Truscott, 165 U. S. 719, 41 L. Ed. 1177; Carmichael *v.* Eberle, 177 U. S. 63, 44 L. Ed. 672; Coughlan *v.* District of Columbia, 106 U. S. 7, 11, 27 L. Ed. 74, citing Baker *v.* White, 92 U. S. 176, 23 L. Ed. 480; Meyer *v.* Cox, 169 U. S. 735, 42 L. Ed. 1217; United States *v.* Krall, 174 U. S. 385, 43 L. Ed. 1017.

It has often been held that a judgment of reversal with directions for a new trial or a new hearing is not final. Butterfield *v.* Usher, 91 U. S. 246, 23 L. Ed. 318.

Where the judgment of the court below reverses the decision of the inferior court and awards a new trial, it is not a final judgment from which a writ of error will lie to this court. Tracy *v.* Holcombe, 24 How. 426, 16 L. Ed. 742.

This court has no jurisdiction of an appeal from a judgment of a circuit court remanding to a state court a cause which had been improperly removed from it. Joy *v.* Adelbert College, 146 U. S. 355, 36 L. Ed. 1003, citing Richmond, etc., R. *v.* Thouron, 134 U. S. 45, 33 L. Ed. 871; Gurnee *v.* Patrick County, 137 U. S. 141, 34 L. Ed. 601; McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893; Chicago, etc., R. Co. *v.* Roberts, 141 U. S. 690, 35 L. Ed. 905.

The judgment of a circuit court, reversing that of a district court and ordering a new trial, is not final; and this court has no jurisdiction to review it. Baker *v.* White, 92 U. S. 176, 23 L. Ed. 480, citing Parcels *v.* Johnson, 20 Wall. 653, 22 L. Ed. 410; McComb *v.* Commissioners of Knox County, 91 U. S. 1, 23 L. Ed. 185.

A judgment of a lower appellate court which reverses the judgment of the court of original jurisdiction, and remands the case to it for further proceedings, is not a final judgment. Smith *v.* Adams, 130 U. S. 167, 177, 32 L. Ed. 895.

An order made at the general term of the supreme court of the District of Columbia remanding a cause to the special term for further proceedings is merely an interlocutory order, and not a final one in reference to matters to which it relates. Grant *v.* Phœnix, etc., Ins. Co., 121 U. S. 105, 112, 118, 30 L. Ed. 905.

A decree of the court of appeals of the District of Columbia, reversing an order of the supreme court, and remanding the

this the case when the opinion, to which the new decree is required to conform,

cause to that court for further proceedings, is not a final decree from which an appeal will lie to the United States supreme court. McFarland *v.* Byrnes, 187 U. S. 246, 47 L. Ed. 162; Macfarland *v.* Brown, 187 U. S. 239, 47 L. Ed. 159, distinguishing Phillips *v.* Negley, 117 U. S. 665, 29 L. Ed. 1013; Humphries *v.* District of Columbia, 174 U. S. 190, 43 L. Ed. 944; Clark *v.* Roller, 199 U. S. 541, 544, 50 L. Ed. 300.

A decree of the court of appeals of the District of Columbia, reversing and remanding the cause "that the account be restated in accordance with the principles of the opinion of this court" and for the determination of who were the next of kin, the portions they should take, the effect of the death of one or more of them, and any other question that might arise, is not final so as to justify an appeal by the executrix therefrom, although had it been a decree of affirmance, an appeal might lie. Kenaday *v.* Sinnott, 179 U. S. 606, 45 L. Ed. 339.

A judgment of the supreme court of a territory which merely reverses the judgment of the territorial district court, and remands the cause to that court for further proceedings according to law and the judgment of the appellate court, is not a final judgment. Smith *v.* Adams, 130 U. S. 167, 32 L. Ed. 895.

Where bill is filed to enjoin a judgment, and the injunction is granted, but a new trial is awarded to the parties who had recovered the original judgment, it was held that the order granting the new trial is merely interlocutory and not a final decree from which an appeal may be taken. Lea *v.* Kelly, 15 Pet. 213, 10 L. Ed. 715.

A decree in favor of the plaintiff for the whole amount of his claim, but which remands the cause for further proceedings, is not a final appealable decree, because until those proceedings are had, the amount of such indebtedness could not be fixed in such manner as to give this court jurisdiction of an appeal, and is purely conjectural upon the court finding that amount to be due. Hollander *v.* Fechheimer, 162 U. S. 326, 40 L. Ed. 985, citing Union Mutual Life Ins. Co. *v.* Kirchoff, 160 U. S. 374, 40 L. Ed. 461.

District court of Florida.—Under the acts of 1839, ch. 20 (5 Stat. at Large 315), and 1840, ch. 43 (5 Stat. at Large 392), where a case was carried from the district court for the middle district of Alabama to the circuit court for the southern district of Alabama, and the circuit court reversed the judgment of the district court, it was not a proper mode of proceeding to bring the case to this court upon such reversal. The judgment of the district court having been reversed, the plaintiff should have taken the necessary steps to bring his case to a final decision in the circuit court, in the same manner as if the suit had been originally brought there. This court could then have re-examined the judgment of the circuit court, if a writ of error were sued out. Mayberry *v.* Thompson, 5 How. 121, 12 L. Ed. 78.

It has been held, that a decree of the circuit court of appeals reversing the judgment of the trial court and remanding the cause for further proceedings in accordance with the views expressed in its opinion, is not a final judgment reviewable by this court. United States *v.* Krall, 174 U. S. 385, 43 L. Ed. 1017, reaffirmed in Wishkah Boom Co. *v.* United States, 202 U. S. 613, 50 L. Ed. 1171.

Cross writ of error.—A circuit court of appeals affirmed a judgment on writ of error and reversed it on cross writ of error and remanded the cause for a new trial of the question presented by the cross writ of error. It was held that the judgment of the court of appeals on the cross writ of error operated to reverse the prior judgment of affirmance, inasmuch as the court in turn reversed the judgment of the circuit court, although imposing a limitation on the extent of the new trial awarded. Even if the court of appeals had power to impose the limitation, the issue so reserved deprived the first judgment of finality so far as the jurisdiction of the supreme court of the United States is concerned. Montana Min. Co. *v.* St. Louis Min., etc., Co., 186 U. S. 24, 46 L. Ed. 1039, citing and approving Covington *v.* Covington Nat. Bank, 185 U. S. 270, 46 L. Ed. 906.

A decree in a court below, reversing a decree where, on a bill to foreclose a mortgage, a court below it had decreed in favor of the complainant, and "remanding" the case to such inferior court for "such other and further proceedings as to law and justice shall appertain," is not a final decree within either the judiciary act of 1789 or the act of 1867 amendatory of it. A writ taken on a contrary assumption dismissed. Moore *v.* Robbins, 18 Wall. 588, 21 L. Ed. 758, citing Brown *v.* Union Bank, 4 How. 465, 11 L. Ed. 1058; Pepper *v.* Dunlap, 5 How. 51, 12 L. Ed. 46; Tracy *v.* Holcombe, 24 How. 426, 16 L. Ed. 742.

Sales under trust deed.—Where an appeal is brought by the holder of one of several promissory notes secured by a deed of trust against the maker of the notes, the trustee and the holder of the other notes, to set aside the sale and for an account of the rents of the trust property which had been collected by the holder of the other note, and the court below ratifies and confirms the sale, and remands the cause for further proceedings, it was held that this decree was not

does not appear.[17] A judgment of reversal is only final when it also enters or directs the entry of a judgment which disposes of the case.[18]

In the language of Mr. Justice Brown, the rule is well-nigh universal that, if the case be remanded by the appellate court to the court below for further judicial proceedings, in conformity with the opinion of the appellate court, the decree is not final.[19]

The face of a judgment is the test of its finality, and the supreme court will not inquire whether in case of a new trial of a case remanded for further proceedings, the defeated party will stand in a position to make a better case.[20]

(2) *Error to State Courts.*—A writ of error will not lie from the federal supreme court to the supreme court of the state to review its judgment reversing that of the trial court, and remanding the cause for further proceedings in harmony with the opinion of the court, because a judgment couched in such terms is not final in such a sense as to sustain a writ of error from this court.[21] When

final within the meaning of that term as used in the statute allowing appeals to this court. Dainese *v.* Kendall, 119 U. S. 53, 30 L. Ed. 305.

17. Brown *v.* Baxter, 146 U. S. 619, 36 L. Ed. 1106; Houston *v.* Moore, 3 Wheat. 433, 4 L. Ed. 428; Bostwick *v.* Brinkerhoff, 106 U. S. 3, 27 L. Ed. 73; Johnson *v.* Keith, 117 U. S. 199, 29 L. Ed. 888; Rice *v.* Sanger, 144 U. S. 197, 36 L. Ed. 403; Meagher *v.* Minnesota Thresher Mfg. Co., 145 U. S. 608, 36 L. Ed. 834; Hume *v.* Bowie, 148 U. S. 245, 37 L. Ed. 438; Werner *v.* Charleston, 151 U. S. 360, 38 L. Ed. 192; Union Life Ins. Co. *v.* Kirchoff, 160 U. S. 374, 378, 40 L. Ed. 461, reaffirmed in Meyer *v.* Cox, 169 U. S. 735, 42 L. Ed. 1217; Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179.

18. Smith *v.* Adams, 130 U. S. 167, 177, 32 L. Ed. 895; Hurlburt Land, etc., Co. *v.* Truscott, 165 U. S. 719, 41 L. Ed. 1177; Oklahoma *v.* Neville, 181 U. S. 615, 45 L. Ed. 1029; Chesapeake, etc., Tel. Co. *v.* Manning, 186 U. S. 238, 46 L. Ed. 1144.

19. Union Life Ins. Co. *v.* Kirchoff, 160 U. S. 374, 378, 40 L. Ed. 461, reaffirmed in Meyer *v.* Cox, 169 U. S. 735, 42 L. Ed. 1217; Jeske *v.* Cox, 171 U. S. 685, 43 L. Ed. 1179.

20. Haseltine *v.* Bank, 183 U. S. 130, 131, 46 L. Ed. 117.

21. Judgment of highest state court reversing and remanding cause not final.—Haseltine *v.* Bank, 183 U. S. 130, 46 L. Ed. 117; Brown *v.* Union Bank, 4 How. 465, 11 L. Ed. 1058; Pepper *v.* Dunlap, 5 How. 51, 12 L. Ed. 46; Tracy *v.* Holcombe, 24 How. 426, 16 L. Ed. 742; Moore *v.* Robbins, 18 Wall. 588, 21 L. Ed. 758; St. Clair County *v.* Lovington, 18 Wall. 628, 21 L. Ed. 813; Parcels *v.* Johnson, 20 Wall. 653, 654, 22 L. Ed. 410; Baker *v.* White, 92 U. S. 176, 23 L. Ed. 480; Bostwick *v.* Brinkerhoff, 106 U. S. 34, 27 L. Ed. 73; Johnson *v.* Keith, 117 U. S. 199, 29 L. Ed. 888, reaffirmed in International Trust Co. *v.* Weeks, 193 U. S. 667, 48 L. Ed. 839; Perea *v.* Perea de Harrison, 195 U. S. 623, 49 L. Ed. 349; White *v.* Wright, 189 U. S. 507, 47 L. Ed. 922; Bogy *v.* Daugherty, 184 U. S. 696, 46 L. Ed. 763; Johnson *v.* Thomas, 197 U. S. 619, 49 L. Ed. 909; Siegel *v.* Swarts, 187 U. S. 638, 47 L. Ed. 344; Cook *v.* Tennessee, 187 U. S. 639, 47 L. Ed. 343; Second Nat. Bank *v.* Fitzpatrick, 189 U. S. 508, 47 L. Ed. 921; Gee *v.* Gee, 190 U. S. 557, 47 L. Ed. 1183; Toney *v.* Macon, 195 U. S. 625, 626, 49 L. Ed. 350; Congdon *v.* People, 200 U. S. 612, 50 L. Ed. 619; Darden *v.* Arkansas, 200 U. S. 615, 50 L. Ed. 621; Wishkah Boom Co. *v.* United States, 202 U. S. 613, 50 L. Ed. 1171; California Min. Co. *v.* Manley, 203 U. S. 579, 580, 51 L. Ed. 326; Chapman *v.* Chapman, 203 U. S. 587, 51 L. Ed. 329; Schlosser *v.* Hemphill, 198 U. S. 173, 49 L. Ed. 1000; Continental Ins. Co. *v.* Insurance Superintendent, 199 U. S. 600, 50 L. Ed. 327; Orrell *v.* Bay Mfg. Co., 198 U. S. 581, 49 L. Ed. 1172; Romig *v.* Gillett, 205 U. S. 535, 51 L. Ed. 919; Gibbs *v.* McDougall, 199 U. S. 602, 603, 50 L. Ed. 329; Haight Co. *v.* Robinson, 203 U. S. 581, 51 L. Ed. 327; McComb *v.* Commissioners of Knox County, 91 U. S. 1, 23 L. Ed. 185; Grafton *v.* Paine, 168 U. S. 704, 42 L. Ed. 1212; Meyer *v.* Cox, 169 U. S. 735, 42 L. Ed. 1217; Union Life Ins. Co. *v.* Kirchoff, 160 U. S. 374, 40 L. Ed. 461; Houston *v.* Moore, 3 Wheat. 433, 4 L. Ed. 428; Rice *v.* Sanger, 144 U. S. 197, 36 L. Ed. 403; Davis *v.* Crouch, 94 U. S. 514, 24 L. Ed. 281.

Judgment of the highest court of a state dismissing an appeal and remanding the case for further proceedings in the state court below, is not reviewable by this court on writ of error. Brown *v.* Baxter, 146 U. S. 619, 36 L. Ed. 1106, citing Meagher *v.* Minnesota Thresher Mfg. Co., 145 U. S. 608, 36 L. Ed. 834; Rice *v.* Sanger, 144 U. S. 197, 36 L. Ed. 403; Johnson *v.* Keith, 117 U. S. 199, 29 L. Ed. 888.

And as a judgment of reversal by a state court with leave for further proceedings in the court of original jurisdiction is not subject to review here, Bostwick *v.* Brinkerhoff, 106 U. S. 3, 4, 27 L. Ed. 73; Rice *v.* Sanger, 144 U. S. 197, 36 L. Ed. 403, this is also true of a judgment merely affirming an interlocutory order, however apparently decisive of the

the highest court of the state, upon a first appeal, decides a federal question against the appellant, and remands the case to the inferior court, not merely to carry the judgment into execution, but for further proceedings according to law, and upon further hearing the inferior court renders final judgment against him, he cannot have that judgment reviewed by this court by writ of error, without

merits. Meagher *v.* Minnesota Thresher Mfg. Co., 145 U. S. 608, 611, 36 L. Ed. 834.

Where the case has been brought here by writ of error directed to the supreme court of a state, and it appears that the judgment which it is proposed to revise is a jugdment reversing the decision in the court below, and awarding a new trial; held, that there is no final judgment in the case, and the writ must be dismissed for want of jurisdiction. Tracy *v.* Holcombe, 24 How. 426, 16 L. Ed. 742, cited in Moore *v.* Robbins, 18 Wall. 588, 21 L. Ed. 758; Parcels *v.* Johnson, 20 Wall. 653, 654, 22 L. Ed. 410; Davis *v.* Crouch, 94 U. S. 514, 517, 24 L. Ed. 281.

A writ of error from this court will not lie to remove the judgment of a state court, where the judgment of that court remands a case to another below it for new trial and hearing, and where it is evident that the parties have not exhausted the power of these inferior courts. Parcels *v.* Johnson, 20 Wall. 653, 22 L. Ed. 410, citing Moore *v.* Robbins, 18 Wall. 588, 21 L. Ed. 758; St. Clair County *v.* Lovington, 18 Wall. 628, 21 L. Ed. 813; Tracy *v.* Holcombe, 24 How. 426, 16 L. Ed. 742; Pepper *v.* Dunlap, 5 How. 51, 12 L. Ed. 46; Brown *v.* Union Bank, 4 How. 465, 11 L. Ed. 1058.

The judgment of the highest court of law of a state, deciding in favor of the validity of a statute of a state, drawn in question on the ground of its being repugnant to the constitution of the United States, is not a final judgment within the 25th section of the judiciary act of 1789, ch. 20, if the suit has been remanded to the inferior state court, where it originated, for further proceedings, not inconsistent with the judgment of the highest court. Winn *v.* Jackson, 12 Wheat. 135, 6 L. Ed. 577, reaffirmed in National Bank *v.* Gadsden, 179 U. S. 681, 45 L. Ed. 383.

Where the supreme court of a state on appeal overruled an exception which had been sustained in a lower court, and, on setting aside the judgment below, remanded the case to be proceeded with according to law, held, that the judgment of such supreme court was not final, and that the writ of error must be dismissed. Zeller *v.* Switzer, 91 U. S. 487, 23 L. Ed. 366, 487, citing Ex parte French, 91 U. S. 423, 23 L. Ed. 249.

Binding effect of state practice.—Where a decree of the court of appeals of Maryland affirmed the decree of the court below and remanded the case to that court, this is not such a final decree as will give jurisdiction over the case to this court. The decree of the court below was merely an interlocutory order; and although state laws allow an appeal to state courts from such an order, this cannot enlarge the jurisdiction of this court given by act of congress. Reddall *v.* Bryan, 24 How. 420, 16 L. Ed. 740.

A writ of error will not lie from the federal supreme court to a judgment of the supreme court of Iowa reversing the decree of the trial court in an equity cause and remanding the cause for further proceedings in harmony with the opinion of that court, because the judgment couched in such terms is not final in such a sense as to sustain a writ of error from this court. The face of the judgment is the test of its finality, and this court cannot be called on to inquire whether, when a cause is sent back, the defeated party might or might not make a better defense. And this is true, although in Iowa the supreme court hears equity causes on appeal de novo, and the successful party is entitled to a decree in that court if he moves for it, where no such decree was applied for or rendered, nor did the supreme court direct the court below to dismiss the plaintiff's petition, or in terms direct the specific decree to be entered. It has been repeatedly held, by the supreme court of Iowa, that when a case triable de novo is remanded for judgment in the court below, the parties may be permitted to introduce material evidence discovered since the original trial, and may amend the pleadings for the purpose of setting up matters materially affecting the merits, subsequently occurring. Schlosser *v.* Hemphill, 198 U. S. 173, 49 L. Ed. 1000, citing Haseltine *v.* Bank, 183 U. S. 130, 46 L. Ed. 117.

Where, on an indictment for a capital offense, the supreme court of a state reverses a judgment of a court below, under such circumstances as that the case must go back for trial on its merits, the judgment is not a "final judgment," and therefore is not capable of being brought here under the 25th section of the judiciary act. Rankin *v.* State, 11 Wall. 380, 20 L. Ed. 175.

A decree in a court below, reversing a decree where, on a bill to foreclose a mortgage, a court below it had decreed in favor of the complainant, and "remanding" the case to such inferior court for "such other and further proceedings as to law and justice shall appertain," is not a final decree within either the judiciary act of 1789 or the act of 1867

first appealing from it to the highest court of the state, or at least, where such is the practice, presenting a petition to that court for leave to appeal. And this, although the state court upon a second appeal from an inferior court, has always declined to recognize any questions of law decided upon the first appeal.[22]

In the language of Mr. Justice Brown, it is too well settled "even to justify citation that a judgment reversing a case and remanding it for a new trial, or for further proceedings of a judicial character, is totally wanting in the requisite finality required to support a writ of error from this court."[23] And the fact that an interlocutory order, made in the progress of the cause, finally disposes of some particular point arising in the case, does not justify a review of such

amendatory of it. A writ taken on a contrary assumption dismissed. Moore *v.* Robbins, 18 Wall. 588, 21 L. Ed. 758, citing Brown *v.* Union Bank, 4 How. 465, 11 L. Ed. 1058; Pepper *v.* Dunlap, 5 How. 51, 12 L. Ed. 46; Tracy *v.* Holcombe, 24 How. 426, 16 L. Ed. 742.

Where a petition for the removal of a suit filed under the act of March 2, 1867 (14 Stat. 588), was, in accordance with the practice of the state, reserved for the decision of the supreme court, and the latter dismissed the petition, and remanded the cause to the inferior court for further proceedings according to law, held, that this court has no jurisdiction, because the judgment of the supreme court is not the final judgment in the suit. It disposed finally of one of the questions involved in the suit, but not of the suit itself. Kimball *v.* Evans, 93 U. S. 320, 23 L. Ed. 920.

Where the circuit court of a state refused an injunction, and from the order of refusal, the plaintiff appealed to the state court of appeals, and that court affirmed the order of the circuit court and remanded the case, and from this decision of the state court of appeals, the case is here upon writ of error, the appeal to this court cannot be sustained. The case is still pending and there is no final decree. Reddall *v.* Bryan, 24 How. 420, 16 L. Ed. 740.

Where a perpetual injunction was granted by a subordinate state court, and, upon appeal, the highest state court decided that the party in whose favor the injunction had been granted was entitled to relief, and therefore remanded the case to the same subordinate court from which it had come for further proceedings, this is not such a final decree as can be reviewed by this court. The writ of error must be dismissed on motion. Pepper *v.* Dunlap, 5 How. 51, 12 L. Ed. 46.

22. Fisher *v.* Perkins, 122 U. S. 522, 30 L. Ed. 1192; Great Western Telegraph Co. *v.* Burnham, 162 U. S. 339, 345, 40 L. Ed. 991, distinguishing Northern Pac. R. Co. *v.* Ellis, 144 U. S. 458, 36 L. Ed. 504.

The case is singularly like McComb *v.* Commissioner of Knox County, 91 U. S. 1, 23 L. Ed. 185, in which an order of a court of common pleas, overruling a demurrer to an answer, was reversed by the supreme court of Ohio, and the case remanded for further proceedings according to law; the court of common pleas, in accordance with that decision, sustained the demurrer to the answer, and the defendant not moving to amend, but electing to stand by his answer, gave judgment against him; and a writ of error to review that judgment was dismissed by this court, Chief Justice Waite saying: "The court of common pleas is not the highest court of the state; but the judgment we are called upon to reexamine is the judgment of that court alone. The judgment of the supreme court is one of reversal only. As such, it was not a final judgment. Parcels *v.* Johnson, 20 Wall. 653, 22 L. Ed. 410; Moore *v.* Robbins, 18 Wall. 588, 21 L. Ed. 758; St. Clair County *v.* Lovingston, 18 Wall. 628, 21 L. Ed. 813. The common pleas was not directed to enter a judgment rendered by the supreme court and carry it into execution, but to proceed with the case according to law. The supreme court, so far from putting an end to the litigation, purposely left it open. The law of the case upon the pleadings as they stood was settled; but ample power was left in the common pleas to permit the parties to make a new case by amendment." "The final judgment is, therefore, the judgment of the court of common pleas, and not of the supreme court. It may have been the necessary result of the decision by the supreme court of the questions presented for its determination; but it is none the less, on that account, the act of the common pleas. As such, it was, when rendered, open to review by the supreme court, and for that reason is not the final judgment of the highest court in the state in which a decision in the suit could be had. Rev. Stat., § 709. The writ is dismissed." See, also, Bostwick *v.* Brinkerhoff, 106 U. S. 3, 27 L. Ed. 73; Rice *v.* Sanger, 144 U. S. 197, 36 L. Ed. 403; Rutland R. Co. *v.* Central Vermont R. Co., 159 U. S. 360, 368, 40 L. Ed. 284; In re Sanford, etc., Co., 160 U. S. 247, 40 L. Ed. 414, reaffirmed in Great Western Telegraph Co. *v.* Burnham, 162 U. S. 339, 343, 40 L. Ed. 991; Haseltine *v.* Bank, 183 U. S. 130, 46 L. Ed. 117.

23. Cincinnati Street R. Co. *v.* Snell, 179 U. S. 395, 397, 45 L. Ed. 248.

order, until the action itself has been finally disposed of. If every order were final, which finally passes upon some motion made by one or the other of the parties to the cause, it might in some cases require numerous writs of error to dispose finally of the case.[24]

A judgment of the highest court of a state, overruling a demurrer, and remanding the case to the trial court for further proceedings, is not a final judgment.[25] A judgment of the highest court of a state reversing an order overruling a demurrer, and remanding the cause for further proceedings, is not reviewable by this court.[26]

Overruling Motion for Change of Venue.—The judgment of the supreme court of a state reversing the judgment of an inferior court and finally adjudging that a change of venue should have been allowed, and remanding the case for a new trial, is totally wanting in the finality required to support a writ of error from the supreme court of the United States.[27] If after the change of venue was denied by a state court, the case is tried upon the merits, and a verdict and judgment rendered for the defendant, of the benefit of which he was subsequently deprived by a judgment of the highest court of the state reversing the case and remanding for a new trial on account of the refusal to change the venue; the defendant loses no right by acquiescing for the time being in the action of the state court, since, after judgment ultimately rendered, he may have a writ of error reaching back to the alleged error of said court, if it involve a federal question.[28]

Limitation of General Rule.—But this court may review on a writ of error the judgment of a state court reversing the lower court of the state and remanding the cause with directions to the court below to enter judgment for the plaintiff. That judgment is final for the purposes of a writ of error to this court, because the litigation is ended and the rights of the parties on the merits have been fully determined.[29] Accordingly the judgment of a highest state court remand-

24. Cincinnati Street R. Co. *v.* Snell, 179 U. S. 395, 45 L. Ed. 248.

25. Meagher *v.* Minnesota Thresher Mfg. Co., 145 U. S. 608, 36 L. Ed. 834; Rice *v.* Sanger, 144 U. S. 197, 36 L. Ed. 403; Hume *v.* Bowie, 148 U. S. 245, 37 L. Ed. 438; Werner *v.* Charleston, 151 U. S. 360, 38 L. Ed. 192; Meyer *v.* Cox, 169 U. S. 735, 42 L. Ed. 1217.

Judgment overruling demurrer.—A judgment of the supreme court of a state affirming with costs an order which overrules a demurrer, and remands the case for further proceedings, is not a final judgment within § 709 of the Revised Statutes. Meagher *v.* Minnesota Thresher Mfg. Co., 145 U. S. 608, 36 L. Ed. 834.

26. Great Western Telegraph Co. *v.* Burnham, 162 U. S. 339, 40 L. Ed. 991.

27. Cincinnati Street R. Co. *v.* Snell, 179 U. S. 395, 45 L. Ed. 248.

28. Cincinnati Street R. Co. *v.* Snell, 179 U. S. 395, 45 L. Ed. 248.

29. Reversal and remand with directions to enter judgment.—Haseltine *v.* Bank, 183 U. S. 130, 46 L. Ed. 117; Atherton *v.* Fowler, 91 U. S. 143, 23 L. Ed. 265; Board of Comm'rs *v.* Lucas, 93 U. S. 108, 23 L. Ed. 822; Mower *v.* Fletcher, 114 U. S. 127, 29 L. Ed. 117, distinguishing cases in which judgments or decrees were reversed and remanded with leave for further proceedings in the inferior court, the court saying that such judgments are not final because something yet remains to be done to complete the litigation.

A judgment of the supreme court of the state remanding the case to an inferior court with an order to enter a specified judgment, nothing being left for judicial discretion of the court below, is final and reviewable by the supreme court. Haseltine *v.* Bank, 183 U. S. 130, 131, 46 L. Ed. 117; Mower *v.* Fletcher, 114 U. S. 127, 29 L. Ed. 117; Atherton *v.* Fowler, 91 U. S. 143, 23 L. Ed. 265; Board of Comm'rs *v.* Lucas, 93 U. S. 108, 23 L. Ed. 822.

Where the judgment of the higher state court reverses and modifies the judgment below, and does not permit further proceedings in the inferior court, if the defendants consent to the modification directed as to the amount of damages, and the record shows that this consent has been given, this is a final judgment in the suit within the meaning of the act of congress. Atherton *v.* Foyler, 91 U. S. 143, 23 L. Ed. 265.

Where the supreme court of California reversed the judgment of an inferior court, and directed a modification thereof as to the amount of damages, but without permitting further proceedings below, if the defendants consented to the modification, and the record shows that such consent was given, held, that the judgment of the supreme court is final within the meaning of the act of congress, and that the writ

ing the cause with directions to the inferior court to dismiss the complaint is a final judgment.[30]

(3) *Judgments Awarding New Trials.*—A decree of the circuit court awarding a new trial is merely interlocutory; and is not a final decree from which an appeal can be taken.[31]

t. *Orders Made in Progress of Cause*—(1) *In General.*—When the decree decides the right to the property in contest, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree must be regarded as a final one to that extent, and authorizes an appeal to this court, although so much of the bill is retained in the circuit court as is necessary for the purpose of adjusting by further decree the accounts between the parties pursuant to the decree passed.[32] The doctrine that, after a decree which disposes of a

of error was properly directed to that court. Atherton *v.* Fowler, 91 U. S. 143, 23 L. Ed. 265.

Judgment affirming as to some parties and reversing as to others.—A judgment in a court of last resort, that a judgment against A. (who had been sued for not faithfully discharging the duties of a vendue master of a city and been held discharged under the bankrupt act) be reversed, is a final judgment within the meaning of the judiciary act; as is also a judgment in a court of last resort that a judgment in an inferior court, holding B. and C. (the sureties of A. on his bond as vendue master) liable, be affirmed. O'Dowd *v.* Russell, 14 Wall. 402, 20 L. Ed. 857.

30. If, by any direction of a supreme court of a state, an entire cause is determined, the decision, when reduced to form and entered in the records of the court, constitutes a final judgment, whatever may be its technical designation, and is subject in a proper case to review by this court. So held, where, upon appeal from an interlocutory order made by a circuit court of Indiana, granting a temporary injunction, the supreme court of the state reversed the order and remanded the cause to the lower court, with directions to dismiss the complaint. Board of Comm'rs *v.* Lucas, 93 U. S. 108, 23 L. Ed. 822.

31. Judgments awarding new trials.—Lea *v.* Kelley, 15 Pet. 213, 10 L. Ed. 715.

Where the trial term of the supreme court of the District of Columbia is prolonged by adjournment for the purpose of settling bills of exceptions, but the party loses the benefit of the exceptions through the death or illness of the judge, in consequence of which a new trial is granted, and the presiding judge in the circuit court orders a motion to be heard in general term, the judgment of the general term setting aside the verdict and judgment at law and ordering a new trial, is equivalent to remanding a cause to the special term for a new trial, and is therefore not a final judgment from which an appeal will lie to this court. Hume *v.* Bowie, 148 U. S. 245, 37 L. Ed. 438.

32. Orders made in progress of cause in general.—Forgay *v.* Conrad, 6 How. 201, 204, 12 L. Ed. 404, approved in Thomson *v.* Dean, 7 Wall. 342, 19 L. Ed. 94, citing Ray *v.* Law, 3 Cranch 179, 2 L. Ed. 404; Whiting *v.* Bank of United States, 13 Pet. 6, 10 L. Ed. 33; Michoud *v.* Girod, 4 How. 503, 11 L. Ed. 1076; Orchard *v.* Hughes, 1 Wall. 73, 17 L. Ed. 560; Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. 609, 17 L. Ed. 886; Withenbury *v.* United States, 5 Wall. 819, 821, 18 L. Ed. 613; In re Farmers' Loan, etc., Co., 129 U. S. 206, 32 L. Ed. 656.

Where a bill related to the ownership and transfer of certain stock, a decree was held to be final when it decided the right to the property in contest, directed it to be delivered by the defendant to the complainant by transfer, and entitled the complainant to have the decree carried immediately into execution; leaving only to be adjusted accounts between the parties in pursuance of the decree settling the question of ownership. Thomson *v.* Dean, 7 Wall. 342, 19 L. Ed. 94.

Where on a bill to foreclose a mortgage given by a railroad company, the mortgagors proposed to pay all the money due on complainants' mortgage, provided his property, which is in the custody of the court, shall then be restored to his possession, it was held that a refusal by the court to grant him this right, may be reviewed by this court, when the whole case is before it, on the record brought here by appeal from a final decree. "There is no question but that many orders or decrees, affecting materially the rights of the parties, are made in the progress of a chancery suit, which are not final in the sense of that word in its relation to appeals. The order of the court affirming or annulling a patent, and referring the case to a master for an account, is an instance. The adjudications which the court makes on exception to reports of masters, often involving the whole matter in litigation, are not final decrees; and in these and numerous other cases, if the court can only, on appeal, examine the final or last order or decree which gives the right of appeal, it

principal subject of litigation and settles the rights of the parties in regard to that matter, there may subsequently arise important matters requiring the judicial action of the court in relation to the same property and some of the same rights litigated in the main suit, making necessary substantive and important orders and decrees in which the most material rights of the parties may be passed upon by the court, and which, when they partake of the nature of final decisions of those rights, may be appealed from, is well established by the decisions of this court.[33] The question in such cases is not whether the order complained of is of a character decisive of questions that the parties are entitled to have reviewed in the appellate court, but whether the order or decree is of that final nature which alone can be brought to this court on appeal.[34]

Rule Qualified.—But the rule that when the decree decides the right to the property in dispute, and directs it to be delivered up by the defendant to the complainant, or directs it to be sold, or directs the defendant to pay a certain sum of money to the complainant, and the complainant is entitled to have such decree carried immediately into execution, the decree is final, does not extend to cases where money is directed to be paid into court, or property to be delivered to a receiver, or property held in trust to be delivered to a new trustee appointed by the court. Orders of that kind are frequently and necessarily made in the progress of the cause, but they are interlocutory only, and intended to preserve the subject matter in dispute from waste or dilapidation, and to keep it within the control of the court until the rights of the parties concerned can be adjudicated by a final decree.[35]

(2) *Orders Directing That Property Be Delivered to a Receiver.*—An order directing that property be delivered to a receiver pending litigation, is not such a final decree from which an appeal will lie.[36]

(3) *Order Directing Payment of Money into and out of Court.*—The better rule is that an order directing the payment of money into court for preservation during the pendency of the litigation as to its ownership, is interlocutory only and not a final decree,[37] but contrary rulings seem to have been made in some

is obvious that the entire benefit of an appeal must, in many cases, be lost. The order complained of in this case seems to be one of this class." Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. 609, 17 L. Ed. 886.

33. Blossom *v.* Milwaukee, etc., R. Co., 1 Wall. 655, 17 L. Ed. 673; Forgay *v.* Conrad, 6 How. 201, 12 L. Ed. 404; Fosdick *v.* Schall, 99 U. S. 235, 25 L. Ed. 339; Williams *v.* Morgan, 111 U. S. 684, 28 L. Ed. 559; Burnham *v.* Bowen, 111 U. S. 776, 28 L. Ed. 596; In re Farmers' Loan, etc., Co., 129 U. S. 206, 213, 32 L. Ed. 656.

34. In re Farmers' Loan, etc., Co., 129 U. S. 206, 213, 32 L. Ed. 656.

In a suit for the foreclosure of a mortgage upon the property of a railroad company, after a final decree of foreclosure, and after appeal therefrom, the lower court made an order directing the receiver of the mortgaged property to borrow money and issue certificates therefor to be a first lien upon the property. The court held that such order was a final decree from which an appeal lay. In re Farmers' Loan, etc., Co., 129 U. S. 206, 32 L. Ed. 656

35. Forgay *v.* Conrad, 6 How. 201, 12 L. Ed. 404, cited with approval in Grant *v.* Phœnix Ins. Co., 106 U. S. 429, 432, 27 L. Ed. 237.

36. Orders directing that property be delivered to a receiver.—Forgay *v.* Conrad, 6 How. 201, 12 L. Ed. 404; Milwaukee, etc., R. Co. *v.* Soutter, 131 U. S. appx. lxxxvi, 18 L. Ed. 862.

37. Order directing payment of money into and out of court.—Louisiana Bank *v.* Whitney, 121 U. S. 284, 30 L. Ed. 961; Forgay *v.* Conrad, 6 How. 201, 204, 12 L. Ed. 404; Grant *v.* Phœnix Ins. Co., 106 U. S. 429, 431, 27 L. Ed. 237; Jones *v.* Craig, 127 U. S. 213, 32 L. Ed. 147.

A decree that money shall be paid into court, or that property shall be delivered to a receiver, or that property held in trust shall be delivered to a new trustee appointed by the court, is interlocutory only, and intended to preserve the subject matter in dispute from waste or dilapidation, and to keep it within the control of the court until the rights of the parties concerned can be finally adjudicated. From such a decree no appeal lies. Criticised in Barnard *v.* Gibson, 7 How. 651, 657, 12 L. Ed. 857; Forgay *v.* Conrad, 6 How. 201, 12 L. Ed. 404

When persons summoned as garnishees in a libel in admiralty in personam are adjudged by the court to have a fund of the principal defendant in their hands.

cases.[38]

Order for Payment of Money out of Court.—A decree of the circuit court directing the distribution of a fund paid into court to a complainant, is pro tanto a final decree from which an appeal lies.[39]

(4) *Decrees upon Matters Arising after Transfer of Cause.*—Although this court has frequently decided that where the act complained of was a mere ministerial duty, necessarily growing out of the decree which was being carried into effect, no appeal would lie, it has never decided that in no case arising after a decree, which is final only in the sense which would allow it to be appealed, will an appeal be allowed from an order of the court, however it might affect important interests, or decide matters not before the court when the first decree was rendered. Such a doctrine would place a very large proportion of the most important matters adjudged by courts of chancery beyond the reach of an appeal. On the contrary, this court has repeatedly considered appeals from the decrees of the circuit courts, upon matters arising after the case had been here, and the courts below had entered decrees in accordance with the directions of this court.[40]

(5) *Rulings on Applications for Receivers.*—No appeal lies to this court from an order appointing or declining to appoint a receiver pendente lite, until after final decree.[41]

(6) *Order Directing Witness to Testify and Produce Documents.*—The mere direction of the court to witnesses to answer questions put to them and to produce written evidence in their possession, is not a final decision.[42] Therefore, an appeal will not lie to this court from an order of the circuit court directing a witness to answer questions and to produce books in answer to a subpœna duces tecum.[43]

u. *Judgments in Summary Proceedings*—(1) *In General.*—Judgments in sum-

and to pay it into court, and the libelant afterwards obtains a final decree against him with the award of execution against the fund in their hands, the first order is interlocutory, and they can appeal from the last decree only. Cushing *v.* Laird, 107 U. S. 69, 27 L. Ed. 391.

38. A decree directing a sale according to the deed of trust, and the bringing of the proceeds into court, is a final decree. Railroad Co. *v.* Bradleys, 7 Wall. 575, 19 L. Ed. 274.

A decree of the circuit court adjudging that the defendant pay a certain sum into court within a limited time, or in default thereof the court will appoint a receiver, is a final decree, from which an appeal lies. Wabash, etc., Canal Co. *v.* Beers, 1 Black 54, 17 L. Ed. 41.

39. Trustees *v.* Greenough, 105 U. S. 527, 26 L. Ed. 1157, cited in Williams *v.* Morgan, 111 U. S. 684, 699, 28 L. Ed. 559.

Where the district court of the United States, sitting in admiralty, decreed that a sum of money was due from a fund then in court, but as the amount to be paid was dependent upon other claims that might be established, and as the fund might not be sufficient to satisfy all of the claims that might be established against the vessel, no order for the payment of the money would be made by the court until it should be further advised in the premises, this was not such a final decree as would justify an appeal to the circuit court. Montgomery *v.* Anderson, 21 How. 386, 16 L. Ed. 160.

Collateral decree ordering payment out of fund in court.—Where a fund was paid into court awaiting the course of distribution, a decree made by the court directing that a party be paid certain costs and expenses out of such fund is pro tanto a final decree. Trustees *v.* Greenough, 105 U. S. 527, 26 L. Ed. 1157.

40. Decrees upon matters arising after transfer of cause.—Blossom *v.* Milwaukee, etc., R. Co., 1 Wall. 655, 657, 17 L. Ed. 673.

41. Rulings on applications for receivers.—Hentig *v.* Page, 102 U. S. 219, 26 L. Ed. 159; Keystone Iron Co. *v.* Martin, 132 U. S. 91, 32 L. Ed. 275; Lodge *v.* Twell, 135 U. S. 232, 33 L. Ed. 153; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 378, 37 L. Ed. 486.

42. Order directing witness to testify and produce documents.—Alexander *v.* United States, 201 U. S. 117, 50 L. Ed. 686, reaffirmed in Haight, etc., Co. *v.* Robinson, 203 U. S. 581, 51 L. Ed. 327.

43. Alexander *v.* United States, 201 U. S. 117, 50 L. 686, reaffirmed in Haight, etc., Co. *v.* Robinson, 203 U. S. 581, 51 L. Ed. 327, distinguishing Interstate Commerce Commission *v.* Brimson, 154 U. S. 447, 38 L. Ed. 1047; Interstate Commerce Commission *v.* Baird, 194 U. S. 25, 48 L. Ed. 860.

Orders of a federal circuit court di-

mary proceedings such as habeas corpus, mandamus and prohibition, are final judgments in a suit within the meaning of the judiciary act regulating writs of error to state courts.[44]

(2) *Mandamus Proceedings.*—A judgment or order awarding or refusing to award a writ of mandamus, is a final judgment in a civil action, within the meaning of that term as used in the statutes regulating writs of error to this court.[45]

A judgment of a state court denying a writ of mandamus stands like the judgment in an ordinary action at law, and is subject to review under similar conditions.[46]

An order awarding a peremptory writ of mandamus which directs the collector of taxes of a county to collect a tax that had been duly levied and extended on the county tax books, is a final judgment subject to review when the other conditions exist.[47]

v. *Orders Reviving Suits and Actions.*—**Decrees Ancillary to Original Decree.**—A decree of revival entered on a bill in equity to revive a suit in equity, which had gone to final decree in the name of the executor of the plaintiff, entered after due notice to the defendants and their appearance and pleading to the bill, is a final appealable decree.[48]

w. *Judgments, Orders and Decrees in Particular Cases Considered*—(1) *Decisions Affecting Judicial Sales.*—A decree which orders a judicial sale of specific property, under which the title may pass beyond the control of the court, is final; and it cannot be reviewed, unless it is challenged by a direct appeal from it, although it contains a provision referring the case to a master to state the

recting witnesses to answer questions, and produce written evidence in their possession, when they are being examined before a special examiner appointed in a suit brought by the United States to enjoin an alleged violation of the antitrust act of July 2, 1890, lack the finality necessary to sustain an appeal to the supreme court. Alexander *v.* United States, 201 U. S. 117, 50 L. Ed. 686.

44. Judgments in summary proceedings in general.—Holmes *v.* Jennison, 14 Pet. 540, 10 L. Ed. 579.

Where in a suit under the 25th section of the judiciary act, the validity of the governor's warrant for the surrender of a criminal to another state is the only question before the highest court of the state, and that question is finally settled by the court adjudging that the cause of the detention and imprisonment is good and sufficient in law, this is a final judgment within the meaning of the act of congress, because the sheriff, upon their judgment, must have proceeded to execute the warrant, and deliver the prisoner to the foreign government, without further delay, if the proceedings are not suspended by the writ of error to this court. Holmes *v.* Jennison, 14 Pet. 540, 564, 10 L. Ed. 579.

45. Mandamus proceedings. — Columbian Ins. Co. *v.* Wheelright, 7 Wheat. 534, 5 L. Ed. 516; Kendall *v.* United States, 12 Pet. 524, 9 L. Ed. 1181; Davies *v.* Corbin, 112 U. S. 36, 28 L. Ed. 627; Riggs *v.* Johnson County, 6 Wall. 166, 18 L. Ed. 768.

46. Hartman *v.* Greenhow, 102 U. S. 672, 26 L. Ed. 271; McPherson *v.* Blacker, 146 U. S. 1, 24, 36 L. Ed. 869.

47. Davies *v.* Corbin, 112 U. S. 36, 28 L. Ed. 627, citing Riggs *v.* Johnson County, 6 Wall. 166, 18 L. Ed. 768.

A obtained a decree against a municipality for a certain sum. Upon his petition the court issued a peremptory writ of mandamus against the city, directing the levy of a tax for his benefit upon all the taxable property of the city. Under the laws of Tennessee in which the judgment was recovered, taxable personal and real property, other than merchant's capital is embraced in one tax list, and merchant's capital in another. Thereupon A made a motion for a further peremtory mandamus requiring the city to include in the property to be taxed for his benefit the taxable merchant's property. Afterwards, during the same term the city appeared and moved the court to set aside this latter order, but this motion was refused, and that order re-entered as the final judgment of the court and premises. Held, that the order made upon the motion to subject merchant's capital to the tax was such a final judgment that it may be brought here for re-examination by writ of error. Memphis *v.* Brown, 94 U. S. 715, 24 L. Ed. 244.

48. Orders reviving suits and actions. —Terry *v.* Sharon, 131 U. S. 40, 33 L. Ed. 94. But this case was distinguished from Mackaye *v.* Mallory, 79 Fed. 2, on the ground that in this case the original suit had passed to a final decree and the defendant would have had no opportunity to review the order by appealing from that decree.

accounts between the parties preparatory to the application of the proceeds of the sale, and to the adjudication of the costs,[49] but a decree which simply sets aside one judicial sale that has been made, and orders another is not final and appealable.[50]

Confirmation of Judicial Sales.—An appeal lies here from the final decree of the circuit court confirming a sale made under its order.[51]

(2) *Decisions Affecting Receivers.*—**In General.**—No appeal lies to this court from an order of the circuit court, appointing or declining to appoint a receiver pendente lite, until after final decree.[52]

A decree confirming a receiver's report, and ordering him to retain a small balance remaining in his hands as his compensation, is final.[53]

An order of court confirming the sale by a receiver is final from which an appeal will lie, since it finally disposes of the possession and ownership of the property.[54]

But the judgment of a state court, directing the transfer of a road in the hands of a receiver to the comptroller general, subject to such orders as the circuit court shall deem necessary for the protection of the rights of the parties in the principal suit, is not a final judgment, and the writ of error will be dismissed.[55]

(3) *Decisions Affecting Trustees.*—A decree fixing the compensation of trustees is final for the purposes of an appeal to this court.[56]

(4) *Orders in Proceedings in Aid of Execution.*—In Kansas, an order of a

49. Decisions affecting judicial sales.—Ray *v.* Law, 3 Cranch 179, 2 L. Ed. 404; Whiting *v.* Bank of United States, 13 Pet. 6, 10 L. Ed. 33; Bronson *v.* Railroad Co., 2 Black 524, 17 L. Ed. 359; Michoud *v.* Girod, 4 How. 503, 11 L. Ed. 1076; Sage *v.* Railroad Co., 96 U. S. 712, 714, 24 L. Ed. 641; First Nat. Bank *v.* Shedd, 121 U. S. 74, 84, 85, 30 L. Ed. 877; Blossom *v.* Milwaukee, etc., R. Co., 1 Wall. 655, 17 L. Ed. 673; Butterfield *v.* Usher, 91 U. S. 246, 23 L. Ed. 318.

50. Butterfield *v.* Usher, 91 U. S. 246, 23 L. Ed. 318.

Where the supreme court of the District of Columbia, at the general term thereof, rendered a decree vacating and setting aside a judicial sale of lands which had been confirmed by an order of the special term of said court, and directing a resale of them, held, that the decree was not final, and that no appeal would lie therefrom to this court. Butterfield *v.* Usher, 91 U. S. 246, 23 L. Ed. 318, distinguishing Blossom *v.* Milwaukee, etc., R. Co., 1 Wall. 655, 17 L. Ed. 673.

51. Sage *v.* Railroad Co., 96 U. S. 712, 24 L. Ed. 641, citing Blossom *v.* Milwaukee, etc., R. Co., 1 Wall. 655, 17 L. Ed. 673; Butterfield *v.* Usher, 91 U. S. 246, 23 L. Ed. 318.

The act of the court in refusing to confirm or complete a marshal's sale made on foreclosure of a mortgage in federal court, so far involves the merits of the case as that it may be reviewed. Blossom *v.* Milwaukee, etc., R. Co., 1 Wall. 655, 17 L. Ed. 673.

The act of confirming or setting aside a sale made by a commissioner in chancery, involving, as it often does, the exercise of a very delicate judgment and discretion, cannot be regarded as a mere control of the ministerial duties of an officer in the execution of final process. Milwaukee, etc., R. Co. *v.* Soutter, 5 Wall. 609, 660, 17 L. Ed. 886, citing Blossom *v.* Milwaukee, etc., R. Co., 1 Wall. 655, 17 L. Ed. 673.

52. Decisions affecting receivers.—Hentig *v.* Page, 102 U. S. 219, 26 L. Ed. 159; Keystone Iron Co. *v.* Martin, 132 U. S. 91, 33 L. Ed. 275; Lodge *v.* Twell, 135 U. S. 232, 34 L. Ed. 153; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 378, 37 L. Ed. 486.

53. Decree confirming receiver's report.—In a suit in equity brought by creditors of a deceased person against his administrator, for the settlement of his estate, a decree was made ordering a sale of his estate and the distribution of the proceeds. This was done, and the receiver reported his doing to the court. The report was confirmed, and the receiver was ordered to retain a small balance remaining as his compensation. Held, that this was a final decree settling the rights of the parties and disposing of the whole cause of action, and that one of the complainants could not reopen it for the purpose of obtaining relief in that suit against a co-complainant. Smith *v.* Woolfolk, 115 U. S. 143, 29 L. Ed. 357.

54. Forgay *v.* Conrad, 6 How. 201, 12 L. Ed. 404; Ex parte Norton, 108 U. S. 237, 27 L. Ed. 709.

55. Hand *v.* Hagood, 131 U. S. 181, 26 L. Ed. 301.

56. Decisions affecting trustees.—Williams *v.* Morgan, 111 U. S. 684, 28 L. Ed. 559.

court in a proceeding in aid of execution directing a garnishee to pay to the judgment creditor money which he owes to the judgment debtor is not a judgment, and does not determine finally the liability of the garnishee.[57]

(5) *Orders in Contempt Proceedings.*—The rule on the circuits is that an order in an equity cause committing a witness, not a party to the suit, for contempt in refusing to testify, is final, and reviewable on a writ of error sued out by the witness before final decree in the cause.[58] But it is well settled in this court that judgments in proceedings in contempt are not reviewable here on appeal or error.[59]

57. Orders in proceedings in aid of execution.—Atlantic, etc., R. Co. *v.* Hopkins, 94 U. S. 11, 24 L. Ed. 48.

58. Orders in contempt proceedings.—Butler *v.* Fayerweather, 91 Fed. 458; Gould *v.* Sessions, 67 Fed. 163.

"In re Debs, 158 U. S. 564, 39 L. Ed. 1092, the defendants in an equity cause were committed for contempt for the violation of a preliminary injunction restraining them from committing the acts to enjoin which the suit was brought, and upon an application to the supreme court for a writ of error the writ was denied upon the ground that the order of committal was not a final judgment or decree. That was a case in which the propriety of the order could have been reconsidered by the court which made it at final decree, and, being an interlocutory order in the progress of the cause, could only be reviewed by the supreme court upon an appeal from the final decree. The case is quite different, however, when a person not a party to the cause is imprisoned or fined for contempt. The order proceeds upon a matter distinct from the general subject of the litigation. The aggrieved party has no opportunity to be heard when the cause is before the court at final hearing, and as to him the proceeding is finally determined when the order is made. Not being a party to the cause, he could not be heard on an appeal from a final decree; and, unless he can be heard by a writ of error, he has no review, but must submit to the determination of the court below, if the court has jurisdiction, however unwarranted it might be by the facts or the law of the case. It would be a reproach to the administration of justice if the statutes of the United States conferring appellate jurisdiction upon this court to review all final decisions of the circuit court failed to provide any means of review to the citizen who has been deprived of his liberty or required to pay a fine without just cause." Butler *v.* Fayerweather, 91 Fed. Rep. 458, 459.

59. Hayes *v.* Fischer, 102 U. S. 121, 26 L. Ed. 95; In re Debs, 158 U. S. 564, 573, 39 L. Ed. 1092; S. C., 159 U. S. 251; In re Chetwood, 165 U. S. 443, 462, 41 L. Ed. 782; Bessette *v.* Conkey Co., 194 U. S. 324, 48 L. Ed. 997, reaffirmed in In re Lewis, 202 U. S. 614, 50 L. Ed. 1172; Tinsley *v.* Anderson, 171 U. S. 101, 43 L. Ed. 91.

Where a complaint is made against a defendant for violation of an injunction, and proceedings are instituted against him for contempt, which result in an order by the court that he pay a fine, and that he stand committed until the order is obeyed, if the order complained of is to be treated as a part of what was done in the original suit, it cannot be brought here for review, because such order, if part of the proceedings in the suit, is interlocutory only. Hayes *v.* Fischer, 102 U. S. 121, 26 L. Ed. 95.

In McMicken *v.* Perin, 20 How. 133, 15 L. Ed. 857, the plaintiff in error was attached for contempt in refusing to make a conveyance after a tender and deposit of money in court had been made in compliance with a mandate of this court. He appealed to this court, and it was held, that the proceedings in contempt involved no new question or decision, but were the ordinary means of enforcing the original decree, and in no sense was it a final decree upon which an appeal could be sustained. It was, in effect, the same as ordering an execution on a judgment of law which had been affirmed on error and remanded for execution to the circuit court. Newport Light Co. *v.* Newport, 151 U. S. 527, 539, 38 L. Ed. 259.

In Hayes *v.* Fischer, 102 U. S. 121, 122, 26 L. Ed. 95, an injunction was granted. Complaint was made against Hayes for a violation thereof, and proceedings were instituted against him for contempt, which resulted in an order by the court that he pay a certain fine, and stand committed until the order was obeyed. To reverse this order, Hayes sued out a writ of error to this court, which the defendant in error moved to dismiss, on the ground that such proceedings in the circuit court could not be re-examined by this court. The court, speaking by Mr. Chief Justice Waite, said: "If the order complained of is to be treated as part of what was done in the original suit, it cannot be brought here for review by writ of error. Errors in equity suits can only be corrected in this court on appeal, and that after a final decree. This order, if part of the proceedings in the suit, was interlocutory only. If the proceeding below, being for contempt, was independent of and separate from the original suit, it can-

The distinction between a proceeding in which a fine is imposed by way of compensation to the party injured by the disobedience, and where it is by way of punishment for an act done in contempt of the power and authority of the court, is pointed out in many cases.[60] Thus, when an order imposing a fine for violation of an injunction is substantially one to reimburse the party injured by the disobedience, although called one in a contempt proceeding, it is to be regarded as merely an interlocutory order, and to be reviewed only on appeal from the final decree.[61] But if the fine payable to the United States is clearly punitive and in vindication of the authority of the court, it predominates the proceedings, and fixes its character and hence is reviewable by the circuit court of appeals on writ of error.[62] And in the latest case on this subject it was held, that an order punishing for contempt made in the progress of the case, when not in the nature of an order in a criminal proceeding, is regarded as interlocutory and to be reviewed only upon appeal from a final decree in the case.[63]

In the circuit court of appeals act, as construed by this court, the jurisdiction of the circuit court of appeals is extended to the right to review judgments entered before final decree in the action out of which the contempt proceedings arose where the order is final and in a proceeding of a criminal nature. Beyond this, the jurisdiction of the court has not been carried, and, no right of

not be re-examined here either by writ of error or appeal. This was decided more than fifty years ago in Ex parte Kearney, 7 Wheat. 38, 5 L. Ed. 391, and the rule then established was followed as late as New Orleans *v.* Steamship Co., 20 Wall. 387, 22 L. Ed. 354." The court held that it had no jurisdiction, and dismissed the writ of error. Newport Light Co. *v.* Newport, 151 U. S. 527, 539, 38 L. Ed. 259.

In New Orleans *v.* Steamship Co., 20 Wall. 387, 22 L. Ed. 354, the act in contempt was by one not then a party to the suit. No order was entered against him until the final decree in the case, and then he was punished for the act of disobedience, purely as an act of a criminal nature, and without compensation to the plaintiff in whose favor the injunction was originally ordered. No review under the then existing law was allowable. In re Christensen Engineering Co., 194 U. S. 458, 459, 48 L. Ed. 1072.

In Worden *v.* Searls, 121 U. S. 14, 30 L. Ed. 853, the proceeding was remedial and compensatory, in that for violations of a preliminary injunction the defendants were ordered to pay the plaintiff $250 "as a fine for said violation," by one order, and, by another order, to pay a fine of $1,182 to the clerk, to be paid over by him to the plaintiff for "damages and costs," the $1,182 being made up of $682 profits made by the infringement, and $500 expenses of plaintiff in the contempt proceedings. These interlocutory orders were reviewed by this court on appeal from the final decree, and as that decree was reversed, the orders were also set aside, this being done "without prejudice to the power and right of the circuit court to punish the contempt referred to in those orders, by a proper proceeding." It was also said "that, though the proceedings were nominally those of contempt, they were really proceedings to award damages to the plaintiff, and to reimburse to him his expenses." In re Christensen Engineering Co., 194 U. S. 458, 460, 48 L. Ed. 1072.

"In Ex parte Debs, 159 U. S. 251, there was nothing of a remedial or conmpensatory nature. No fine was imposed, but only a sentence of imprisonment. This court had no jurisdiction of a writ of error in such a case. And see O'Neal *v.* United States, 190 U. S. 36, 47 L. Ed. 945." In re Christensen Engineering Co., 194 U. S. 458, 460, 48 L. Ed. 1072.

In Hayes *v.* Fischer, 102 U. S. 121, 26 L. Ed. 95, the contempt proceeding was remedial and compensatory, and the entire amount of the fine was ordered paid to the plaintiff in reimbursement. It was held, that if the remedial feature was alone to be considered, and the proceeding regarded as a part of the suit, it could not be brought to this court by writ of error, but could only be corrected on appeal from the final decree; if to be regarded as a criminal action, then it was one of which this court had no jurisdiction, either by writ of error or appeal. In re Christensen Engineering Co., 194 U. S. 458, 460, 48 L. Ed. 1072.

60. In re Christensen Engineering Co., 194 U. S. 458, 48 L. Ed. 1072.

61. In re Christensen Engineering Co., 194 U. S. 458, 460, 48 L. Ed. 1072.

62. Bessette *v.* Conkey Co., 194 U. S. 324, 48 L. Ed. 997, reaffirmed in In re Lewis, 202 U. S. 614, 50 L. Ed. 1172; In re Christensen Engineering Co., 194 U. S. 458, 48 L. Ed. 1072.

63. Doyle *v.* London Guarantee, etc., Co., 204 U. S. 599, 603, 51 L. Ed. 641, citing Bessette *v.* Conkey Co., 194 U. S. 324, 48 L. Ed. 997; In re Christensen Engineering Co., 194 U. S. 458, 48 L. Ed. 1072; Alexander *v.* United States, 201 U. S. 117, 50 L. Ed. 686.

review exists in such a case, in advance of a final decree in the case in which the order was made.[64]

But they may be reached by certiorari in the absence of any other adequate remedy.[65]

The decision of the highest state court declaring what their judgment really meant, and defining its scope, and holding that the party thereto had not been guilty of contempt, cannot be reviewed here because such judgment is not final.[66]

(6) *Orders in Habeas Corpus Proceedings.*—**In General.**—An order of the circuit court of the United States in habeas corpus proceedings discharging the prisoner is a final judgment.[67] A judgment of this court affirming the judgment of the circuit court denying an application for a writ of habeas corpus, is a final judgment in the premises, because it determines the whole controversy involved in the appeal.[68]

Error to State Court.—But court orders made upon the return to a writ of habeas corpus, which was granted by a judge and returnable before him, remanding the prisoner after a hearing upon the returns to the various writs, do not constitute that final judgment or decree in a suit in the highest court of a state in which a decision in the suit could be had which may be reviewed on writ of error from this court under § 709 of the Revised Statutes of the United States.[69]

(7) *Decrees in Suits to Dissolve Corporations.*—In a suit by the creditors of an indebted corporation, to compel the collection of what is due to it, and the payment of the debt it owes, a decree made before the funds of the corporation are collected, that all the moneys recovered, or to be recovered, shall be distributed among the original complainants, and the several persons who have filed their petitions to be made parties, and appointing a master to state an account, is not a final decree in the cause.[70]

(8) *Decrees in Admiralty.*—**In General.**—In admiralty causes a decree is not final while it is depending here, and any statute which governs the case must be an existing, valid statute, at the time of affirming the decree below.[71]

A decree in a prize cause, which disposes of the whole matter in controversy, upon a claim filed by particular parties; which is final as to them and their rights and final also so far as the claimants and their rights are concerned as to the United States, which leaves nothing to be litigated between the parties, and awards execution in favor of the libelants against the claimants, is final within the meaning of the judiciary acts, and this court has jurisdiction of an appeal from it.[72]

64. Doyle *v.* London Guarantee, etc., Co., 204 U. S. 599, 607, 51 L. Ed. 641.

65. In re Chetwood, 165 U. S. 443, 462, 41 L. Ed. 782; Bessette *v.* Conkey, 194 U. S. 458, 48 L. Ed. 997.

66. Newport Light Co. *v.* Newport, 151 U. S. 527, 38 L. Ed. 259, citing McMickin *v.* Perin, 20 How. 133, 15 L. Ed. 857; Hayes *v.* Fischer, 102 U. S. 121, 26 L. Ed. 95.

67. Orders in habeas corpus proceedings.—Harkrader *v.* Wadley, 172 U. S. 148, 43 L. Ed. 399.

68. In re Jugiro, 140 U. S. 291, 35 L. Ed. 510.

69. Clarke *v.* McDade, 165 U. S. 168, 41 L. Ed. 673.

70. Decrees in suits to dissolve corporations.—Ogilvie *v.* Knox Ins. Co., 2 Black 539, 17 L. Ed. 349.

71. Decrees in admiralty.—United States *v.* Preston, 3 Pet. 57, 66, 7 L. Ed. 601, 605; Yeaton *v.* United States, 5 Cranch 281, 286, 3 L. Ed. 101.

In admiralty cases a decree is not final while an appeal from the same is depending in this court, and any statute which governs the case must be an existing valid statute at the time of affirming the decree below. If, therefore, the persons of color who were on board the Josefa Segunda when captured had been specifically before the court on the 13th of March, 1820, they must have been delivered up to the president of the United States to be sent to Africa, under the provisions of the act of the 3d of March, 1819, and therefore there is no claim to the proceeds of their sale under the law of Louisiana which appropriated the same. The court do not mean to intimate that the United States are entitled to the money, for they had no power to sell the persons of color. United States *v.* Preston, 3 Pet. 57, 7 L. Ed. 601.

72. Withenbury *v.* United States, 5 Wall. 819, 18 L. Ed. 613.

Decree of Condemnation.—Where the libel in admiralty claims the condemnation of the schooner and cargo, and the decree condemns the schooner, but makes no mention of the cargo, the decree does not dispose of the cause and is not final.[73]

In Tort Actions.—It is equally well settled, that a decree in admiralty determining the question of liability for a collision or other tort, is interlocutory merely.[74]

Reference to Commissioner to Ascertain Damages.—No appeal lies from a decree of restitution, with costs and damages, in the circuit court, the report of the commissioners appointed to ascertain the damages not having been acted on by the court when the appeal was taken. Such a decree is not a final decree.[75] Therefore, on a libel in personam for damages, if the court decrees that damages be recovered, and that commissioners be appointed to ascertain the amount thereof, no appeal will lie from such a decree until the commissioners have made their report, this not being a final decree.[76]

A decree in admiralty ordering a libel to stand dismissed if not amended within ten days, is final and appealable, in case of the prosecution of the appeal within that time, because this is an election to waive the right to amend and the decree of dismissal takes effect immediately.[77]

(9) *Judgments and Decrees in Condemnation Proceedings.*—Upon a writ of error to a state court, it was held, that a judgment in condemnation proceedings is final and appealable, though the amount of compensation to be made is still to be determined by commissioners appointed.[78] But an order appointing commissioners in condemnation proceedings is not a final judgment nor subject to review until after the confirmation of the award of the commissioners.[79]

73. Dayton *v.* United States, 131 U. S. appx. lxxx, 18 L. Ed. 169.

74. The Palmyra, 10 Wheat. 502, 6 L. Ed. 376; Chace *v.* Vasquez, 11 Wheat. 420, 6 L. Ed. 511; Mordecai *v.* Lindsay; 19 How. 199, 15 L. Ed. 624; McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 536, 545, 36 L. Ed. 1079.

75. The Palmyra, 10 Wheat. 502, 6 L. Ed. 376, distinguishing Ray *v.* Law, 3 Cranch, 179, 2 L. Ed. 404.

76. Chace *v.* Vasquez, 11 Wheat. 429, 6 L. Ed. 511, following The Palmyra, 10 Wheat. 502, 6 L. Ed. 376, approved in McGourkey *v.* Toledo, etc., R. Co., 146 U. S. 545, 36 L. Ed. 1079.

In the case of The Palmyra, 10 Wheat. 502, 6 L. Ed. 376, where, in a libel for a tortious seizure, restitution with costs and damages had been decreed, but the damages had not been assessed, this court held, that the decree was not final, and dismissed the appeal. It said: "The decree of the circuit court was not final in the sense of the act of congress. The damages remain undisposed of, and an appeal may still lie upon that part of the decree awarding damages. The whole cause is not, therefore, finally determined in the circuit court, and we are of the opinion that the cause cannot be divided so as to bring up distinct parts of it."

77. The Three Friends, 166 U. S. 1, 41 L. Ed. 897.

78. Judgments and decrees in condemnation proceedings.—Wheeling, etc., Bridge Co. *v.* Wheeling Bridge Co., 138 U. S. 287, 34 L. Ed. 967.

But this case has been distinguished as follows: "In Wheeling, etc., Bridge Co. *v.* Wheeling Bridge Co., 138 U. S. 287, 34 L. Ed. 967, this court sustained its jurisdiction of a writ of error to the supreme court of appeals of West Virginia, and inquired into the validity of a judgment of that court affirming an order of a trial court appointing commissioners in condemnation proceedings. But that decision was based on the fact that the order of the trial court had been held by the state supreme court to be a final judgment, on which a writ of error would lie, and therefore, being a final judgment in the view of the highest court of the state, it ought to be considered final here for the purposes of review." Southern R. Co. *v.* Postal Tel. Co., 179 U. S. 641, 643, 45 L. Ed. 355.

79. Southern R. Co. *v.* Postal Tel., etc., Co., 179 U. S. 641, 45 L. Ed. 355.

Under § 4 of the act of congress incorporating the North River Bridge Company, and enacting that compensation for property, appropriated and condemned under the act, shall be ascertained according to the laws of the state within which the same is located, it was held, that an order of the circuit court, appointing commissioners to assess damages for the taking of land by the bridge company, is not a final judgment upon which a writ of error will lie. Luxton *v.* North River Bridge Co., 147 U. S. 337, 37 L. Ed. 194, distinguishing Wheeling, etc., Bridge Co. *v.* Wheeling Bridge Co., 138 U. S. 287, 34 L. Ed. 967, in the following language:

x. *Decrees Respecting Costs.*—**Reservations Respecting Costs.**—When a decree determines all of the equities raised by the bill, and the party is entitled to have it immediately carried into execution, it is final, although a clause is added to the decree reserving to itself the right to make such further directions respecting costs, as might be necessary to carry the decree into execution.[80] A decree for the dismissal of a bill and for costs may be final, although the costs are not taxed and entered in the judgment.[81]

When to Be Paid Out of Particular Fund.—An order for the allowance of costs and expenses to a complainant suing on behalf of a trust fund, is final and appealable.[82]

5. PRACTICE—a. *Raising and Waiving Objections.*—Although this court has appellate jurisdiction only where the judgment or decree of the inferior court is final, it does not follow, when it renders a decree upon an interlocutory and not a final decree, that it can, or ought, on an appeal from a decree in the same cause, which is final, examine into its jurisdiction upon a former occasion. This is an exception, of which advantage might have been taken by motion on the first appeal.[83]

"Jurisdiction of a writ of error to the supreme court of appeals of West Virginia, affirming an order appointing commissioners under a somewhat similar statute, was there entertained by this court, solely because that order had been held by the highest court of the state to be an adjudication of the right to condemn the land, and to be a final judgment, on which a writ of error would lie, and could therefore hardly be considered in any other light by this court in the exercise of its jurisdiction to review the decisions of the highest court of the state upon a federal question. Wheeling, etc., Bridge Co. *v.* Wheeling Bridge Co., 138 U. S. 287, 290, 34 L. Ed. 967. To have held otherwise might have wholly defeated the appellate jurisdiction of this court under the constitution and laws of the United States; for if the highest court of the state held the order appointing commissioners to be final and conclusive unless appealed from, and the validity of the condemnation not to be open on a subsequent appeal from the award of damages, it is difficult to see how this court could have reached the question of the validity of the condemnation, except by writ of error to the order appointing commissioners. That case, therefore, affords no precedent or reason for sustaining this writ of error to the circuit court of the United States."

In Luxton *v.* North River Bridge Co., 147 U. S. 337, 341, 37 L. Ed. 194, in condemnation proceedings, an order was made appointing commissioners to assess damages. To reverse this order, a writ of error was sued out, and by that writ of error an attempt was made to challenge the constitutionality of the act authorizing the condemnation, but this court dismissed the writ on the ground that the order was not a final judgment, saying, after referring to possible proceedings in the state court, that the action of the United States circuit court could be reviewed here "only by writ of error, which does not lie until after final judgment, disposing of the whole case, and adjudicating all the rights, whether of title or of damages, involved in the litigation. The case is not to be sent up in fragments by successive writs of error. Act of September 24, 1789, ch. 20, § 22; 1 Stat. 84; Rev. Stat., § 691; Rutherford *v.* Fisher, 4 Dall. 22, 1 L. Ed. 724; Holcombe *v.* McKusick, 20 How. 552, 554, 15 L. Ed. 1020; Louisiana Bank *v.* Whitney, 121 U. S. 284, 30 L. Ed. 961; Keystone Iron Co. *v.* Martin, 132 U. S. 91, 33 L. Ed. 275; McGourkey *v* Toledo, etc., R. Co., 146 U. S. 536, 36 L. Ed. 1079." Southern R. Co. *v.* Postal Tel. Co., 179 U. S. 641, 643, 45 L. Ed. 355.

80. Decrees respecting costs.—Winthrop Iron Co. *v.* Meeker, 109 U. S. 180, 27 L. Ed. 898.

Stockholders of a corporation filed a bill praying that a receiver be appointed for the corporation and that proceedings at a meeting of the stockholders of the corporation and proceedings of the board of directors under a supposed authority derived therefrom be set aside as fraudulent and void. The court rendered a decree appointing a receiver and setting aside the proceedings in accordance with the prayer of the petition, and added to the decree a provision reserving "such further directions as may be necessary to carry this decree into effect concerning costs." It was held, that such reservation did not affect the finality of the decree. Winthrop Iron Co. *v.* Meeker, 109 U. S. 180, 27 L. Ed. 898.

81. Fowler *v.* Hamill, 139 U. S. 549, 35 L. Ed. 266.

82. Costs ordered to be paid out of fund in receiver's hands awaiting distribution.—Trustees *v.* Greenough, 105 U. S. 527, 26 L. Ed. 1157.

83. Raising and waiving objection.—Washington Bridge Co. *v.* Stewart, 3 How. 413, 11 L. Ed. 658.

b. *Dismissal.*—The practice in this court, in case the judgment or decree is not final, is to dismiss the writ of error or appeal for want of jurisdiction, and remand it to the court below to be further proceeded in. And this the court will do either on the motion of the appellee or ex mero motu.[84]

c. *Reinstatement.*—Where a cause comes on to be heard upon an appeal, and upon inspection of the record, it does not appear that there has been any final decree, the appeal will be dismissed. But if at a subsequent term, it appears that in point of fact there had been a final award of damages, and that the error was a mere misprison of the clerk in transmitting an imperfect record, the court, upon motion of the appellants, will order the cause to be reinstated.[85] But where a common-law case was dismissed at the last term for want of jurisdiction (the record showing that no final judgment was given in the court below), an affidavit setting forth that the final judgment was accidentally omitted from the record, and the production of a correct record, are not sufficient to sustain a motion to annul the order of dismissal, and reinstate the case upon the docket. After the judgment of this court was passed upon the case, and the term was closed, the function of the writ of error was over, and it cannot now be revived.[86]

84. Dismissal.—Rutherford *v.* Fisher, 4 Dall. 22, 1 L. Ed. 724; Houston *v.* Moore, 3 Wheat. 433, 4 L. Ed. 428; Van Ness *v.* Buell, 4 Wheat. 74, 75, 4 L. Ed. 516; Forgay *v.* Conrad, 6 How. 201, 206, 12 L. Ed. 404; United States *v.* Girault, 11 How. 22, 23, 13 L. Ed. 587; Ogilvie *v.* Knox Ins. Co., 2 Black. 539, 17 L. Ed. 349; Follansbee *v.* Ballard Paving Co., 154 U. S. 651, 25 L. Ed. 802; Patton *v.* Texas, etc., R. Co., 166 U. S. 717, 41 L. Ed. 1177; Agricultural Ditch Co. *v.* Farmers' Independent Ditch Co., 166 U. S. 719, 41 L. Ed. 1188; Young *v.* Grundy, 6 Cranch 51, 3 L. Ed. 149; The Palmyra, 10 Wheat. 502, 6 L. Ed. 376; Gibbons *v.* Ogden, 6 Wheat. 448, 5 L. Ed. 302; Carr *v.* Hoxie, 13 Pet. 460, 10 L. Ed. 247; Lea *v.* Kelly, 15 Pet. 213, 10 L. Ed. 715; Smith *v.* Trabue, 9 Pet. 4, 9 L. Ed. 30; Barnard *v.* Gibson, 7 How. 651, 12 L. Ed. 857; Brown *v.* Union Bank, 4 How. 465, 11 L. Ed. 1058; Pepper *v.* Dunlap, 5 How. 51, 12 L. Ed. 46; Miners' Bank *v.* United States, 5 How. 213, 12 L. Ed. 121; McCollum *v.* Eager, 2 How. 61, 11 L. Ed. 179; Verden *v.* Coleman, 18 How. 86, 15 L. Ed. 272; Craighead *v.* Wilson, 18 How. 199, 15 L. Ed. 332; Reddall *v.* Bryan, 24 How. 420, 16 L. Ed. 740; McMicken *v.* Perin, 20 How. 133, 15 L. Ed. 857; Tracy *v.* Holcombe, 24 How. 426, 16 L. Ed. 742; Perkins *v.* Fourniquet, 6 How. 206, 12 L. Ed. 406; Pulliam *v.* Christian, 6 How. 209, 12 L. Ed. 408; Callan *v.* May, 2 Black 541, 17 L. Ed. 281; Wheeler *v.* Harris, 13 Wall. 51, 20 L. Ed. 531; Moses *v.* The Mayor, 15 Wall. 387, 21 L. Ed. 176; Moore *v.* Robbins, 18 Wall. 588, 21 L. Ed. 758; St. Clair County *v.* Lovington, 18 Wall. 628, 21 L. Ed. 813; Thomas *v.* Wooldridge, 23 Wall. 283, 23 L. Ed. 135; Rankin *v.* State, 11 Wall. 380, 20 L. Ed. 175; Bethell *v.* Demaret, 10 Wall. 537, 19 L. Ed. 1007; Huminston *v.* Stainthrop, 2 Wall. 106, 17 L. Ed. 905; The Lucille, 19 Wall. 73, 22 L. Ed. 64; North Carolina R. Co. *v.* Swasey, 23 Wall. 405, 23 L. Ed. 136; Chicago, etc., R. Co. *v.* Wiswall, 23 Wall. 507, 22 L. Ed. 103; Parcels *v.* Johnson, 20 Wall. 653, 22 L. Ed. 410; Louisiana Bank *v.* Whitney, 121 U. S. 284, 30 L. Ed. 961; Kimball *v.* Evans, 93 U. S. 320, 23 L. Ed. 920; Zeller *v.* Switzer, 91 U. S. 487, 23 L. Ed. 366; Harrington *v.* Holler, 111 U. S. 796, 797, 28 L. Ed. 602; Parsons *v.* Robinson, 122 U. S. 112, 30 L. Ed. 1122; Chicago, etc., R. Co. *v.* Fosdick, 106 U. S. 48, 27 L. Ed. 47; Grant *v.* Phœnix Ins. Co., 106 U. S. 429, 27 L. Ed. 237; Benjamin *v.* Dubois, 118 U. S. 46, 30 L. Ed. 52; Davis *v.* Crouch, 94 U. S. 514, 24 L. Ed. 281; McComb *v.* Commissioners of Knox County, 91 U. S. 1, 23 L. Ed. 185; Butterfield *v.* Usher, 91 U. S. 246, 23 L. Ed. 318; Baker *v.* White, 92 U. S. 176, 23 L. Ed. 480; Johnson *v.* Keith, 117 U. S. 199, 29 L. Ed. 888; Bostwick *v.* Brinkerhoff, 106 U. S. 3, 27 L. Ed. 73; Green *v.* Fisk, 103 U. S. 518, 26 L. Ed. 486; McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893; Rice *v.* Sanger, 144 U. S. 197, 36 L. Ed. 403; Brown *v.* Baxter, 146 U. S. 619, 36 L. Ed. 1106.

Where the order or decree sought to be reviewed was not final but interlocutory, and the writ of error and the appeal must be dismissed. Acts, September 24, 1789, c. 20, §§ 13, 22, 1 Stat. 81, 84; March 3, 1803 c. 40, 2 Stat. 244; Rev. Stat., §§ 691, 692; act, March 3, 1891, c. 517, 26 Stat. 826; Forgay *v.* Conrad, 6 How. 201, 205, 12 L. Ed. 404; McLish *v.* Roff, 141 U. S. 661, 35 L. Ed. 893; American Construction Co. *v.* Jacksonville, etc., R. Co., 148 U. S. 372, 378, 37 L. Ed. 486; Smith *v.* Vulcan Iron Works, 165 U. S. 518, 524, 41 L. Ed. 810; Reaves *v.* Oliver, 168 U. S. 704, 42 L. Ed. 1212.

85. Reinstatement.—The Palmyra, 12 Wheat. 1, 6 L. Ed. 531.

86. Rice *v.* Minnesota, etc., R. Co., 21 How. 82, 16 L. Ed. 31.

"The case of The Palmyra, 12 Wheat. 1,

d. *Examination of the Merits.*—By the practice in equity, as administered in the court of chancery and the House of Lords in England, and in the courts of chancery and court of errors in the states of New York and New Jersey, appeals lie from interlocutory, as well as from final, orders or decrees; and upon an appeal from an interlocutory order or decree the appellate court had the power of examining the merits of the case, and, upon deciding them in favor of the defendant, of dismissing the bill, and thus saving to both parties the needless expense of a further prosecution of the suit.[87] But under the judicial system of the United States, from the beginning until the passage of the act of 1891 establishing circuit courts of appeals, appeals from the circuit courts of the United States in equity or in admiralty, like writs of error at common law, would lie only after final judgment or decree.[88] Under the act of March 3, 1891, c. 517, § 7, the circuit court of appeals, upon appeal from the interlocutory decree of the circuit court, granting an injunction and ordering an account, has authority to consider and decide the case upon its merits, and thereupon to render or direct a final decree dismissing the bill.[89]

D. Discretionary Matters—1. In General.—Decisions which rest in the discretion of the court below cannot be examined in the appellate court except in cases of gross abuse. Generally, where the action of the inferior court is discretionary, its decision is final.[90] But where the very point in issue is

6 L. Ed. 531, has been referred to, where a motion similar to the present was granted by the court. And if that had been a case at common law, we might have felt ourselves bound to follow it, as establishing the law of this court. But it was a case in admiralty, where the power and jurisdiction of an appellate court is much wider, upon appeal, than in a case at common law. For, in an admiralty case, you may in this court amend the pleadings, and take new evidence, so as in effect to make it a different case from that decided by the court below. And the court might well, therefore, deal with the judgment and appeal of the inferior tribunal in the same spirit. But the powers which an appellate court may lawfully exercise in an admiralty proceeding, are altogether inadmissible in a common-law suit." Rice *v.* Minnesota, etc., R. Co., 21 How. 82, 16 L. Ed. 31.

87. Examination of the merits.—Palmer H. L., Pract. 1; 2 Dan. Ch. Pract. (1st Ed.) 1491, 1492; Forgay *v.* Conrad, 6 How. 201, 205, 12 L. Ed. 404; Le Guen *v.* Gouverneur, 1 Johns Cas. 436, 498, 499, 507, 509; Bush *v.* Livingston, 2 Caines Cas. 66, 86; Newark & New York Railroad *v.* Newark, 8 C. E. Gr. (23 N. J. Eq.) 515. Smith *v.* Vulcan Iron Works, 165 U. S. 518, 524, 41 L. Ed. 810.

88. Smith *v.* Vulcan Iron Works, 165 U. S. 518, 524, 41 L. Ed. 810, reaffirmed in Reaves *v.* Oliver, 168 U. S. 704, 42 L. Ed. 1212.

89. Smith *v.* Vulcan Iron Works, 165 U. S. 518, 525, 41 L. Ed. 810.

90. Discretionary matters in general.—2 Daniell's Chy. Pl. & Prac. 5th Ed. 462; Cook *v.* Burnley, 11 Wall. 659, 20 L. Ed. 29; Cheang-Kee *v.* United States, 3 Wall. 320, 18 L. Ed. 72; Earnshaw *v.* United States, 146 U. S. 60, 36 L. Ed. 887; Bullitt County *v.* Washer, 130 U. S. 142, 32 L. Ed. 885; Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207, 34 L. Ed. 97; Terre Haute, etc., R. Co. *v.* Struble, 109 U. S. 381, 27 L. Ed. 970; Ex parte Roberts, 6 Pet. 216, 8 L. Ed. 375; Kennon *v.* Gilmer, 131 U. S. 22, 32 L. Ed. 110; Freeborn *v.* Smith, 2 Wall. 160, 17 L. Ed. 922; Parsons *v.* Bedford, 3 Pet. 433, 445, 7 L. Ed. 732; Wiggins *v.* Gray, 24 How. 303, 16 L. Ed. 688; Woods *v.* Young, 4 Cranch 237, 2 L. Ed. 607; Sim *v.* Hundley, 6 How. 1, 6. 12 L. Ed. 319; Thompson *v.* Selden, 20 How. 194, 15 L. Ed. 1001; San Antonio *v.* Mehaffy, 96 U. S. 312, 315, 24 L. Ed. 816; Terre Haute, etc., R. Co. *v.* Struble, 109 U. S. 381, 27 L. Ed. 970; United States *v.* Rio Grande Irrig. Co., 184 U. S. 416, 423, 46 L. Ed. 619; Murphy *v.* Stewart, 2 How. 263, 11 L. Ed. 261; Morsell *v.* Hall, 13 How. 212, 14 L. Ed. 117; Steines *v.* Franklin County, 14 Wall. 15, 20 L. Ed. 846; Liter *v.* Green, 2 Wheat. 306, 4 L. Ed. 246; Breedlove *v.* Nicolet, 7 Pet. 413, 8 L. Ed. 731; Schaumburg *v.* United States, 103 U. S. 667, 26 L. Ed. 599; Pomeroy *v.* Bank of Indiana, 1 Wall, 592, 598, 17 L. Ed. 638; Van Stone *v.* Stillwell, etc., Mfg. Co., 142 U. S. 128, 134, 35 L. Ed. 961; Fuller *v.* Claflin, 93 U. S. 14, 23 L. Ed. 785; Wood *v.* United States, 16 Pet. 342, 10 L. Ed. 987.

The general principle is too well settled to admit of doubt that where the action of an inferior tribunal is discretionary, its decision is final. Henderson *v.* Moore, 5 Cranch 11, 3 L. Ed. 22; Marine Ins. Co. *v.* Young, 5 Cranch 187, 3 L. Ed. 74; Marine Ins. Co. *v.* Hodgson, 6 Cranch 206, 3 L. Ed. 200; Earnshaw *v.* United States, 146 U. S. 60, 68, 36 L. Ed. 887.

Before this court will interfere with the circuit court of the United States in the exercise of discretion, a very clear

whether the court had such discretion, and whether they exercised it in a manner that cannot be reviewed in the court, is the subject of appeal.[91]

Generally speaking, matters of practice in inferior courts do not constitute subjects upon which error can be assigned in the appellate court.[92]

2. AMENDMENTS.—The general rule is well settled that amendments are discretionary with the court below, and therefore the allowance or refusal of amendments by the trial court is not reviewable here,[93] except for a clear

showing must be made. Russell *v.* Farley, 105 U. S. 433, 26 L. Ed. 1060.

A writ of error can bring up nothing but questions of law. It does not bring up questions of equity arising out of the rules and practice of the court. Morsell *v.* Hall, 13 How. 212, 14 L. Ed. 117.

The allowance and refusal of amendments in the pleadings, the granting or refusing new trials; and, indeed, most other incidental orders made in the progress of a cause, before trial, are matters so peculiarly addressed to the sound discretion of the courts of original jurisdiction, as to be fit for their decision only, under their own rules and modes of practice. This, it is true, may, occasionally, lead to particular hardships; but on the other hand, the general inconvenience of this court attempting to revise and correct all the intermediate proceedings in suits, between their commencement and final judgment, would be intolerable. This court has always declined interfering in such cases; accordingly, it was held, by the court in Woods *v.* Young, 4 Cranch 237, 2 L. Ed. 607, that the refusal of the court below to continue a cause, after it is at issue, is not a matter upon which error can be assigned. That the refusal of the court below to grant a new trial, is not matter for which a writ of error lies (Henderson *v.* Moore, 5 Cranch 11, 3 L. Ed. 22; Marine Ins. Co. *v.* Young, 5 Cranch 187, 3 L. Ed. 74; and Barr *v.* Gratz, 4 Wheat. 213, 220, 4 L. Ed. 553), and that the refusal of the court below to allow a plea to be amended, or a new plea to be filed, or to grant a new trial, or to continue a cause, cannot be assigned as a cause of reversal or a writ of error. Wright *v.* Hollingsworth, 1 Pet. 165, 168, 7 L. Ed. 97.

It is well settled that mere matters of procedure, such as the granting or refusing of motions for new trials, and questions respecting amendments to the pleadings, are purely discretionary matters for the consideration of the trial court, and, unless there has been gross abuse of that discretion, they are not reviewable in this court on writ of error. Mexican Central R. Co. *v.* Pinkney, 149 U. S. 194, 201, 37 L. Ed. 699.

"With regard to the judicial power in cases of this kind, it was held, by this court, as early as 1803, in the great case of Marbury *v.* Madison, 1 Cranch 137, 2 L. Ed. 60, that there was a distinction between acts involving the exercise of judgment or discretion and those which are purely ministerial; that, with respect to the former, there exists, and can exist, no power to control the executive discretion, however erroneous its exercise may seem to have been, but with respect to ministerial duties, an act or refusal to act is, or may become, the subject of review by the courts." Noble *v.* Union River Logging R. Co., 147 U. S. 165, 171, 37 L. Ed. 123.

91. Where point in issue is whether court had such discretion.—"The other reason given why the appeal should not be granted is that the action of the circuit court in the case is one within its discretion. All we have to say upon this subject is, that if it be an authority vested in the judges of the circuit court, it must be exercised and governed by the principles of a judicial discretion, and the very point to be decided upon an appeal here is, whether they had such discretion, and whether they exercised it in a manner that cannot be reviewed in this court. The question is one which in its nature must be a subject of appeal. Whether the court below can exercise any such power at all, after the case has been removed from its jurisdiction into this court by an appeal accompanied by a supersedeas, is itself a proper matter of review; and still more, whether, in the exercise of what the court asserts to be its discretionary power, it has invaded established rights of the petitioners in this case, contrary to law, in such a manner that they can have no relief except by an appeal to this court. This is a matter eminently proper to be inquired into upon an appeal from such an order." In re Farmers' Loan, etc., Co., 129 U. S. 206, 215, 32 L. Ed. 656.

92. Parsons *v.* Bedford, 3 Pet. 433, 445, 7 L. Ed. 732.

93. Amendments.—Mandeville *v.* Wilson, 5 Cranch 15, 3 L. Ed. 23; Sheehy *v.* Mandeville, 6 Cranch 253, 3 L. Ed. 215; Walden *v.* Craig, 9 Wheat. 576, 6 L. Ed. 164; Chirac *v.* Reinicker, 11 Wheat. 280, 6 L. Ed. 474; Wright *v.* Hollingsworth, 1 Pet. 165, 7 L. Ed. 97; United States *v.* Buford, 3 Pet. 12, 7 L. Ed. 585; Matheson *v.* Grant, 2 How. 263, 11 L. Ed. 261; Ex parte Bradstreet, 7 Pet. 634, 8 L. Ed. 810; Chapman *v.* Barney, 129 U. S. 677, 32 L. Ed. 800; Pickett *v.* Legerwood, 7 Pet. 144, 8 L. Ed. 638; Breedlove *v.* Nicolet, 7 Pet. 413, 8 L. Ed. 731; Slicer *v.* Pittsburg Bank, 16 How. 571, 14 L. Ed. 1063, 1066; Spencer *v.* Lapsley, 20 How. 264,

abuse.[94]

Amendments to pleadings are within the discretion of the trial court, and its action granting or refusing such amendment cannot be reviewed in the supreme court of the United States.[95] This depends so much on the discretion of the court below, which must be regulated more by the particular circumstances of every case, than by any precise and known rule of law, and of which the superior court can never become fully possessed, that there would be more

15 L. Ed. 902; Gormley *v.* Bunyan, 138 U. S. 623, 34 L. Ed. 1086; Royal Ins. Co. *v.* Miller, 199 U. S. 353, 50 L. Ed. 226; Sawyer *v.* Piper, 189 U. S. 154, 47 L. Ed. 757; Walden *v.* Craig, 14 Pet. 147, 153, 10 L. Ed. 393; Holmes *v.* Jennison, 14 Pet. 540, 586, 10 L. Ed. 579; Marine Ins. Co. *v.* Hodgson, 6 Cranch 206, 3 L. Ed. 200; Boyle *v.* Zacharie, 6 Pet. 648, 656, 8 L. Ed. 532; Murphy *v.* Stewart, 2 How. 263, 11 L. Ed. 261; Bullitt County *v.* Washer, 130 U. S. 142, 145, 32 L. Ed. 885; Tilton *v.* Cofield, 93 U. S. 163, 166, 23 L. Ed. 858.

This court will not direct the court below to allow the proceedings to be amended. Sheehy *v.* Mandeville, 6 Cranch 253, 3 L. Ed. 215.

Marshall, Ch. J., observed that the permitting amendments is a matter of discretion. He did not mean to say that a court may in all cases permit or refuse amendments without control. A case may occur where it would be error in a court, after having allowed one party to amend, to refuse to suffer the other party to amend also before trial. After the parties have gone to trial upon a set of pleadings, and the judgment has been pronounced, it may be doubted whether the court can permit the demurrer to be withdrawn. Mandeville *v.* Wilson, 5 Cranch 15, 17, 3 L. Ed. 23, 24.

Illustrative cases—Amendments as to parties.—An assignment of error in this court that the court below erred in permitting a new sole plaintiff to be substituted for, and in the place of the sole original plaintiff, is not well taken, because amendments are discretionary with the court below, and not reviewable by this court. Chapman *v.* Barney, 129 U. S. 677, 32 L. Ed. 800.

In ejectment, an amendment, so as to enlarge the term laid in the declaration, will be permitted, in the discretion of the court. But a writ of error will not lie in a case where the court below has denied a motion for this purpose. Walden *v.* Craig, 9 Wheat. 576, 6 L. Ed. 164.

In a trial in an action of ejectment, in which, according to the provisions of the laws of Tennessee, the defendant was held to bail, the declaration stated two demises, one, by H. & K., citizens of Pennsylvania; and the other, the demise of B. & G., citizens of Massachusetts. The cause coming on for trial before a jury, the plaintiffs suffered a nonsuit, which was set aside; and the court, on the motion of the plaintiffs, permitted the declaration to be amended, by adding a count on the demise of S., a citizen of Missouri. The parties went to trial without any other pleading; and the jury found for the plaintiff, upon the third, or new count, and a judgment was rendered in his favor. Held, no ground for writ of error. Wright *v.* Hollingsworth, 1 Pet. 165, 7 L. Ed. 96.

94. Royal Insurance Co. *v.* Miller, 199 U. S. 353, 50 L. Ed. 226.

Making new parties.—An objection made at the trial to an amendment that it substituted a new party and an entirely new cause of action, is not reviewable unless there is clear abuse of discretion. Royal Ins. Co. *v.* Miller, 199 U. S. 353, 370, 50 L. Ed. 226, citing Gormley *v.* Bunyan, 138 U. S. 623, 34 L. Ed. 1086.

95. Bullitt County *v.* Washer, 130 U. S. 142, 32 L. Ed. 885; Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207, 34 L. Ed. 97; Chirac *v.* Reinicker, 11 Wheat. 280, 6 L. Ed. 474; Chapman *v.* Barney, 129 U. S. 677, 32 L. Ed. 800; United States *v.* Breward, 16 Pet. 143, 10 L. Ed. 916.

"Motions to amend mere formal defects in the pleadings are always addressed to the discretion of the court, and are usually granted as a matter of course, and their allowance is never the subject of error. That point has been so frequently decided, that we do not think it necessary to cite authorities in its support." Jenkins *v.* Banning, 23 How. 455, 16 L. Ed. 581.

This court will not exercise any control over the proceedings of an inferior court of the United States, in allowing or refusing to allow amendments in the pleadings, in cases depending in those courts; but every party in such court has a right to the judgment of this court in a suit brought in those courts, provided the matter in disputs exceeds the value of two thousand dollars. Ex parte Bradstreet, 7 Pet. 634, 8 L. Ed. 810.

The refusal of the court below to allow the plaintiff in error to amend and supplement its petition, and file them as original bills of review, is not reviewable by this court because it is a matter within the discretion of the court below. Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207, 34 L. Ed. 97.

The refusal of the trial court to permit the amendment of the pleadings in order to let in a supplementary answer is within the discretion of the trial court, and will not be reviewed here unless the discre-

danger of injury in revising matters of this kind than what might result now and then from an arbitrary or improper exercise of this discretion.[96]

Annexing Conditions.—This court cannot interfere because the court below did not require the costs formerly accrued to be paid as a condition of the amendment.[97]

The allowance of an amendment to an application for the removal of a cause from the state court, for the purposes of making additional allegations as to the amount in controversy, as to the citizenship of a party, etc., is a matter of discretion, and error cannot be assigned upon the decision.[98]

3. Bail.—If the accused applies for bail, and bail is denied, the action of the court is not the subject of review, because the granting or refusing bail is made by the statute matter of discretion.[99]

4. Bills of Review.—This court will not review the action of the lower court in refusing to grant leave to file a bill of review, because it is discretionary with that court.[1]

5. Certiorari.—Although the granting of the writ of certiorari rests in the discretion of the court, yet, after the writ has been granted, and the record certified in obedience to it, the questions arising upon that record must be determined according to fixed rules of law, and their determination is reviewable on error.[2]

6. Change of Venue.—The granting or refusing a change of venue is a matter of discretion in the court below, and not the subject of review here, unless

tion has been abused. Sawyer *v.* Piper, 189 U. S. 154, 47 L. Ed. 757.

Amendment of writ of right.—In the district court of the Northern District of New York, writs of right were prosecuted for lands lying in that district, and neither in the writs nor in the counts was there an averment of the value of the premises being sufficient in amount to give the court jurisdiction. The tenants, appeared and moved to dismiss the cause for want of jurisdiction; which motion was granted. Subsequently, the demandant moved to reinstate the cases and to amend, by inserting an averment that the premises were of the value of five hundred dollars; which motion was denied by the court. The demandant also moved the court to compel full records of the judgments and orders of dismission, and of the process in the several suits, to be made up and filed, so that the demandant might have the benefit of a writ of error to the supreme court, in order to have its decision upon the grounds and merits of such judgments and orders. The district court refused this motion. On a rule in the supreme court for a mandamus to the district judge and a return to the same, it was held that the refusal to allow the amendment to the writ and count, by inserting the averment of the value of the property was not the subject of examination in this court. The allowance of amendments to pleadings is in the discretion of the judge of the inferior court; and no control over the action of the judge in refusing or admitting them will be exercised by this court. The court granted a mandamus requiring the district judge to have the records of the cases made up, and to enter judgments thereon, in order to give the demandant the benefit of a writ of error to the supreme court. Ex parte Bradstreet, 7 Pet. 634, 8 L. Ed. 810.

The refusal of an inferior court to allow a plea to be amended cannot be assigned as error. Marine Ins. Co. *v.* Hodgson, 6 Cranch 206, 3 L. Ed. 200; United States *v.* Buford, 3 Pet. 12, 31, 7 L. Ed. 585, 591; United States *v.* Evans, 5 Cranch 280, 3 L. Ed. 101.

A motion to amend an answer after default, is generally addressed to the discretion of the court, which is not subject to the revision of this court. Dean *v.* Mason, 20 How. 198, 15 L. Ed. 876.

Bill in equity.—The action of an inferior court as to the terms on which it will allow a complainant to amend a bill in equity to which it has sustained a demurrer, is a matter within the discretion of such court, and not open to examination here on appeal. Sheets *v.* Selden, 7 Wall. 416, 19 L. Ed. 166.

96. Marine Ins. Co. *v.* Hodgson, 6 Cranch 206, 3 L. Ed. 200, 203.

97. Wright *v.* Hollingsworth, 1 Pet. 165, 168, 7 L. Ed. 97, 98.

98. Ayers *v.* Watson, 137 U. S. 584, 34 L. Ed. 803.

99. Bail.—Clawson *v.* United States, 113 U. S. 143, 28 L. Ed. 958; McKane *v.* Durston, 153 U. S. 684, 687, 38 L. Ed. 867.

1. Bills of review.—Thomas *v.* Harvie, 10 Wheat. 146, 6 L. Ed. 287.

2. Certiorari.—Harris *v.* Barber, 129 U. S. 366, 369, 32 L. Ed. 697; Hyde *v.* Shine, 199 U. S. 62, 50 L. Ed. 90.

there has been a manifest abuse of discretion.[3] And the refusal to grant a change of venue on the mere affidavit of the defendants' agent to the state of public opinion in the county clearly involves matter of fact and discretion, and is not a ruling upon a mere question of law.[4]

By the statutes of the territory, "the court may, on good cause shown, change the place of trial, when there is reason to believe that an impartial trial cannot be had therein;" and an appeal lies to the supreme court of the territory from an order granting or refusing a new trial, or from an order granting or refusing to grant a change of venue. Montana Code of Civil Procedure of 1879, §§ 62, 408; Act of Amendment of February 23, 1881, § 7. But the statutes of the territory cannot enlarge the appellate jurisdiction of this court. The granting or denial of a change of venue, like the granting or refusal of a new trial, is a matter within the discretion of the court, not ordinarily reviewable by this court on writ of error.[5]

7. Consolidation of Actions.—A consolidation of actions is within the discretionary power of the court, and therefore an order granting or denying the motion is not reviewable on appeal,[6] except where there is a clear abuse of the discretion.[7]

8. Continuances.—It is well settled that the action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court, unless it be clearly shown that such discretion has been abused.[8] A postponement or continuance is largely within the discretion of the

3. Change of venue.—McFaul *v.* Ramsey, 20 How. 523, 15 L. Ed. 1010; Kennon *v.* Gilmer, 131 U. S. 22, 32 L. Ed. 110; Cook *v.* Burnley, 11 Wall. 659, 660, 20 L. Ed. 29.

4. Kennon *v.* Gilmer, 131 U. S. 22, 32 L. Ed. 110.

5. McFaul *v.* Ramsey, 20 How. 523, 15 L. Ed. 1010; Kerr *v.* Clampitt, 95 U. S. 188, 24 L. Ed. 493; Railway Co. *v.* Heck, 102 U. S. 120, 26 L. Ed. 58; Kennon *v.* Gilmer, 131 U. S. 22, 32 L. Ed. 110.

6. No review of order granting or denying motion to consolidate.—"The learning and research of counsel have produced no instance in this country, in which such an order, made in the exercise of the discretionary power of the court, unrestricted by statute, has been set aside on bill of exceptions or writ of error." Mutual Life Ins. Co. *v.* Hillmon, 145 U. S. 285, 293, 36 L. Ed. 707.

7. United States *v.* Marchant, 12 Wheat. 480, 6 L. Ed. 700.

8. Continuances.—Woods *v.* Young, 4 Cranch 237, 2 L. Ed. 607; Barrow *v.* Hill, 13 How. 54, 14 L. Ed. 48; Crumpton *v.* United States, 138 U. S. 361, 34 L. Ed. 958; Cox *v.* Hart, 145 U. S. 376, 36 L. Ed. 741; Earnshaw *v.* United States, 146 U. S. 60, 68, 36 L. Ed. 887; Means *v.* Bank of Randall, 146 U. S. 620, 36 L. Ed. 1107; Isaacs *v.* United States, 159 U. S. 487, 489, 40 L. Ed. 229; Marine Ins. Co. *v.* Hodgson, 6 Cranch 206, 3 L. Ed. 200; Thompson *v.* Selden, 20 How. 195, 15 L. Ed. 1001; McFaul *v.* Ramsey, 20 How. 523, 15 L. Ed. 1010; Woods *v.* Young, 4 Cranch 237, 2 L. Ed. 607; Barrow *v.* Hill, 13 How. 54, 14 L. Ed. 48; Goldsby *v.* United States, 160 U. S. 70, 40 L. Ed. 343; Hardy *v.* United States, 186 U. S. 224, 46 L. Ed. 1137, 1139; Simms *v.* Hundley, 6 How. 1, 12 L. Ed. 319, 321; United States *v.* Rio Grande Irrigation Co., 184 U. S. 416, 46 L. Ed. 619; Spencer *v.* Lapsley, 20 How. 264, 15 L. Ed. 902, 904.

It has often been decided by this court, that the refusal of an inferior court to continue a case to another term cannot be assigned for error here. Justice requires that the granting or refusal of a continuance should be left to the sound judicial discretion of the court where the motion is made, and where all of the circumstances connected with it, and proper to be considered, can readily be brought before the court. Thompson *v.* Selden, 20 How. 195, 15 L. Ed. 1001; McFaul *v.* Ramsey, 20 How. 523, 15 L. Ed. 1010.

The refusal of the court below to continue a cause after it is at issue cannot be assigned for error. "The question is, whether a refusal to continue a cause can be assigned for error. The impression of the court is, that it cannot. Has the party, by law, a right to a continuance in any case? If he has, it will have weight. It is not merely a matter of favor and discretion. This is a case in which this court cannot look into the merits of the question, whether the court below ought to have granted a continuance of the cause." Woods *v.* Young, 4 Cranch 237, 2 L. Ed. 607.

Whether the trial should be delayed for the production of witnesses is clearly a matter of discretion and not reviewable upon a writ of error, and this whether the application was made before or after the trial is begun. Crumpton *v.* United States, 138 U. S. 361, 34 L. Ed. 959, citing Silsby *v.* Foote, 14 How. 218; Cook *v.* Burnley, 11 Wall. 659, 672, 20 L. Ed. 29

trial court, and unless that discretion is shown to have been abused, there is no sufficient ground for reversal.[9] And yet there are doubtless cases to be found which hold that where, under the recognized practice, a party makes a clear case for a continuance, it is an abuse of discretion to refuse it.[10] But the facts must show with great clearness that such discretion was abused.[11]

9. Costs.—**In General.**—As costs in equity and admiralty cases are within the sound discretion of the court, this court will not disturb a mere decree as to costs alone,[12] except in a case of grave and manifest abuse.[13]

And costs in admiralty, as well as in equity, are in the discretion of the court. Appeals in matter of costs only are not usually entertained; but when the entire case is before the appellate court, it has control of the subject of costs, as well as of the merits.[14]

Allowance of Interest and Costs in Admiralty Cases.—The allowance of interest and costs in admiralty cases rests in the discretion of the court below, and its action will not be disturbed on appeal.[15]

9. Fidelity, etc., Co. *v.* Bucki, etc., Lumber Co., 189 U. S. 135, 140, 143, 47 L. Ed. 744.

10. Earnshaw *v.* United States, 146 U. S. 60, 68, 36 L. Ed. 887.

11. Hardy *v.* United States, 186 U. S. 224, 46 L. Ed. 1137.

12. Costs in general.—Du Bois *v.* Kirk, 158 U. S. 58, 39 L. Ed. 895, citing Canter *v.* American Ins. Co., 3 Pet. 307, 7 L. Ed. 688; The Malek Adhel, 2 How. 210, 11 L. Ed. 239; The Sapphire, 18 Wall. 51, 21 L. Ed. 814; Kittredge *v.* Race, 92 U. S. 116, 23 L. Ed. 488; Citizens' Bank *v.* Cannon, 164 U. S. 319, 41 L. Ed. 451; Elastic Fabric Co. *v.* Smith, 100 U. S. 110, 25 L. Ed. 547; Paper-Bag Machine Cases, 105 U. S. 766, 26 L. Ed. 959; Wood *v.* Weimar, 104 U. S. 786, 26 L. Ed. 779; Russell *v.* Farley, 105 U. S. 433, 437, 26 L. Ed. 1060; Burns *v.* Rosenstein, 135 U. S. 449, 34 L. Ed. 193; City Bank *v.* Hunter, 152 U. S. 512, 38 L. Ed. 534.

This court has held, in several cases, that an appeal does not lie from a decree for costs; and if an appeal be taken from a decree upon the merits, and such decree be affirmed with respect to the merits, it will not be reversed upon the question of costs. Elastic Fabric Co. *v.* Smith, 100 U. S. 110, 112, 25 L. Ed. 547; Paper-Bag Machine Cases, 105 U. S. 766, 772, 26 L. Ed. 959; Wood *v.* Weimar, 104 U. S. 786, 792, 26 L. Ed. 779; Russell *v.* Farley, 105 U. S. 433, 437. Du Bois *v.* Kirk, 158 U. S. 58, 67, 39 L. Ed. 895; Canter *v.* American Ins. Co., 3 Pet. 307, 7 L. Ed. 688.

This court will not disturb the action of the court below in awarding a party full costs, notwithstanding that, in the report of the master and in the final decree, he was awarded only nominal damages. Du Bois *v.* Kirk, 158 U. S. 58, 39 L. Ed. 895, distinguishing Dobson *v.* Hartford Carpet Co., 114 U. S. 439, 29 L. Ed. 177; Dobson *v.* Dornam, 118 U. S. 10, 30 L. Ed. 63.

Where letters patent expired before the final determination of the suit brought by the patentee complaining of the infringement of them, and letters had been reissued in separate divisions, and the patentee filed in the patent office a disclaimer in regard to one of them, after bringing a suit for the infringement of the others, the validity of which was sustained, and the fact of infringement found by the court below; held, that § 4922, Rev. Stat., as to costs after a disclaimer, has no application to the case, and that he is entitled to costs. Elastic Fabric Co. *v.* Smith, 100 U. S. 110, 25 L. Ed. 547.

Extent of reversal.—The decree of the circuit court directed two of the defendants, in whom was the legal title to the lot of ground claimed by the plaintiff in the bill, to convey the same; and awarded costs, generally, against all the defendants; all the defendants appealed together to this court, some of whom held the legal title to the lot, and all the defendants had an interest in defending this title, standing as they did in the relation of vendors and warrantors, and vendees. Although the defendants, against whom there is a decree for costs only, could not appeal from this decree for costs; yet, the reversal of the decree of the circuit court was made general, as to all of the appellants, and the whole case opened. Findlay *v.* Hinde, 1 Pet. 241, 7 L. Ed. 128.

13. In re City Nat. Bank, 153 U. S. 246, 38 L. Ed. 705, citing City Bank *v.* Hunter, 152 U. S. 512, 38 L. Ed. 534.

14. Trustees *v.* Greenough, 105 U. S. 527, 26 L. Ed. 1157; The Scotland, 118 U. S. 507, 519, 30 L. Ed. 153, citing Benedict's Adm., § 549.

Costs in the admiralty are in the sound discretion of the court; and no appellate court should interfere with that discretion, unless under peculiar circumstances. United States *v.* Adhel, 2 How. 210, 11 L. Ed. 239.

15. Allowance of interest and costs in admiralty cases.—The Maggie J. Smith, 123 U. S. 349, 356, 31 L. Ed. 175.

Limitations of General Rule.—But though as a general rule, an appeal will not lie in a matter of costs alone, yet such appeals have been sustained in particular circumstances, as, for instance, where the costs have been directed to be paid out of a trust fund. In Trustees *v.* Greenough, 105 U. S. 527, 26 L. Ed. 1157, this court said, through Mr. Justice Bradley, that the objection to an appeal on the ground of its being from a decree for costs only, is untenable. Where an appeal is taken on other grounds as well, and not on the sole ground that costs were wrongfully awarded, this court can determine whether a circuit court, dismissing a suit for want of jurisdiction, can give a decree for costs, including a fee to the defendants' counsel in the nature of a penalty.[16] In like manner, when the entire case is before the appellate court, it has control of the subject of costs, as well as of the merits.[17]

10. Allowance of Counsel Fees and Damages.—No error can be assigned to the action of the court below in the allowance of solicitor's fees. The amount of such fees is within the judicial discretion of the court, and in fixing that amount, the trial court may proceed upon its own knowledge of the value of the solicitor's services.[18]

Allowance of Fees to District Attorneys.—The discretionary fee that "may be allowed" to a district attorney for securing a conviction in a case of indictment for a crime tried by a jury, is none the less an incident to the trial and judgment because its allowance is contingent upon a conviction. Both before and since the enactment of the statute of 1853, courts in the exercise of their discretion have allowed counsel fees in many cases without question when reviewed by this court.[19]

The allowance of an increase of damages, under the statute, to the plaintiff in a suit for the infringement of letters patent, rests somewhat in the discretion of the court below, and its finding on this point will not be disturbed unless the evidence clearly demands it.[20]

11. Dismissal and Nonsuit.—It has been repeatedly decided that the exercise of the discretion of the court below in refusing to reinstate cases after nonsuit, affords no ground for writ of error.[21]

12. Election between Counts in Indictment.—An error cannot be assigned to a refusal of the court to compel an election on the part of the state as

16. Limitations of general rule.—Citizens' Bank *v.* Cannon, 164 U. S. 319, 323, 41 L. Ed. 451.

Ordinarily a decree will not be reviewed by this court on a question of costs merely in a suit in equity, although the court has entire control of the matter of costs, as well as the merits, when it has possession of the cause on appeal from the final decree. But when the case is not one of personal costs, in which the court has ordered one party to pay them, but a case in which the court has directed them to be paid out of a particular fund, an appeal lies on the part of those interested in the fund. Trustees *v.* Greenough, 105 U. S. 527, 26 L. Ed. 1157, reaffirmed in Williams *v.* Morgan, 111 U. S. 684, 699, 28 L. Ed. 559, cited in The Scotland, 118 U. S. 507, 30 L. Ed. 153; Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207, 224, 34 L. Ed. 97; Citizens' Bank *v.* Cannon, 164 U. S. 319, 323, 41 L. Ed. 451.

17. Trustees *v.* Greenough, 105 U. S. 527, 26 L. Ed. 1157; The Scotland, 118 U. S. 507, 30 L. Ed. 153.

18. Allowance of counsel fees and damages.—Harrison *v.* Perea, 168 U. S. 311, 42 L. Ed. 478, citing Trustees *v.* Greenough, 105 U. S. 507, 527, 30 L. Ed. 153; Fowler *v.* Equitable Trust Co., 141 U. S. 411, 35 L. Ed. 794.

19. In The Apollon, 9 Wheat. 362, 379, 6 L. Ed. 111, and in Canter *v.* American Ins. Co., 3 Pet. 307, 319, 7 L. Ed. 688, the allowance of counsel fees by the court below was affirmed by this court as a matter within the sound discretion of the court before whom the cause was tried; and those decisions were cited with approval in Elastic Fabric Co. *v.* Smith, 100 U. S. 110, 25 L. Ed. 547 and Paper-Bag Machine Cases, 105 U. S. 766, 772, 26 L. Ed. 959; United States *v.* Waters, 133 U. S. 268, 212, 33 L. Ed. 594.

20. Topliff *v.* Topliff, 145 U. S. 156, 157, 36 L. Ed. 658.

21. Dismissal and nonsuit.—United States *v.* Beauford, 3 Pet. 12, 31, 7 L. Ed. 585; United States *v.* Evans, 5 Cranch 280, 3 L. Ed. 101; Marine Ins. Co. *v.* Hodgson, 6 Cranch 206, 3 L. Ed. 200; Spencer *v.* Lapsley, 20 How. 264, 15 L. Ed. 902; Welch *v.* Mandeville, 7 Cranch 152, 3 L. Ed. 299.

to which of two counts in the indictment it would proceed, because the question whether the prosecution should be compelled to elect is a matter purely within the discretion of the court below.[22]

13. EVIDENCE—a. *Order of Proof.*—The order in which testimony shall be admitted is largely within the discretion of the trial court.[23]

The refusal of the court in a patent case to permit further evidence to support defendant's contention as to the question of novelty, the court stating that it had heard sufficient evidence to enable it to understand the operation of the different devices, cannot be assigned for error, because it is discretionary with the court whether to admit further evidence or not, where the defendant has already had an opportunity to give it.[25]

b. *Admission or Rejection of Evidence.*—**In General.**—If the rejection of evidence is a matter resting in the sound discretion of the court, this cannot be assigned as error.[26] Offers of proof must be offers of relevant proof, specific, not so broad as to embrace irrelevant and immaterial matter, and made in good faith. The exercise of the discretion of the trial court in rejecting general offers cannot properly be reviewed by us.[27]

Circumstantial Evidence.—It is familiar law that where a case rests upon circumstantial evidence, much discretion is left to the trial court and its ruling will be sustained if the testimony which is admitted tends even remotely to establish the ultimate fact.[28]

22. Election between counts in indictment.—Pierce *v.* United States, 160 U. S. 355, 40 L. Ed. 454; Pointer *v.* United States, 151 U. S. 396, 38 L. Ed. 208.

23. Order of proof.—Thiede *v.* Utah Territory, 159 U. S. 510, 519, 40 L. Ed. 237; Johnston *v.* Jones, 1 Black 210, 227, 17 L. Ed. 117.

All questions as to reopening a case, as to order of proof, are matters of discretion not reviewable. Ames *v.* Quimby, 106 U. S. 342, 27 L. Ed. 100.

The mode of conducting trials, the order of introducing evidence, and the times when it is to be introduced, are properly matters belonging to the practice of the circuit courts, with which the supreme court ought not to interfere; unless it shall choose to prescribe some fixed general rules on the subject, under the authority of the act of congress. The circuit courts possess this discretion in as ample a manner as other judicial tribunals. Philadelphia, etc., R. Co. *v.* Stimpson, 14 Pet. 448, 10 L. Ed. 535.

A judgment will not be reversed because of an error of the court in directing as to the order in which testimony shall be introduced, unless it clearly appears that the complaining party has been injured by what was done. Clark *v.* Fredericks, 105 U. S. 4, 5, 26 L. Ed. 938.

No error, or ground of appeal, can be assigned upon the refusal of the court below to refer the cause back to the master for the purpose of reopening the proofs. We think that that matter was fairly addressed to the discretion of the court, and cannot properly be made the ground of objection on this appeal. Thomson *v.* Wooster, 114 U. S. 104, 118, 29 L. Ed. 105.

"The government called a witness in rebuttal, who was examined as to the presence of the defendant at a particular place, at a particular time, to rebut testimony which had been offered by the defendant to prove the alibi upon which he relied. This testimony was objected to on the ground that the proof was not proper rebuttal. The court ruled that it was, and allowed the witness to testify. It was obviously rebuttal testimony; however, if it should have been more properly introduced in the opening, it was purely within the sound judicial discretion of the trial court to allow it, which discretion, in the absence of gross abuse, is not reviewable here. Wood *v.* United States, 16 Pet. 342, 361, 10 L. Ed. 987; Johnston *v.* Jones, 1 Black 210, 227, 17 L. Ed. 117." Goldsby *v.* United States, 160 U. S. 70, 74, 40 L. Ed. 343.

Error cannot be assigned to the action of the court in sustaining an objection to a question propounded upon cross-examination, on the ground that it was not within the scope of the direct examination, because the order in which evidence shall be produced is within the discretion of the trial court, and as the matter sought to be elicited on the cross-examination was not offered at any subsequent stage of the trial, no prejudicial error was committed by the ruling complained of. Putnam *v.* United States, 162 U. S. 687, 40 L. Ed. 1118.

25. St. Louis Plow Works *v.* Starling, 140 U. S. 184, 35 L. Ed. 404.

26. Admission or rejection of evidence in general.—Philadelphia, etc., R. Co. *v.* Stimpson, 14 Pet. 448, 10 L. Ed. 535.

27. Central Pacific R. Co. *v.* California, 162 U. S. 91, 117, 40 L. Ed. 903.

28. Circumstantial evidence.—Alexander *v.* United States, 138 U. S. 353, 34 L.

Declarations and Admissions.—The extent to which a declaration made by one of two or more persons associated together for the same illegal purpose, is admissible in evidence against the others, is in the discretion of the trial court, and is not reviewable except in case of manifest abuse.[29]

Experiments in Evidence.—The granting or refusing of a request made in the midst of a criminal trial, to make an experiment, as, for example, a request for the permission of the court to take the gun out with which the killing was done, and shoot it off in the presence of a deputy marshal, in order to test how it threw shot, where such fact was material to be proved, is clearly within the discretion of the court.[30]

Expert Testimony.—As in the case of all witnesses, the question of the admissibility of expert testimony is one within the discretion of the trial court, and that decision will not be disturbed except in a case of manifest abuse.[31]

c. *Manner of Taking Down Testimony.*—The manner of taking down testimony in the court below cannot be assigned as error. Generally speaking, matters of practice in inferior courts do not constitute subjects upon which error can be assigned in the appellate court.[32]

d. *Witnesses.*—The right to summon witnesses at the expense of the government is by the statute, Rev. Stat., § 878, left to the discretion of the trial court, and the exercise of such discretion is not reviewable here.[33]

The extent to which the power of cross-examination may be carried must necessarily be guided and limited by the discretion of the court trying a cause, and the exercise of this discretion by a circuit court cannot be made the subject of review by this court.[34] Since the extent and manner of cross-examination is necessarily within the discretion of the court, even though it extends to matters not connected with the examination in chief, such decision is not reviewable.[35]

To Test Credibility of Witness.—The extent to which a cross-examination may be allowed to test the accuracy or credibility of a witness—especially where the question has no reference to any matter disclosed by the examination-in-chief—is largely subject to the sound discretion of the trial court, and the exercise of that discretion is not reviewable upon writ of error; certainly not where the question, upon its face, suggests nothing material to the inquiry

Ed. 954; Holmes *v.* Goldsmith, 147 U. S. 150, 37 L. Ed. 118; Moore *v.* United States, 150 U. S. 57, 37 L. Ed. 996; Thiede *v.* Utah Territory, 159 U. S. 510, 40 L. Ed. 237; Wiborg *v.* United States, 163 U. S. 632, 658, 41 L. Ed. 289; Clune *v.* United States, 159 U. S. 590, 592, 593, 40 L. Ed. 269.

29. Declarations and admissions.—Wiborg *v.* United States, 163 U. S. 632, 41 L. Ed. 289.

30. Experiments in evidence.—United States *v.* Ball, 163 U. S. 662, 41 L. Ed. 300.

31. Expert testimony.—Gila Valley, etc., R. Co. *v.* Lyon, 203 U. S. 465, 51 L. Ed. 276, citing Congress, etc., Spring Co. *v.* Edgar, 99 U. S. 645, 648, 25 L. Ed. 487; Chateaugay Ore and Iron Co. *v.* Blake, 144 U. S. 476, 36 L. Ed. 510.

32. Manner of taking down testimony.—Parsons *v.* Bedford, 3 Pet. 433, 7 L. Ed. 732.

33. Witnesses.—Crumpton *v.* United States, 138 U. S. 361, 364, 34 L. Ed. 959; Goldsby *v.* United States, 160 U. S. 70, 73, 40 L. Ed. 343.

34. Johnson *v.* Jones, 1 Black 210, 17 L. Ed. 117; Philadelphia, etc., R. Co. *v.* Simpson, 14 Pet. 448, 10 L. Ed. 535.

35. Davis *v.* Coblens, 174 U. S. 719, 727, 43 L. Ed. 1147.

In Rea *v.* Missouri, 17 Wall. 532, 21 L. Ed. 707, it was said: "Where the cross-examination is directed to matters not inquired about in the principal examination, its course and extent are very largely subject to the control of the court in the exercise of a sound discretion; and the exercise of that discretion is not reviewable on a writ of error." Davis *v.* Coblens, 174 U. S. 719, 727, 43 L. Ed. 1147.

Although a greater latitude is allowable in the cross-examination of a party who places himself on the stand, than in that of other witnesses, still, where the cross-examination is directed to matters not inquired about in the principal examination, its course and extent are very largely subject to the control of the court in the exercise of a sound discretion; and the exercise of that discretion is not reviewable on a writ of error. Rea *v.* Missouri, 17 Wall. 532, 21 L. Ed. 707.

whether the defendant is guilty or not guilty of the specific offense charged in the indictment.[36]

Questions regarding the age, antecedents, business, and experience of a witness are largely within the discretion of the court, and unless it manifestly appears that such questions are put for an improper purpose, such discretion is not reviewable on error.[37]

Likewise, how much knowledge a witness must possess before a party is entitled to his opinion as an expert is a matter which, in the nature of things, must be left largely to the discretion of the trial court, and its ruling thereon will not be disturbed unless clearly erroneous.[38]

The allowance of a leading question is within the discretion of the court, and is no ground for reversal.[39] It cannot be safely said that, in no case, can a court of errors take notice of an exception to the conduct of the trial court in permitting leading questions. But such conduct must appear to be a plain case of the abuse of discretion.[40]

Recalling Witnesses.—No error can be assigned to a refusal of the trial court to permit a witness who has been examined and cross-examined to be recalled in order to make some change in the statements made by him on cross-examination, because this is plainly a matter within the discretion of the court below.[41]

e. *Interpreters.*—The refusal of the court to appoint an interpreter cannot be assigned as error, unless it appears from the answer made by the witness that there was an abuse of such discretion, because this is a matter largely resting in the discretion of the trial court.[42]

f. *Demurrer to the Evidence.*—A demurrer to the evidence being a matter resting in the discretion of the trial court, the action of that court in overruling such a demurrer is not assignable for error.[42a]

14. FINES.—Section 725 of the Revised Statutes which provides that the courts of the United States shall have power to punish "by fine or imprisonment, at the discretion of the court, contempts of their authority," provided that such power "shall not be construed to extend to any cases except * * * the disobedience by * * * any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts," does not make the action of the circuit court such a matter of discretion that its orders imposing fines are not reviewable.[43]

15. INDICTMENTS.—**Motion to File Printed Matter in Indictment.**—Applications to compel a prosecutor to file a copy of the printed matter alleged in an indictment should ordinarily be granted, wherever the accused is liable to be surprised by the evidence for which he is unprepared. But as the application is one addressed to the discretion of the court, its action thereon is not subject to review where this court cannot see that the defendant was prejudiced by its refusal.[44] No error can be assigned to the action of the court in refusing to require the district attorney on motion to file the printed matter alleged in an

36. To test credibility of witness.—Blitz *v.* United States, 153 U. S. 308, 312, 38 L. Ed. 725.

37. Cochran *v.* United States, 157 U. S. 286, 291, 39 L. Ed. 704.

38. Stillwell & Bierce Mfg. Co. *v.* Phelps, 130 U. S. 520, 32 L. Ed. 1035; Montana R. Co. *v.* Warren, 137 U. S. 348, 34 L. Ed. 681; Inland, etc., Coasting Co. *v.* Tolson, 139 U. S. 551, 35 L. Ed. 270; Chateaugay Iron Co. *v.* Blake, 144 U. S. 476, 484, 36 L. Ed. 510.

39. Northern Pac. R. Co. *v.* Urlin, 158 U. S. 271, 273, 39 L. Ed. 977.

40. Northern Pac. R. Co. *v.* Urlin, 158 U. S. 271, 273, 39 L. Ed. 977.

41. Recalling witnesses.—Faust *v.* United States, 163 U. S. 452, 41 L. Ed. 224.

42. Interpreters.—Perovich *v.* United States, 205 U. S. 86, 51 L. Ed. 722.

42a. Demurrer to the evidence.—Stone *v.* Stillwell Mfg. Co., 142 U. S. 128, 35 L. Ed. 961, citing Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978.

43. Fines.—Worden *v.* Searls, 121 U. S. 14, 30 L. Ed. 853.

44. Indictments.—Rosen *v.* United States, 161 U. S. 29, 40 L. Ed. 606; Dunlop *v.* United States, 165 U. S. 486, 41 L. Ed. 799.

indictment to be obscene, lewd, lascivious and indecent for the purpose of enabling the defendant to demur to, the indictment, if it is nowhere stated that he designed it for the purpose of demurring to the indictment, more especially where if it had been furnished it would not have been the subject of demurrer, since it is no part of the record. It shows the application is one addressed to the discretion of the court and its action thereon is not subject to review.[45] Whether the matter was too obscene to be set forth in the record is a matter primarily to be considered by the district attorney in preparing the indictment; and, in any event it is within the discretion of the court to say whether it is fit to be spread upon the record or not. Therefore error will not lie to the action of the court in this particular.[46]

16. INJUNCTIONS.—Granting or dissolving a temporary injunction, rests in the sound discretion of the court, and furnishes no ground for an appeal.[47]

17. INTEREST.—This court will not interfere by modifying a decree with regard to the rate of interest charged against a defendant, because it is to a certain extent discretionary with the court below.[48]

18. INTERVENTION.—The action of the court below in denying an application to intervene and file a petition in a cause is not reviewable by this court, because it involves an exercise of discretion vested in the court below.[49] When leave to intervene in an equity case is asked and refused, the rule is well settled that the order thus made denying leave to intervene is not regarded as a final determination of the merits of the claim on which the intervention is based, but leaves the petitioner at full liberty to assert his rights in any other appropriate form of proceeding. Such an order not only lacks the finality which is necessary to support an appeal, but it is usually said of it that it cannot be reviewed, because it merely involves an exercise of the discretionary powers of the trial court.[50] It is doubtless true that cases may arise where the denial of a third party to intervene therein would be a practical denial of certain relief to which the intervenor is fairly entitled, and which he can only obtain by an intervention. Cases of this sort are those where there is a fund in court undergoing administration to which a third party

45. Dunlop *v.* United States, 165 U. S. 486, 41 L. Ed. 799.

46. Dunlop *v.* United States, 165 U. S. 486, 41 L. Ed. 799.

47. Injunctions.—Buffington *v.* Harvey, 95 U. S. 99, 24 L. Ed. 381.

48. Interest.—Harrison *v.* Perea, 168 U. S. 311, 42 L. Ed. 478.

49. Intervention.—Central Trust Co. *v.* Grant Locomotive Works, 135 U. S. 207, 34 L. Ed. 97; Buffington *v.* Harvey, 95 U. S. 99, 24 L. Ed. 381; Brockett *v.* Brockett, 2 How. 238, 11 L. Ed. 251; Mellen *v.* Moline Iron Works, 131 U. S. 352, 33 L. Ed. 178.

50. Credits Commutation Co. *v.* United States, 177 U. S. 311, 315, 44 L. Ed. 782.

In Connor *v.* Peugh, 18 How. 394, 15 L. Ed. 432, it was said by Mr. Justice Grier, giving the opinion of the court: "On the 5th of June, 1855, the tenant in possession came into court for the first time, and moved to set aside the judgment and execution issued thereon, and to be allowed to defend the suit for reasons set forth in her affidavit. The court refused to grant this motion, 'whereupon the said Mary Ann Connor prayed an appeal.' The tenant in possession having neglected to appear and have herself made defendant and confess lease, entry and ouster the judgment was properly entered against the casual ejector. No one but a party to the suit can bring a writ of error. The tenant having neglected to have herself made such, cannot have a writ of error to the judgment against the casual ejector. The motion made afterwards to have the judgment set aside and for leave to intervene was an application to the sound discretion of the court. To the action of the court on such a motion no appeal lies, nor is the subject of a bill of exceptions or a writ of error." Credits Commutation Co. *v.* United States, 177 U. S. 311, 316, 317, 44 L. Ed. 782.

In denying a petition for leave to intervene, the court used the following language: "Ordered, that the prayers of the petitioners for leave to intervene herein be and the same are hereby denied, not as matter of discretion, but because said petitions do not state facts sufficient to show that the petitioners, or either of them, have a legal right to intervene." It was held, that the action of the court below, in denying the petition to intervene, was an exercise of purely discretionary power, and lacks the finality in its character which is necessary to support an appeal. Credits Commutation Co. *v.* United States, 177 U. S. 311, 44 L. Ed. 782.

asserts some right which will be lost in the event that he is not allowed to intervene before the fund is dissipated. In such cases an order denying leave to intervene is not discretionary with the chancellor, and will generally furnish the basis for an appeal, since it finally disposes of the intervenor's claim by denying him all right to relief.[51]

19. JUDGMENTS AND DECREES—a. *Arrest of Judgment.*—It is a well-settled rule that this court will not overrule or even canvass a decision of the court below overruling a motion for an arrest of judgment.[52]

b. *Opening, Amending and Vacating*—(1) *Opening.*—An appeal will not lie from the refusal of a circuit court to open its decree.[53] Likewise, the action of the court below in granting or refusing an application to open a default is not subject to revision, because it is a matter resting in the discretion of that court.[54]

(2) *Amending.*—The authority of a court to amend a judgment, by causing it to be entered nunc pro tunc, is discretionary, and cannot be reviewed by an appellate court.[55]

(3) *Vacating.*—**In General.**—And neither an appeal nor writ of error will lie from the refusal of the court below to vacate a judgment or decree. The decision of such a motion rests in the sound discretion of the trial court.[56] Set-

51. Credits Commutation Co. *v.* United States, 177 U. S. 311, 315, 316, 44 L. Ed. 782.

52. Arrest of judgment.—Leitensdorfer *v.* Webb, 20 How. 176, 181, 15 L. Ed. 891. When to a declaration two special pleas are interposed, each setting up substantially the same defense, and by the replication to one issue is joined on the merits, and by the replication to the other an immaterial issue is formed, and upon the trial all the issues are found for the plaintiff, it is a matter of discretion in the court whether to arrest the judgment for the verdict on the immaterial issue and award a repleader, with which this court will not interfere. Erskine *v.* Hohnbach, 14 Wall. 613, 614, 20 L. Ed. 745.

53. Opening.—McMicken *v.* Perin, 18 How. 507, 15 L. Ed. 504; Brockett *v.* Brockett, 2 How. 238, 11 L. Ed. 251.

No appeal lies from the refusal of the court below to open a former decree as it rests merely in the sound discretion of the court below. But if the court entertains a petition to open a decree, the time limited for an appeal does not begin to run until the refusal to open it, the same term continuing. Brockett *v.* Brockett, 2 How. 238, 11 L. Ed. 251.

Brockett v. Brockett distinguished.—An appeal will not lie to this court from a refusal of the court below to open a prior decree, and grant a rehearing. The decision of this point rests entirely in the sound discretion of the court below. "The case of Brockett *v.* Brockett, 2 How. 238, 240, 11 L. Ed. 251, which was relied on in the argument, was decided on different ground. In that case, before any appeal was taken, a petition was filed to open the decree for certain purposes, and the court referred it to a commissioner to examine and report on the matters stated in the petition. Upon his report, the court refused to open the decree, and the party thereupon appealed from this refusal, as well as the original decree, and gave bond, with sufficient security, to prosecute the appeal. This bond was given within ten days of the refusal of the motion, but was more than a month after the original decree. And the court held that this appeal was well taken; not because an appeal will lie from the refusal of a motion to open the decree and grant a rehearing, but because the court regarded the original decree as suspended by the action of the court on the motion, and that it was not effectual and final until the motion was overruled." Wyle *v.* Coxe, 14 How. 1, 14 L. Ed. 301.

54. United States *v.* Estudillo, 1 Wall. 710, 17 L. Ed. 702.

Where, under the statute of June 14, 1860, relating to surveys of Mexican grants in California, notice has been given to all parties having or claiming to have any interest in the survey and location of the claim, to appear by a day designated, and intervene for the protection of their interest, and upon the day designated certain parties appeared, and the default of all other parties was entered; the opening of such default with respect to any party subsequently applying for leave to appear and intervene, is a matter resting in the discretion of the district court, and its action on the subject is not open to revision on appeal. United States *v.* Estudillo, 1 Wall. 710, 17 L. Ed. 702.

55. Amendments of judgments.—Slicer *v.* Pittsburg Bank, 16 How. 571, 14 L. Ed. 1063, citing Chirac *v.* Reinicker, 11 Wheat. 280, 302, 6 L. Ed. 474; Walden *v.* Craig, 9 Wheat. 576, 6 L. Ed. 164.

56. Vacating.—Wyle *v.* Coxe, 14 How. 1, 14 L. Ed. 301; Connor *v.* Peugh, 18 How. 394, 15 L. Ed. 432; Raub *v.* Carpenter, 187 U. S. 159, 47 L. Ed. 119.

"A motion, even if made within the time prescribed by the rule, to set aside a judgment, is addressed to the discretion of the trial court, and where the exercise of

ting aside a default, like a motion for a new trial, lies entirely in the discretion of the trial court, and is not reviewable.[57]

Limitations of General Rule.—Although the general rule is that is that it is not within the power of this court to review a judgemnt or a decree of the court below vacating or refusing to vacate its judgment, because such matter is within the discretion of the court below, yet this rule does not apply to an order of the court vacating a judgment after the term is ended, because such an order is necessarily made without jurisdiction on the part of the court making it, and therefore is a proceeding which is the subject of review by an appellate court. The reason of this ruling is that after a term has ended, all final judgments and decrees of the court pass beyond its control, unless steps be taken during that term, by motion or otherwise, to set aside, modify or correct them; and if errors exist, they can only be corrected by such proceeding, by a writ of error or appeal, as may be allowed in the court which, by law, can review the decision; and the supreme court of the District of Columbia comes within this rule, such court having no more power over its judgment rendered at a previous term of the court than any other judicial tribunal.[58]

c. *Motion and Order for Judgment.*—The action of a circuit court, relative to a motion and order for judgment, is a matter within the circuit court's discretion, and not a subject for review here.[59]

20. Judicial Sales.—An act of the court in refusing to confirm or complete a judicial sale is not entirely within its discretion, and therefore may be reviewed here.[60]

21. Jury.—**Withdrawal of Jurors.**—Where a juror is discharged, and the court orders another to be sworn and proceeds with the trial, it was held, that it rested in the discretion of the court whether the withdrawal of a juror should be treated simply as occasioning a vacancy on a still-existing panel, or as breaking up the panel altogether, and it being a matter of discretion, no error could be assigned upon it, even if there were reason to believe that the discretion was not wisely exercised.[61]

Opinions as Disqualifying Jurors.—Upon the trial of the issue of fact raised by "a challenge to a juror, in a criminal case, on the ground that he had formed and expressed an opinion as to the issues to be tried," the court will practically be called upon to determine whether the nature and strength of the opinion formed are such as in law necessarily raise the presumption of partiality.

that discretion has been approved by the supreme court of the territory, we should not feel disposed to overrule those courts, unless misuse or abuse of discretionary power plainly appeared; and we cannot say that this is such a case. Even if we could regard this not as a mere application under the rule to vacate a judgment, but as a proceeding of an equitable character outside of the rule, we should be compelled to reach the same conclusion." Rio Grande Irrigation, etc., Co. *v.* Gildersleeve, 174 U. S. 603, 609, 43 L. Ed. 1103.

Where, after a final decree on the merits had been rendered upon the report of the receiver and upon the reports of the master to whom it had been referred, all of which had been confirmed without exception, the complainant filed a petition supported by his affidavit asserting that his solicitor had deserted his interests, failed to except to the reports, and improperly consented to the decree, held, that this court cannot consider the alleged errors in the reports of the master, or review the action of the court below in refusing to set aside the decree upon an application addressed mainly to its discretion. Terry *v.* Commercial Bank of Alabama, 92 U. S. 454, 23 L. Ed. 620.

57. Ex parte Roberts, 6 Pet. 216, 8 L. Ed. 375.

This court has no power to re-examine the action of the territorial courts in refusing to set aside a judgment by default. McAllister *v.* Kuhn, 96 U. S. 87, 90, 24 L. Ed. 615.

58. Phillips *v.* Negley, 117 U. S. 665, 29 L. Ed. 1013.

59. Motion and order for judgment.—Cheang-Kee *v.* United States, 3 Wall. 320, 17 L. Ed. 72.

60. Judicial sales.—Blossom *v.* Milwaukee, etc., R. Co., 1 Wall. 655, 17 L. Ed. 673, citing Delaplaine *v.* Lawrence, 10 Paige Ch. (N. Y.) 602.

61. Jury.—Silsby *v.* Foote, 14 How. 218, 14 L. Ed. 394.

The question thus presented is one of mixed law and fact, and to be tried, as far as the facts are concerned, like any other issue of that character, upon the evidence. The finding of the trial court upon that issue ought not to be set aside by a reviewing court, unless the error is manifest. It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the "conscience or discretion" of the court.[62] If such is the degree of strictness which is required in the ordinary cases of writs of error from one court to another in the same general jurisdiction, it certainly ought not to be relaxed in a case where the ground relied on for the reversal by this court of a judgment of the highest court of the state is, that the error complained of is so gross as to amount in law to a denial by the state of a trial by an impartial jury to one who is accused of crime.[63]

The action of the court in recalling the jury, must be left to the sound discretion of the trial court, and if there is nothing in the record to show that the court abused this discretion, such action cannot be held to be error sufficient to reverse the judgment.[64]

22. Lost Instruments and Records.—"Nothing can be more certain, in legal decision, than the proposition that an application to supply a lost writ, declaration, or other pleading, if accompanied by proof of loss, is in general addressed to the discretion of the court, and it is well-settled law, that decisions which rest in the discretion of a court of original jurisdiction, cannot be re-examined in an appellate court upon a writ of error."[65]

23. Mandamus.—An order granting or refusing a mandamus is discretionary and not appealable.[66]

24. Decisions on Motions—a. *In General.*—It has uniformly been held that error will not lie, without a statutory provision, on a motion for a new trial, to amend the pleadings, or any other motion which depends upon the discretion of the court.[67] And an order of a supreme court of a territory affirming an order of a district court, by which a motion to set aside a sheriff's return to an execution was allowed, and an alias execution awarded, is within the discretion of the inferior court.[68] There are cases, however, in which this court has taken cognizance of questions directly affecting the merits of the cause, even though arising in form, upon motions determinable at discretion.[69]

b. *Motion to Quash Execution or Indictment.*—As a motion to quash an execution is always addressed to the sound discretion of the court, a decision upon it is not error, and cannot be reviewed on a writ of error.[70]

62. Reynolds *v.* United States, 98 U. S. 145, 156, 25 L. Ed. 244.

63. Spies *v.* Illinois, 123 U. S. 131, 179, 31 L. Ed. 80.

64. Allis *v.* United States, 155 U. S. 117, 39 L. Ed. 91.

65. Lost instruments and records.—Liter *v.* Green, 2 Wheat. 306, 4 L. Ed. 246; Silsby *v.* Foote, 14 How. 218, 14 L. Ed. 394; Morsell *v.* Hall, 13 How. 212, 14 L. Ed. 117; United States *v.* Buford, 3 Pet. 12, 7 L. Ed. 585; Jenkins *v.* Banning, 23 How. 455, 16 L. Ed. 580; Mandeville *v.* Wilson, 5 Cranch 15, 3 L. Ed. 23; Spencer *v.* Lapsley, 20 How. 264, 15 L. Ed. 902; Cook *v.* Burnley, 11 Wall. 659, 672, 20 L. Ed. 29.

An application to an inferior court to supply a lost record, being matter addressed to its discretion, is not a subject for writ of error. If after a lost record of a case where judgment below has been affirmed, is supplied in the inferior court, final process issue in accordance with the mandate sent to such court on the affirmance, the action of the court in granting such process will not be reviewed here. Cook *v.* Burnley, 11 Wall. 659, 672, 20 L. Ed. 29.

66. Mandamus.—Kendall *v.* United States, 12 Pet. 524, 9 L. Ed. 1181; Columbian Ins. Co. *v.* Wheelright, 7 Wheat. 534, 5 L. Ed. 516.

67. Decisions on motions in general.—McCargo *v.* Chapman, 20 How. 555, 15 L. Ed. 1021.

68. Wells *v.* McGregor, 13 Wall. 188, 20 L. Ed. 538.

69. United States *v.* Wilson, 7 Pet. 150, 8 L. Ed. 640; United States *v.* Chicago, 7 How. 185, 190, 12 L. Ed. 660.

70. Motion to quash execution or indictment.—United States *v.* Hamilton, 109 U. S. 63, 27 L. Ed. 857; Boyle *v.* Zacharie, 6 Pet. 635, 8 L. Ed. 527; Toland *v.* Sprague, 12 Pet. 300, 9 L. Ed. 1093, citing

So, also, a motion to quash an indictment is ordinarily addressed to the discretion of the court, and therefore a refusal to quash cannot generally be assigned for error.[71]

c. *Motion for Stay of Execution.*—The action of the court upon an application to grant a temporary stay of proceedings is usually discretionary, and a refusal of the court to grant such a motion or an order staying proceedings, when addressed to its judicial discretion, will not be reviewed.[72]

d. *Motion for Leave to Discontinue.*—Unless there is an obvious violation of a fundamental rule of a court of equity or an abuse of the discretion of the court, the decision of a motion for leave to discontinue will not be reviewed here.[73]

e. *Motion to Enter Exoneretur of Bail.*—A judgment of a court upon a motion to enter an exoneretur of bail is not the proper subject of a writ of error. It is a collateral proceeding not forming a legal defense to the scire facias but addressing itself to the equitable discretion of the court and founded upon its rules and practice.[74]

25. NEW TRIALS—a. *In General.*—Authorities are numerous to the point that the allowance or refusal of a new trial rests in the sound discretion of the court to which the application is addressed, and the result cannot be made the subject

Boyle *v.* Zacharie, 6 Pet. 635, 8 L. Ed. 527; Wells *v.* McGregor, 13 Wall. 188, 20 L. Ed. 538; Mountz *v.* Hodgson, 4 Cranch 324, 2 L. Ed. 635; McCargo *v.* Chapman, 20 How. 555, 15 L. Ed. 1021.

In the case of Early *v.* Rogers, 16 How. 599, 14 L. Ed. 1074, it is said: "Whether a court will quash an execution on account of proceedings against the debtor, as the garnishee of the creditor, is a question appealing to the discretion of the court below, and a court of error cannot revise its decision thereon." McCargo *v.* Chapman, 20 How. 555, 15 L. Ed. 1021.

And in Boyle *v.* Zacharie, 6 Pet. 635, 8 L. Ed. 527, 532, the court say: "In modern times, courts of law exercise a summary jurisdiction, upon motion, over executions, and quash them, without putting a party to his writ of audita querela; but these motions are addressed to the sound discretion of the court, and their refusal is not a ground for a writ of error." McCargo *v.* Chapman, 20 How. 555, 15 L. Ed. 1021.

In Mountz *v.* Hodgson, 4 Cranch 324, 2 L. Ed. 635, it is said: "A refusal of the court below to quash the execution on motion, is, by some of the judges, supposed not to be a judgment to which a writ of error will lie. Others are of opinion that a writ of error will lie to that decision of the court; but that the writ of error is not to the judgment of the circuit court, but to that of the justices." McCargo *v.* Chapman, 20 How. 555, 15 L. Ed. 1021.

71. United States *v.* Rosenburgh, 7 Wall. 580, 19 L. Ed. 263; United States *v.* Hamilton, 109 U. S. 63, 26 L. Ed. 857; Logan *v.* United States, 144 U. S. 263, 282, 36 L. Ed. 429; Durland *v.* United States, 161 U. S. 306, 314, 40 L. Ed. 709.

72. Motion for stay of execution.—Where the debtor alleged that process of attachment had been laid in his hands as garnishee, attaching the debt which he owed to the creditor in question; and moved the court to stay execution until the rights of the parties could be settled in the state court which had issued the attachment, and the court refused so to do, this refusal is not the subject of review by this court. The motion was addressed to the discretion of the court below, which will take care that no injustice shall be done to any party. Early *v.* Rogers, 16 How. 599, 14 L. Ed. 1075.

73. Motion for leave to discontinue.—Pullman's Palace Car Co. *v.* Central Transportation Co., 171 U. S. 138, 146, 43 L. Ed. 108.

74. Motion to enter exoneretur of bail.—Morsell *v.* Hall, 13 How. 212, 14 L. Ed. 117; United States *v.* Abatoir Place, 106 U. S. 162, 27 L. Ed. 128.

A motion to enter an exoneretur of the bail is no defense to a scire facias, even if sufficient grounds were shown to support the motion (which we do not mean to say was the case in the present instance). It is a collateral proceeding, not forming a legal defense to the scire facias, but addressing itself to the equitable discretion of the court, and founded upon its rules and practice. (Chit. Pl., Am. Ed. 1847, 469). No writ of error will therefore lie upon the decision of a motion of that kind; because a writ of error can bring up nothing but questions of law. It does not bring up questions of equity arising out of the rules and practice of the courts. And the proceedings upon the motion to discharge the bail form no part of the legal record in the proceedings on the scire facias and ought not to have been inserted in the record transmitted to this court. Morsell *v.* Hall, 13 How. 212, 214, 14 L. Ed. 117.

of review by writ of error.[75] In one case Mr. Justice Bradley, in deciding that no error could be assigned upon the refusal of the court below to grant a new

75. **Allowance or refusal of new trial.** —Henderson *v.* Moore, 5 Cranch 11, 3 L. Ed. 22; Newcomb *v.* Wood, 97 U. S. 581, 24 L. Ed. 1085; Mattox *v.* United States, 146 U. S. 140, 147, 36 L. Ed. 917; Reagan *v.* United States, 157 U. S. 301, 311, 39 L. Ed. 709; Blitz *v.* United States, 153 U. S. 308, 312, 38 L. Ed. 725; Wheeler *v.* United States, 159 U. S. 523, 40 L. Ed. 244; Bucklin *v.* United States, 159 U. S. 680, 682, 685, 40 L. Ed. 304; Moore *v.* United States, 150 U. S. 57, 37 L. Ed. 996; Holder *v.* United States, 150 U. S. 91, 37 L. Ed. 1010; Clune *v.* United States, 159 U. S. 590, 591, 40 L. Ed. 269; McLanahan *v.* Universal Ins. Co., 1 Pet. 170, 183, 7 L. Ed. 98; United States *v.* Buford, 3 Pet. 12, 32, 7 L. Ed. 585; Blunt *v.* Smith, 7 Wheat. 248, 5 L. Ed. 446; Pomeroy's Lessee *v.* Bank of Indiana, 1 Wall. 592, 597, 17 L. Ed. 638; Levy *v.* Dangel, 154 U. S. 671, 38 L. Ed. 1093; Ewing *v.* Howard, 7 Wall. 499, 502. 19 L. Ed. 293; Railway Co. *v.* Heck, 102 U. S. 120, 26 L. Ed. 58; Hanna *v.* Mass, 122 U. S. 24, 30 L. Ed. 1117; Addington *v.* United States, 165 U. S. 184, 41 L. Ed. 679; Insurance Co. *v.* Barton, 13 Wall. 603, 20 L. Ed. 708; Doswell *v.* De La Lanzo, 20 How. 29, 15 L. Ed. 824; Smith *v.* Mississippi, 162 U. S. 592, 601, 602, 40 L. Ed. 1082; Ward *v.* Joslin, 186 U. S. 142, 153, 46 L. Ed. 1093; Parsons *v.* Bedford, 3 Pet. 433, 447, 7 L. Ed. 732; Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531; Wabash R. Co. *v.* McDaniel, 107 U. S. 454, 456, 27 L. Ed. 605; Minor *v.* Tillotson, 2 How. 392, 394, 11 L. Ed. 312; Barreda *v.* Silsbee, 21 How. 146, 167, 16 L. Ed. 86; Insurance Co. *v.* Folsom, 18 Wall. 237, 249, 21 L. Ed. 827; Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291, 301, 23 L. Ed. 898; Missouri Pac. R. Co. *v.* Chicago, etc., R. Co., 132 U. S. 191, 32 L. Ed. 309; Fishburn *v.* Chicago, etc., R. Co., 137 U. S. 60, 61, 34 L. Ed. 585; Wilson *v.* Everett, 139 U. S. 616, 6 1, 35 L. Ed. 286; Ætna Ins. Co. *v.* Ward, 140 U. S. 76, 35 L. Ed. 371; New York, etc., R. Co. *v.* Winter, 143 U. S. 60, 75, 36 L. Ed. 71; Van Stone *v.* Stillwell, etc., Mfg. Co., 142 U. S. 128, 134, 35 L. Ed. 961; Ayers *v.* Watson, 137 U. S. 584, 34 L. Ed. 803; Railway Co. *v.* Twombly, 100 U. S. 78, 25 L. Ed. 550; Boogher *v.* Insurance Co., 103 U. S. 90, 97, 26 L. Ed. 310; United States *v.* Buford, 3 Pet. 12, 7 L. Ed. 585; United States *v.* Evans, 5 Cranch 280, 3 L. Ed. 101; Marine Ins. Co. *v.* Hodgson, 6 Cranch 206, 3 L. Ed. 200; Embry *v.* Palmer, 107 U. S. 13, 17, 27 L. Ed. 346; United States *v.* Hodge, 6 How. 279, 12 L. Ed. 437; Brown *v.* Clark, 4 How. 4, 11 L. Ed. 850; Barr *v.* Gratz, 4 Wheat. 213, 4 L. Ed. 553; United States *v.* Daniel, 6 Wheat. 542, 5 L. Ed. 326; Walton *v.* United States, 9 Wheat. 651, 6 L. Ed. 182; Marine Ins. Co. *v.* Young, 5 Cranch 187, 190, 3 L. Ed. 74; Mumford *v.* Wardwell, 6 Wall. 423, 18 L. Ed. 756; Erskine *v.* Hohnbach, 14 Wall. 613, 20 L. Ed. 745; Freeborn *v.* Smith, 2 Wall. 160, 17 L. Ed. 922; Lancaster *v.* Collins, 115 U. S. 222, 29 L. Ed. 373; Crumpton *v.* United States, 138 U. S. 361, 363, 34 L. Ed. 958; Mulhall *v.* Keenan, 18 Wall. 342, 21 L. Ed. 809; Laber *v.* Cooper, 7 Wall. 565, 19 L. Ed. 151; San Antonio *v.* Mehaffy, 96 U. S. 312, 315, 24 L. Ed. 816; Steines *v.* Franklin County, 14 Wall. 15, 20 L. Ed. 846; Warner *v.* Norton, 20 How. 448, 15 L. Ed. 950; Insurance Co. *v.* Barton, 13 Wall. 603, 20 L. Ed. 708; Hills *v.* Ross, 3 Dall. 184, 1 L. Ed. 562; Jennings *v.* The Brig Perseverance, 3 Dall. 336, 1 L. Ed. 625; Woods *v.* Young, 4 Cranch 237, 2 L. Ed. 607; Welch *v.* Mandeville, 7 Cranch 152, 3 L. Ed. 299; Ruch *v.* Rock Island, 97 U. S. 693, 696, 24 L. Ed. 1101; Fitzgerald, etc., Co. *v.* Fitzgerald, 137 U. S. 98, 34 L. Ed. 608; Springer *v.* United States, 102 U. S. 586, 26 L. Ed. 253; Beaupre *v.* Noyes, 138 U. S. 397, 34 L. Ed. 991; Schuchardt *v.* Allens, 1 Wall. 359, 371, 17 L. Ed. 642; Hall *v.* Weare, 92 U. S. 728, 732, 23 L. Ed. 500; Leitensdorfer *v.* Webb, 20 How. 176, 15 L. Ed. 891; Jones *v.* Buckell, 104 U. S. 554, 26 L. Ed. 841; Pittsburg, etc., R. Co. *v.* Heck, 102 U. S. 120, 26 L. Ed. 58; Terre Haute, etc., R. Co. *v.* Struble, 109 U. S. 381, 27 L. Ed. 970; The Abbotsford, 98 U. S. 440, 445, 25 L. Ed. 168; Cooper *v.* Omohundro, 19 Wall. 65, 68, 22 L. Ed. 47; Arkansas Val., etc., Co. *v.* Mann, 130 U. S. 69, 75, 32 L. Ed. 854; Pacific Express Co. *v.* Malin, 132 U. S. 531, 538, 32 L. Ed. 450; Dahl *v.* Raunheim, 132 U. S. 260, 32 L. Ed. 324, affirmed in Dahl *v.* Montana Copper Co., 132 U. S. 264, 32 L. Ed. 325; Bullitt County *v.* Washer, 130 U. S. 142, 145, 32 L. Ed. 885.

A motion for a new trial is always addressed to the discretion of the court, and this court will not control the exercise of that discretion by a circuit court, either by a writ of mandamus or on a certificate of division between the judges. Life & Fire Ins. Co. *v.* Wilson, 8 Pet. 291, 8 L. Ed. 949.

It is settled in Doswell *v.* De La Lanza, 20 How. 29, 15 L. Ed. 824; Henderson *v.* Moore, 5 Cranch 11, 12, 3 L. Ed. 22; Marine Ins. Co. *v.* Hodgson, 6 Cranch 206, 3 L. Ed. 200; Barr *v.* Gratz, 4 Wheat. 213, 220, 4 L. Ed. 553, that this court will not review an order overruling the motion for a new trial. The granting or refusing of new trials is a matter of discretion, with the exercise of which, by the court below, this court will not interfere. The circumstances that the discretion was exercised under a peculiar

trial said, with some show of impatience, "we have only to repeat what we have so often endeavored to impress upon the counsel that error does not lie for granting or refusing a new trial.[76] And if when the final judgment is brought here for review by writ of error, no other documents are presented for consideration than such as were before the inferior court upon the application for a new trial, this court cannot look into them; and, if error is not otherwise disclosed by the record, the judgment will be affirmed.[77]

But where the court below excludes affidavits filed in support of a motion for a new trial, and in passing upon the motion does not exercise any discretion in respect of the matters stated therein, if due exception is taken, the question of the admissibility of the affidavits may be reviewed by this court on writ of error.[78]

statute by an appellate court, and on appeal, cannot withdraw the case from the operation of the principles which control this court. Sparrow *v.* Strong, 3 Wall. 97, 105, 18 L. Ed. 49.

"It is well settled that this court will not revise the opinion of a circuit court, either granting or rejecting a motion for a new trial; but the exception to the charge of the judge, although taken after a motion for a new trial, may have been and probably was reserved at the time the charge was given, and will therefore be considered." Blunt *v.* Smith, 7 Wheat. 272, 5 L. Ed. 446, 452.

"Equally beyond our authority to review, upon a writ of error sued out by a party against whom a verdict is rendered, is an order overruling a motion for a new trial, after the plaintiff, with leave of the court, has remitted a part of the verdict. Whether the verdict should be entirely set aside upon the ground that it was excessive, or was the result of prejudice, or of a reckless disregard of the evidence or of the instructions of the court, or whether the verdict should stand after being reduced to such amount as would relieve it of the imputation of being excessive, are questions addressed to the discretion of the court, and cannot be reviewed at the instance of the party in whose favor the reduction was made." Arkansas Val., etc., Co. *v.* Mann, 130 U. S. 69, 75, 32 L. Ed. 854.

An application for a new trial, on motion after verdict, addresses itself to the sound discretion of the court; and if, upon the whole case, the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed on the trial. The application is not a matter of absolute right, but rests in the judgment of the court, and is to be granted only in furtherance of justice. On a writ of error, bringing the proceedings on the trial, by bill of exceptions, to the cognizance of the appellate court, the directions of the court below must then stand or fall, upon their own intrinsic propriety, as matters of law. M'Lanahan *v.* Universal Ins. Co., 1 Pet. 170, 7 L. Ed. 98, 99.

Settlement of private land claims.—The district court, in the exercise of its jurisdiction, under an act entitled "An act to ascertain and settle the private land claims in the state of California," approved March 3, 1857 (9 Stat. 631), rendered a decree Nov. 12, 1859, rejecting the claim of A. He died Jan. 22, 1869, and his executrix was, by an order of the court entered April 3, 1875, permitted to become the party claimant of the land. She thereupon moved for a new trial and the reversal of the decree. The motion was overruled; and, on the same day, an appeal was allowed her from the decree and from the order refusing a new trial. Held, that no appeal lies from the order refusing a new trial. Cambuston *v.* United States, 95 U. S. 285, 24 L. Ed. 448.

Judgment of affirmance.—This court will not take jurisdiction of a judgment shown by the context of the record to be but an order affirming a refusal of a court below to grant a new trial; even though the language of the record of affirmance brought here by the writ of error purports to affirm generally the judgment of a court inferior to the affirming court, and the only judgment in strict language, in the record of such inferior court, is a general judgment. Sparrow *v.* Strong, 3 Wall 103, 105, 18 L. Ed. 49.

When the judgment brought before this court by writ of error purports to affirm generally the judgment of a court inferior to the affirming court; and the only judgment in the record of such inferior court is a general judgment; this court will take jurisdiction, though an appeal has also been taken in the inferior court, under state laws, upon a motion refusing a new trial, and there are some indications in the record that this affirmance was intended to be of that refusal. Sparrow *v.* Strong, 3 Wall. 103, 105, 18 L. Ed. 49.

76. Ayers *v.* Watson, 137 U. S. 584, 34 L. Ed. 803.

77. Kerr *v.* Clampitt, 95 U. S. 188, 24 L. Ed. 493.

78. Mattox *v.* United States, 146 U. S. 140, 36 L. Ed. 917, distinguished from

b. *Binding Effect of State Practice.*—Furthermore, the rule that according to the practice of the courts of the United States, the overruling of a motion for a new trial is a matter of discretion and not a subject of exception, is independent of any statute or practice prevailing in the courts of the state, in which the trial is had.[79]

c. *Effect of Uniformity Act.*—The fifth section of the act of congress of June 1, 1872 (17 Stat. 197), was not intended to abrogate the established law of the courts of the United States, that to grant or refuse a new trial rests in the sound discretion of the court to which the motion is addressed, and that the result cannot be made the subject of review by writ of error.[80]

d. Rule in Territorial Courts.—Under the practice act of the territory of Utah, an appeal will lie to this court from the refusal of the territorial court to grant a new trial.[81] Under the laws of Nevada, appeals are allowed from orders granting or refusing new trials.[82]

26. OPEN AND CLOSE.—The action of the court below in ordering the argument cannot be assigned as error. It is purely a question of practice and does not affect the merits of the controversy.[83]

Haws *v.* Victoria Copper Min. Co., 160 U. S. 303, 313, 40 L. Ed. 436, on the ground that "that case involved a refusal to exercise discretion, whilst the contention here amounts to the assertion of a right to control a discretion when it has been lawfully exerted."

79. Binding effect of state practice.—Missouri Pac. R. Co. *v.* Chicago, etc., R. Co., 132 U. S. 191, 32 L. Ed. 309, citing Indianapolis, etc., *v.* Horst, 93 U. S. 291, 23 L. Ed. 898; Newcomb *v.* Wood, 97 U. S. 581, 24 L. Ed. 1085; Chateaugay Ore, etc., Co. *v.* Petitioner, 128 U. S. 544, 32 L. Ed. 508.

Ordinarily a writ of error or an appeal will not lie for the purpose of revising and controlling the exercise of the discretion in granting or refusing to grant a motion for a new trial by an appellate tribunal; yet in some of the states a contrary practice prevails, and a writ of error is authorized to bring up for review the proceedings and judgment of an inferior court, on which it may be assigned as an error in law, upon a bill of exceptions setting forth the whole evidence, that the court below erred in not granting a new trial because the verdict was against the weight of the evidence. Such a practice in the appellate courts of the United States is perhaps forbidden by the seventh amendment to the constitution of the United States, declaring that "no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law." Metropolitan R. Co. *v.* Moore, 121 U. S. 558, 573, 30 L. Ed. 1022.

An appeal lies to the general term of the supreme court of the District of Columbia from a denial by that court in special term of a motion for a new trial, made on the ground that the verdict was against the weight of evidence; but the legal discretion of that court respecting the disposition of such a motion is not reviewable in this court. Stewart *v.* Elliott, 2 Mackey 307, overruled on the ground that "the construction of the statute (in that case) overlooks the operation and effect of § 772. By that section an appeal will lie from the special to the general term from any order, judgment, or decree, 'if the same involve the merits of the action or proceeding.' Certainly, motions for a new trial upon grounds other than those recited in § 804 are included in this description." Metropolitan R. Co. *v.* Moore, 121 U. S. 558, 564, 30 L. Ed. 1022.

80. Effect of uniformity act.—Nudd *v.* Burrows, 91 U. S. 426, 23 L. Ed. 286; Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291, 23 L. Ed. 898; Newcomb *v.* Wood, 97 U. S. 581, 24 L. Ed. 1085.

81. Rule in territorial courts.—Gray *v.* Howe, 108 U. S. 12, 27 L. Ed. 634.

By the system of procedure in civil cases adopted in Utah, an appeal lies to its supreme court from an order of its district courts granting or refusing a new trial, as well as from a final judgment. Kerr *v.* Clampitt, 95 U. S. 188, 189, 24 L. Ed. 493.

82. Sparrow *v.* Strong, 4 Wall. 584, 595, 18 L. Ed. 410.

83. Open and close.—Day *v.* Woodworth, 13 How. 363, 14 L. Ed. 181; Hall *v.* Weare, 92 U. S. 728, 23 L. Ed. 500; Lancaster *v.* Collins, 115 U. S. 222, 29 L. Ed. 373.

The decision of a court below, granting counsel the right to open and close arguments to a jury, will not be reviewed here. Hall *v.* Weare, 92 U. S. 728, 23 L. Ed. 500.

Where an action of trespass quare clausum fregit was brought, and the defendants justified, and the court allowed the defendants, upon the trial, to open and close the argument, this ruling of the court is not a proper subject for a bill of exceptions. Day *v.* Woodworth, 13 How. 363, 14 L. Ed. 181.

27. PLEADINGS—a. *Supplemental Pleadings.*—The refusal of the circuit court to permit a supplemental bill or answer to be filed, is a matter of discretion in the court; and it affords no ground for the reversal of the decree.[84]

b. *Allowance of New and Additional Pleas.*—The granting or refusal of leave to file an additional plea is discretionary with the court below, and not reviewable by this court, except in a case of gross abuse of discretion.[85] The refusal of an inferior court to allow a new plea to be filed cannot be assigned as error.[86]

c. *Filing Pleadings.*—**Removal of Causes.**—Whether or not on the transfer of a case from a state court to a federal court, under the 12th section of the judiciary act, a new declaration should be filed, is a question of practice and not a subject for error.[87]

Time of Filing Pleadings.—An order of court refusing to grant further time to effect an answer, is a discretionary order and not appealable.[88] A motion to file an answer after default is generally addressed to the discretion of the court. Under some circumstances, the court, for the purposes of justice, will go great lengths in opening a default and allowing a plea to be filed. But this is done or refused by the court, in the exercise of its discretion, which is not subject to the revision of this court.[90] It is exceedingly disputable whether it is an abuse of discretion to deny a motion to file an amended bill after final judgment has been entered.[91]

Refusal of Leave to File.—Since it is clearly within the discretion of the court below to refuse leave to file a cross bill, such action cannot be assigned as error.[92] An assignment of error that the court erred in refusing leave to file a plea, during the progress of the trial, on the question of the plaintiff's citizenship, and refusing to permit issue to be joined thereon, relates to matters purely within the discretion of the trial court, and is therefore of no avail.[93]

d. *Order to Make More Definite and Certain.*—It would seem that an order directing an answer to be made more specific is one depending upon the discretion of the court, and therefore is not appealable.[94]

e. *Withdrawal and Striking Out Pleadings.*—**Withdrawal of Pleadings.**—In overruling a motion for leave to withdraw a replication and file a new one, the court exercises its discretion; and the reason assigned, as influencing that discretion, cannot affect the decision.[95] It is discretionary with the United States

84. Supplemental pleadings.—Dean *v.* Mason, 20 How. 198, 15 L. Ed. 876; Hardin *v.* Boyd, 113 U. S. 756, 28 L. Ed. 1141; Jones *v.* Mechan, 175 U. S. 1, 28, 44 L. Ed. 49.

85. Allowance of new and additional pleas.—Gormley *v.* Bunyan, 138 U. S. 623, 34 L. Ed. 1086, citing Mandeville *v.* Wilson, 5 Cranch 15, 3 L. Ed. 23; Chapman *v.* Barney, 129 U. S. 677, 32 L. Ed. 800.

Permitting or denying a further answer by a defendant is discretionary with the trial court, and the supreme court of the United States cannot review a judgment of the circuit court exercising such discretion. Vicksburg *v.* Waterworks Co., 202 U. S. 453, 50 L. Ed. 1102; Chapman *v.* Barney, 129 U. S. 677, 681, 32 L. Ed. 800, 801; Dean *v.* Mason, 20 How. 198, 204, 15 L. Ed. 876, 878.

86. Marine Ins. Co. *v.* Hodgson, 6 Cranch 206, 3 L. Ed. 200; Wright *v.* Hollingsworth, 1 Pet. 165, 168, 7 L. Ed. 97; Embry *v.* Palmer, 107 U. S. 3, 17, 27 L. Ed. 346.

The refusal of an inferior court to allow a plea to be amended or a new plea to be filed cannot be questioned for error in this court. Spencer *v.* Lapsley, 20 How. 264, 15 L. Ed. 902.

87. Filing pleadings.—Insurance Co. *v.* Weide, 9 Wall. 677, 19 L. Ed. 810.

88. Fuller *v.* Claflin, 93 U. S. 14, 23 L. Ed. 785.

90. Dean *v.* Mason, 20 How. 198, 15 L. Ed. 878.

After a bill is taken pro confesso in the circuit court, a motion to allow an answer to be filed is addressed to the discretion of the court; and from a refusal so to do, an appeal does not lie to this court. Dean *v.* Mason, 20 How. 198, 15 L. Ed. 876.

91. Brown *v.* Schleier, 194 U. S. 18, 25, 48 L. Ed. 857.

92. Indiana Southern R. Co. *v.* Liverpool, etc., Ins. Co., 109 U. S. 168, 27 L. Ed. 895.

93. Mexican Central R. Co. *v.* Pinkney, 149 U. S. 194, 37 L. Ed. 699.

94. Order to make more definite and certain.—Fuller *v.* Claflin, 93 U. S. 14, 23 L. Ed. 785.

95. Withdrawal and striking out pleadings.—United States *v.* Buford, 3 Pet. 12, 7 L. Ed. 585.

circuit court to permit the withdrawal of intervening pleadings and to suppress evidence taken concerning the same, and such action cannot be reviewed by the supreme court of the United States.[96]

Striking Out Pleadings.—The action of the court below in ordering a plea to be stricken out on the ground that it came too late, is within the discretion of the circuit court, and cannot be revised.[97]

In like manner, an order refusing to strike out an answer is one depending upon the discretion of the court, as mere procedure in the cause and therefore is not appealable.[98] But an order striking out an answer, is not a mere procedure in the cause. It is the ending of the cause, leaving the action undefended and with a right to immediate judgment. Such an order has often been held to be appealable.[99]

28. PROHIBITION.—It is often said that the granting or refusing of a writ of prohibition is discretionary, and therefore not the subject of a writ of error. That may be true, where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court whose action is sought to be prohibited is doubtful, or depends on facts which are not made matter of record, or where a stranger, as he may in E. land, applies for the writ of prohibition. But where that court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as matter of right; and a refusal to grant it, where all the proceedings appear of record, may be reviewed on error. This is the clear result of the modern English decisions, in which the law concerning writs of prohibition has been more fully discussed and explained than in the older authorities.[1]

29. RECEIVERS.—The removal or appointment of a receiver rests in the sound

96. Vicksburg *v.* Waterworks Co., 202 U. S. 453, 50 L. Ed. 1102; Chapman *v.* Barney, 129 U. S. 677, 681, 32 L. Ed. 800, 801; Dean *v.* Mason, 20 How. 198, 204, 15 L. Ed. 876, 878.

97. Burbank *v.* Bigelow, 154 U. S., appx. 558, 19 L. Ed. 51, following Breedlove *v.* Nicolet, 7 Pet. 413, 8 L. Ed. 731.

Where in an action brought by partners, the defendants, after issue taken on pleas in bar of the action, and on the day set for trial, filed a plea averring that others who were also partners with the plaintiffs were not joined, it was held that the action of the court in striking out the plea on the ground that it came too late was discretionary with the court below and would not be revised. Burbank *v.* Bigelow, 19 L. Ed. 51.

After issue joined in the district court, the defendants filed a plea, that the firm of Theodor Nicolet & Company, the plaintiffs, consisted of other persons, in addition to those named in the writ and petition, and that those other persons were citizens of Louisiana; the court, after receiving the plea, directed that it be taken from the files of the court. Held, that this was a proceeding in the discretion of the court; and was not assignable as error, in this court. Breedlove *v.* Nicolet, 7 Pet. 413, 8 L. Ed. 731.

98. Fuller *v.* Claflin, 93 U. S. 14. 23 L. Ed. 785, citing 4 How. Pr. 432.

99. Fuller *v.* Claflin, 93 U. S. 14, 23 L. Ed. 785, citing Mandebaum *v.* The People, 8 Wall. 310, 19 L. Ed. 479; Hozey *v.* Bachan, 16 Pet. 215, 10 L. Ed. 941.

1. Prohibition.—Smith *v.* Whitney, 116 U. S. 167, 173, 29 L. Ed. 601; In re Alix, 166 U. S. 136, 41 L. Ed. 948.

Whether the granting or refusal of the writ of prohibition is discretionary or demandable of right has been much debated. As remarked by Mr. Justice Gray in Smith *v.* Whitney, 116 U. S. 167, 173, 29 L. Ed. 601, it may be said to be discretionary, "where there is another legal remedy, by appeal or otherwise, or where the question of the jurisdiction of the court whose action is sought to be prohibited is doubtful, or depends on facts which are not made matter of record, or where a stranger, as he may in England, applies for the writ of prohibition. But where that court has clearly no jurisdiction of the suit or prosecution instituted before it, and the defendant therein has objected to its jurisdiction at the outset, and has no other remedy, he is entitled to a writ of prohibition as a matter of right; and a refusal to grant it, where all the proceedings appear of record, may be reviewed on error." But it is clear upon reason and authority that where the case has gone to sentence and the want of jurisdiction does not appear upon the face of the proceedings, the granting of the writ, which even if of right is not of course, is not obligatory upon the court, and the party applying may be precluded by acquiescence from obtaining it. In re Cooper, 143 U. S. 472, 495, 36 L. Ed. 232.

discretion of the court, and is not reviewable here.[2]

30. REHEARING.—Since the application for a rehearing is not founded in matter of right but is addressed to the sound discretion of the court, the exercise of that discretion cannot be assigned for error or reviewed in an appellate court.[3] Or, as the rule has been otherwise expressed, a petition for rehearing is no more significant than a motion for a new trial, which, as well settled, presents no question for review in this court.[4]

31. RULES OF COURT.—A rule of court that "in causes tried by a jury, any special charge or instruction asked for by either party, must be presented to the court in writing, directly after the close of the evidence, and before any argument is made to the jury, or it will not be considered," is a reasonable rule; and the enforcement or disregard of it is matter of discretion with the court making it, and, therefore, not the subject of a writ of error.[5]

32. SALVAGE.—This court is not in the habit of revising decrees as to the amount of salvage, unless upon some clear and palpable mistake, or gross over allowance of the court below. It is equally against sound policy and public convenience to encourage appeals of this sort in matters of discretion; unless there

2. Receivers.—Milwaukee, etc., R. Co. *v.* Howard, 131 U. S. appx. lxxxi, 18 L. Ed. 252; Milwaukee, etc., R. Co. *v.* Soutter, 154 U. S. 540, 38 L. Ed. 604; Browson *v.* LaCrosse, etc., R. Co., 1 Wall. 405, 17 L. Ed. 616; Quincy, etc., R. Co. *v.* Humphreys, 145 U. S. 82, 83, 36 L. Ed. 632.

The appointment or discharge of a receiver is ordinarily matter resting wholly within the discretion of the court below. But it is not always and absolutely so. Thus, where there is a proceeding to foreclose a mortgage given by a railroad corporation on its road, etc.—a long and actively worked road—(a sort of property to a control of which a receiver ought not to be appointed at all, except from necessity), and the amount due on the mortgage is a matter still unsettled and fiercely contested, the appointment or discharge of a receiver is matter belonging to the discretion of the court in which the litigation is pending. But when the amount due has been passed on and finally fixed by this court, and the right of the mortgagor to pay the sum thus settled and fixed is clear, the court below has then no discretion to withhold such restoration; and a refusal to discharge the receiver is judicial error, which this court may correct, supposing the matter (not itself one in the nature of a final decree) to be in any way fairly before it otherwise. If other parties in the case set up claims on the road, which they look to the receiver to provide for and protect, these other claims being disputed, and, in reference to the main concerns of the road, small—this court will not the less exercise its power of discharge. It will exercise it, however, under conditions, such as that of the company's giving security to pay those other claims, if established as liens. Milwaukee, etc., R. Co. *v.* Soutter, 2 Wall. 609, 17 L. Ed. 886.

3. Rehearing.—Steines *v.* Franklin County, 14 Wall. 15, 20 L. E. 846; Buffington *v.* Harvey, 95 U. S. 99, 24 L. Ed. 381; Pittsburg, etc., Co. *v.* Heck, 102 U. S. 120, 26 L. Ed. 58; Boesch *v.* Graff, 133 U. S. 697, 699, 33 L. Ed. 787; Roemer *v.* Bernheim, 132 U. S. 103, 106, 33 L. Ed. 277; Lewisburg Bank *v.* Sheffey, 140 U. S 445, 35 L. Ed. 493; Brockett *v.* Brockett, 2 How. 238, 11 L. Ed. 251; Kennon *v.* Gilmer, 131 U. S. 22, 24, 33 L. Ed. 110; United States *v.* Rio Grande Irrigation Co., 184 U. S. 416, 46 L. Ed. 619; Wyle *v.* Coxe, 14 How. 1, 14 L. Ed. 301; Conboy *v.* First Nat. Bank, 203 U. S. 141, 145, 51 L. Ed. 128.

The granting or refusal, absolute or conditional, of a rehearing in equity, as of a new trial at law, rests in the discretion of the court in which the case has been heard or tried, and is not a subject of appeal. Roemer *v.* Bernheim, 132 U. S. 103, 106, 33 L. Ed. 277.

"Necessary jurisdictional allegations cannot properly be introduced for the first time on a motion for rehearing, as the motion itself is one addressed to the discretion of the court and one in which the decisions of the court in granting or refusing it is not subject to review in an appellate court. Thomas *v.* Harvie's Heirs, 10 Wheat. 151; Peck *v.* Sanderson, 18 How. 42. Such a motion is not founded in a matter of right, but rests in the sound discretion of the court. Story's Equity Pleading (7 Ed.), §§ 412, 417; Brown *v.* Aspden, 14 How. 25; Public Schools *v.* Walker, 9 Wall. 603, 19 L. Ed. 650; United States *v.* Knight, 1 Black 488." Steines *v.* Franklin County, 14 Wall. 15, 22, 20 L. Ed. 846.

4. San Pedro, etc., Co. *v.* United States, 146 U. S. 120, 137, 36 L. Ed. 911.

5. Rules of court.—Life Ins. Co. *v.* Francisco, 17 Wall. 666, 672, 21 L. Ed. 683.

has been some violation of the just principles which ought to regulate the subject.[6]

33. Separate Trials.—A separate trial is a matter of discretion in the court, and not of right in the parties.[7] Therefore, the question whether defendants jointly indicted should be tried together or separately is a question resting in the sound discretion of the court below, and is not reviewable unless there was an abuse of such discretion.[8]

34. Special Interrogatories to the Jury.—It is within the discretion of the presiding justice to put inquiries to the jury as to the grounds upon which they found their verdict, and the answers of the foreman, assented to by his fellows, may be made a part of the record, and will have the effect of special findings of the facts stated by him. And no exception lies to the exercise of this discretion.[9] The submission of special questions to the jury is, under the Arkansas statute, in the discretion of the court, and therefore cannot be assigned for error.[10]

35. Surprise.—All questions as to surprise are matters of discretion and therefore not reviewable.[11]

36. Venditioni Exponas.—A writ of error will not lie to a circuit court of the United States to revise its decisions in refusing to grant a writ of venditioni exponas issued on a judgment obtained in that court. A writ of error does not lie in such a case.[12]

37. Appeal and Supersedeas Bond.—The mode of taking the security, and the time for perfecting it, are within the discretion of the court below, and this court will not interfere with the exercise of that discretion.[13] This court will not interfere with the discretion exercised by the judge below as to the amount of a supersedeas bond as well as the sufficiency of the security.[14]

38. Review of Action of Court in Expressing Opinion upon Facts.[15]—It is no longer an open question that a judge of a court of the United States, in submitting a case to the jury, may, in his discretion, express his opinion upon the facts; and that "when no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury," such expressions of opinion are not reviewable on writ of error.[16]

39. Acts of Officers of the Various Departments.—**In General.**—Where congress has committed to the head of a department certain duties requiring the exercise of judgment and discretion, his action thereon, whether it involve

6. Salvage.—Hobart *v.* Drogan, 10 Pet. 108, 9 L. Ed. 363; Irvine *v.* Hesper, 122 U. S. 256, 30 L. Ed. 1075.

A noncommissioned captor can only proceed in the prize court as for salvage, the amount of which is discretionary. The appellate court will not interfere in the exercise of this discretion, as to the amount of salvage allowed, unless in a very clear case of mistake. The Dos Hermanos, 10 Wheat. 306, 6 L. Ed. 328.

7. Separate trials.—United States *v.* Marchant, 12 Wheat. 480, 6 L. Ed. 700.

8. United States *v.* Ball, 163 U. S. 662, 41 L. Ed. 300, citing United States *v.* Marchant, 12 Wheat. 480, 6 L. Ed. 700; Sparf *v.* United States, 156 U. S. 51, 58, 38 L. Ed. 343.

9. Special interrogatories to the jury.—Walker *v.* Southern Pacific Railroad, 165 U. S. 593, 597, 31 L. Ed. 837.

10. Grimes Dry Goods Co. *v.* Malcolm, 164 U. S. 483, 41 L. Ed. 524.

11. Surprise.—Ames *v.* Guinby, 106 U. S. 342, 27 L. Ed. 100.

12. Venditioni exponas.—Boyle *v.* Zacharie, 6 Pet. 635, 646, 8 L. Ed. 527, 532.

13. Appeal and supersedeas bond.—The Dos Hermanos, 10 Wheat. 306, 6 L. Ed. 328.

14. Jerome *v.* McCarter, 21 Wall. 17, 22 L. Ed. 515.

15. See the title INSTRUCTIONS.

16. Vicksburg, etc., R. Co. *v.* Putnam, 118 U. S. 545, 553, 30 L. Ed. 257; St. Louis, etc., R. Co. *v.* Vickers, 122 U. S. 360, 30 L. Ed. 1161; United States *v.* Reading R. Co., 123 U. S. 113, 114, 31 L. Ed. 138; Rucker *v.* Wheeler, 127 U. S. 85, 93, 32 L. Ed. 102; Carver *v.* Jackson, 4 Pet. 1, 7 L. Ed. 761; Magniac *v.* Thompson, 7 Pet. 348, 8 L. Ed. 709; Mitchell *v.* Harmony, 13 How. 115, 14 L. Ed. 75; Transportation Line *v.* Hope, 95 U. S. 297, 24 L. Ed. 477; Nudd *v.* Burrows, 91 U. S. 426, 23 L. Ed. 286; Indianapolis, etc., R. Co. *v.* Horst, 93 U. S. 291, 23 L. Ed. 898; Lovejoy *v.* United States, 128 U. S. 171, 173, 32 L. Ed. 389; Baltimore, etc., R. Co. *v.* First Baptist Church, 137 U. S. 568, 34 L. Ed. 784.

questions of law or fact, will not be reviewed by the courts, unless he has exceeded his authority or this court should be of opinion that his action was clearly wrong.[17] The rule upon this subject may be summarized as follows: That where the decision of questions of fact is committed by congress to the judgment and discretion of the head of a department, his decision thereon is conclusive; and that even upon mixed questions of law and fact, or of law alone, his action will carry with it a strong presumption of its correctness, and the courts will not ordinarily review it, although they may have the power, and will occasionally exercise the right of so doing.[18]

Secretary of Navy.—This court cannot entertain an appeal from the decision of the secretary of the navy, nor revise his judgment, in any case where the law authorized him to exercise his discretion or judgment.[19]

Secretary of Treasury.—A power intrusted by the act of congress of March 3, 1797, and that of June 3, 1864, as amended in its 179th section by the act of March 3, 1865, to the secretary of the treasury to remit penalties, is one for the exercise of his discretion in a matter intrusted to him alone, and admits of no appeal to the court of claims or to any other court.[20]

The decisions of the postmaster general, imposing forfeitures because of the failure of the contractor to cause the mail to be carried between the termini within the time prescribed, are not subject to review by this court, where by the terms of the contract it is within his discretion.[21]

As the board of appraisers, appointed to reappraise imported goods, is vested with powers of a quasi judicial character, "no reason is perceived for excluding this board of appraisers from the benefit of the general rule applicable to such officers, that some presumption is to be indulged in favor of the propriety and legality of their action, and that, with respect to their methods of procedure, they are vested with a certain discretion which will be respected by the courts, except where such discretion has been manifestly abused, and the board has proceeded in a wanton disregard of justice or of the rights of the importer."[22]

E. Review of Questions of Fact—1. In General.—In common-law cases, it is the ruling of the inferior court on the law alone which this court is authorized to review.[23] No point has been more repeatedly and authoritatively settled, than that this court will not, upon a writ of error, revise or give judgment as to the facts, but takes them as found by the court below, and as they are exhibited by the record.[24] It is not the province of this court to review a determination by

17. Acts of officers of the various departments in general.—Decatur *v.* Paulding, 14 Pet. 497, 10 L. Ed. 559; Riverside Oil Co. *v.* Hitchcock, 190 U. S. 316, 324, 47 L. Ed. 1073; Marquez *v.* Frisbie, 101 U. S. 473, 25 L. Ed. 800; Gaines *v.* Thompson, 7 Wall. 347, 19 L. Ed. 62; United States *v.* Black, 128 U. S. 40, 32 L. Ed. 346; Redfield *v.* Windom, 137 U. S. 636, 34 L. Ed. 811; Bates *v.* Payne, 194 U. S. 106, 108, 48 L. Ed. 894.

Where it has been judicially determined by a board of inquiry and the secretary of labor and commerce that an immigrant is an anarchist, within the act of March 3rd, 1903, and there exists evidence on which to base their judgment, the exclusion or deportation of the immigrant, unlawfully in this county, will not be reviewed on the facts. Turner *v.* Williams, 194 U. S. 279, 48 L. Ed. 979.

18. Bates *v.* Payne, 194 U. S. 106, 109, 48 L. Ed. 894.

19. Secretary of navy.—Decatur *v.* Paulding, 14 Pet. 497, 10 L. Ed. 559.

20. Secretary of treasury.—Dorsheimer *v.* United States, 7 Wall. 166, 19 L. Ed. 187.

21. Allman *v.* United States, 131 U. S. 31, 33 L. Ed. 51, citing Chicago R. Co. *v.* United States, 127 U. S. 406, 32 L. Ed. 180; Eastern R. Co. *v.* United States, 129 U. S. 391, 32 L. Ed. 730.

Findings of fact by the postmaster general are conclusive. Bates *v.* Payne, 194 U. S. 106, 48 L. Ed. 894.

22. Earnshaw *v.* United States, 146 U. S. 60, 36 L. Ed. 887.

23. Review of questions of fact in general.—Barney *v.* Schmeider, 9 Wall. 248, 251, 19 L. Ed. 648; The San Pedro, 2 Wheat. 132, 4 L. Ed. 202, 203; Generes *v.* Campbell, 11 Wall. 193, 20 L. Ed. 110; Andes *v.* Slauson, 130 U. S. 435, 32 L. Ed. 989; Parks *v.* Turner, 12 How. 39, 13 L. Ed. 883; Retzer *v.* Wood, 109 U. S. 185, 27 L. Ed. 900; Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608.

24. Rev. Stats., 1011; Penhallow *v.* Doane, 3 Dall. 89, 102, 1 L. Ed. 522;

the jury of questions of fact, or to examine the testimony further than to see

Wiscart *v.* Dauchy, 3 Dall. 321, 327, 1 L. Ed. 619; Jennings *v.* The Perseverance, 3 Dall. 336, 1 L. Ed. 625; Talbot *v.* Seeman, 1 Cranch 1, 38, 2 L. Ed. 15; Fau *v.* Boberdeau, 3 Cranch 174, 177, 2 L. Ed. 402; Dunlop *v.* Monroe, 7 Cranch 242, 270, 3 L. Ed. 329; United States *v.* 422 Casks of Wine, 1 Pet. 547, 550, 7 L. Ed. 257; Clark *v.* Fredericks, 105 U. S. 4, 26 L. Ed. 938; Vicksburg, etc., R. Co. *v.* Putnam, 118 U. S. 545, 553, 30 L. Ed. 257; Bessette *v.* Conkey Co., 194 U. S. 324, 48 L. Ed. 997; In re Lewis, 202 U. S. 614, 50 L. Ed. 1172; Parks *v.* Turner, 12 How. 39, 43, 13 L. Ed. 883; Arthurs *v.* Hart, 17 How. 6, 12, 15 L. Ed. 30; Lanfear *v.* Hunley, 4 Wall. 204, 209, 18 L. Ed. 325; Generes *v.* Campbell, 11 Wall. 193, 20 L. Ed. 110; Jeffries *v.* Mutual Life Ins. Co., 110 U. S. 305, 309, 28 L. Ed. 156; Dower *v.* Richards, 151 U. S. 658, 666, 38 L. Ed. 305; Wilson *v.* Everett, 139 U. S. 616, 35 L. Ed. 286; The Abbotsford, 98 U. S. 440, 25 L. Ed. 168; Zeckendorf *v.* Johnson, 123 U. S. 617, 618, 31 L. Ed. 277; Lincoln *v.* Power, 151 U. S. 436, 38 L. Ed. 224; Miles *v.* United States, 103 U. S. 304, 26 L. Ed. 481; United States *v.* Dawson, 101 U. S. 569, 25 L. Ed. 791; St. Louis *v.* Rutz, 138 U. S. 226, 34 L. Ed. 941; Runkle *v.* Burnham, 153 U. S. 216, 225, 38 L. Ed. 694; Parsons *v.* Armor, 3 Pet. 413, 7 L. Ed. 724; McKinley, etc., Min. Co. *v.* Alaska, etc., Min. Co., 183 U. S. 563, 46 L. Ed. 331; Walnut *v.* Wade, 103 U. S. 683, 688, 26 L. Ed. 526.

If upon the facts found by the circuit court the decree appealed from is right, that finding is conclusive upon us. Steamboat Louisville *v.* Halliday, 154 U. S. 657, 25 L. Ed. 771, citing The Abbotsford, 98 U. S. 440, 25 L. Ed. 168.

The decision of a jury on the question of fact fairly submitted to them, is not subject to review in this court. Packet Co. *v.* McCue, 17 Wall. 508, 21 L. Ed. 705.

The facts found by the circuit court are not open to review in this court, and we can only consider questions of law arising upon the trial, and duly presented by bill of exceptions, and errors of law apparent on the face of the pleadings. Insurance Co. *v.* Folsom, 18 Wall. 237, 154 U. S. 657, 21 L. Ed. 827; Cooper *v.* Omohundro, 19 Wall. 65, 22 L. Ed. 47; Jessup *v.* United States, 106 U. S. 147, 150.

Assignments of error to rulings of the court below upon its finding of particular facts; and to its refusal to find other facts, are not open to review here; they can be considered only by the court below. Stanley *v.* Supervisors of Albany, 121 U. S. 535, 547, 30 L. Ed. 1000.

Whether the evidence before a jury does or does not sustain the allegations in a case is a matter wholly within the province of the jury, and if they find in one way, this court cannot review their finding. Gregg *v.* Moss, 14 Wall. 564, 20 L. Ed. 740.

The determination by the court below of questions as to the effect of evidence and the burden of proof, even if necessary to the decision of the case, is final and cannot be re-examined here. Marsh *v.* Citizens' Ins. Co., 131 U. S. appx. cxiii, 25 L. Ed. 9.

This court will not examine evidence to ascertain whether a jury was justified in finding, as it has done, on an issue of fact. Express Co. *v.* Ware, 20 Wall. 543, 22 L. Ed. 422.

In Hyde *v.* Booraem, 16 Pet. 169, 10 L. Ed. 925, this court say: "We cannot upon a writ of error revise the evidence in the court below, in order to ascertain whether the judge rightly interpreted the evidence, or drew right conclusions from it. That is the proper province of the jury, or of the judge himself, if the trial by jury is waived. The court can only re-examine the law so far as he has pronounced it on a state of facts, and not merely on the evidence of facts found in the record in the making of a special verdict or an agreed case. If either party in the court below is dissatisfied with the ruling of the judge in a matter of law, that ruling should be brought before the supreme court, by an appropriate exception, in the nature of a bill of exceptions, and should not be mixed up with supposed conclusions in matters of fact." See, also, Minor *v.* Tillotson, 2 How. 392, 394, 11 L. Ed. 312, and United States *v.* King, 7 How. 833, 12 L. Ed. 934; Prentice *v.* Zane, 8 How. 470, 485, 12 L. Ed. 1160.

This court has no authority to review on bill of exceptions rulings of a judge of the circuit court at the trial of an action at law, had before him at chambers, by consent of the parties, under an order providing that it should be so tried, and that if at such trial there should appear to the judge to be in issue questions of fact of such a character that he would submit them to a jury if one were present, they should be submitted to a jury at the next term. Andes *v.* Slauson, 130 U. S. 435, 32 L. Ed. 989.

In the first judiciary act, the whole appellate jurisdiction of this court was limited to matters of law. While an appeal lay from the district court to the circuit court in admiralty cases, neither the judgments or decrees of the circuit court, whether in law, equity or admiralty, nor judgments or decrees of the highest court of a state, could be reviewed by this court, except by writ of error. Act of September 24, 1789, c. 20, §§ 19, 22-25; 1 Stat. 83-86. Dower *v.* Richards, 151 U. S. 658, 663, 38 L. Ed. 305.

Findings of fact made by the court at the request of the parties cannot be re-

viewed by this court, any more than the finding of a jury on a question of fact fairly submitted to them. Bowen *v.* Chase, 98 U. S. 254, 25 L. Ed. 47.

Order of remand.—Where a writ of error is brought to reverse an order of the circuit court remanding a suit at law to the state court from which it has been removed, a finding of facts by the court that the parties to the suit were not citizens of different states, cannot be examined here on a writ of error, unless the evidence is brought into the record by a bill of exceptions or some equivalent method, as, for instance, an agreed statement of facts, or a special finding in the nature of a special verdict. England *v.* Gebhardt, 112 U. S. 502, 28 L. Ed. 811.

Hearing of motion.—The findings of facts by the court below upon the hearing of a motion, cannot be reviewed here upon a writ of error. Jeffries *v.* Mutual Life Ins. Co., 110 U. S. 305, 28 L. Ed. 156.

Salvage.—Erroneous findings of the jury—assuming them to be erroneous—as to what injury the ship did suffer by the stranding and what by swelling of the cargo, or such findings on any other matter of fact, are not subject to review here. Fowler *v.* Rathbone, 12 Wall. 102, 20 L. Ed. 281.

"As to the finding of fact that there was a contract by the first administrator giving to the attorneys an interest in the proceeds of the claim, with authority to compromise it, this court is prohibited, by § 1011 of the Revised Statutes, from reversing a case on a writ of error for any error in fact." Jeffries *v.* Mutual Life Ins. Co., 110 U. S. 305, 309, 28 L. Ed. 156, citing Hyde *v.* Booraem, 16 Pet. 169, 176, 10 L. Ed. 925; Parks *v.* Turner, 12 How. 39, 43, 13 L. Ed. 883.

Carriers—Excess of baggage.—In an action against a carrier to recover for lost baggage in which the defense is set up that the baggage taken by the carrier was in excess of the fixed amount beyond which the carrier would not be liable unless additional compensation is paid, it was held, that the question whether the passenger had taken such an excess of baggage is a question not of law for the court, but of fact for the jury under proper guidance as to the law of the case. Their determination of it upon the evidence, no error of law appearing, is not subject to re-examination here. "Whether its action, in that particular, was erroneous or not, our power is restricted by the constitution to the determination of the questions of law arising upon the record. Our authority does not extend to a re-examination of facts which have been tried by the jury under instructions correctly defining the legal rights of parties. Parsons *v.* Bedford, 3 Pet. 433, 446, 7 L. Ed. 732; Grand Gulf, etc., Co. *v.* Marshall, 12 How. 165, 167, 13 L. Ed. 938; Insurance Co. *v.* Folsom, 18 Wall. 237, 249, 21 L. Ed. 827." Railroad Co. *v.* Fraloff, 100 U. S. 24, 31, 25 L. Ed. 531.

Reasonableness of rates.—The supreme court of the United States will not, on an appeal, inquire as to the reasonableness or unreasonableness of the rates of a telephone company, but will remand the cause to the lower court with directions to inquire into the reasonableness of the rates and find the facts. Chesapeake, etc., Tel. Co. *v.* Manning, 186 U. S. 238, 250, 46 L. Ed. 1144, citing and approving Chicago, etc., R. Co. *v.* Tompkins, 176 U. S. 167, 179, 44 L. Ed. 417; Kansas *v.* Colorado, 185 U. S. 125, 46 L. Ed. 838.

"In Chicago, etc., R. Co. *v.* Tompkins, 176 U. S. 167, 179, 44 L. Ed. 417, a case involving the validity of railroad rates established by a commission in the state of South Dakota, and in which we found that there had been error in the methods pursued by the trial court for determining the question of reasonableness, we said: 'The question then arises what disposition of the case shall this court make. Ought we to examine the testimony, find the facts, and from those facts deduce the proper conclusion? It would doubtless be within the competency of this court on an appeal in equity to do this, but we are constrained to think that it would not (particularly in a case like the present) be the proper course to pursue. This is an appellate court, and parties have a right to a determination of the facts in the first instance by the trial court. Doubtless if such determination is challenged, on appeal, it becomes our duty to examine the testimony and see if it sustains the findings, but if the facts found are not challenged by either party, then this court need not go beyond its ordinary appellate duty of considering whether such facts justified the decree. We think this is one of those cases in which it is especially important that there should be a full and clear finding of the facts by the trial court. The questions are difficult, the interests are vast, and therefore the aid of the trial court should be had.'" Chesapeake, etc., Tel. Co. *v.* Manning, 186 U. S. 238, 250, 46 L. Ed. 1144.

Reasonableness of water rates.—The supreme court of the United States will not pass upon the unreasonableness of rates fixed by a city in regulating the rates of a water company, where it depends upon many questions of fact and of values to which the circuit court gave no attention and on which it expressed no judgment. It is better for a trial court to determine such questions in the first instance. Chicago, etc., R. Co. *v.* Tompkins, 176 U. S. 167, 179, 44 L. Ed. 417; Owensboro *v.* Owensboro Waterworks Co., 191 U. S. 358, 372, 48 L. Ed. 217.

The question of fraud or mistake is

that there was sufficient to justify the conclusions reached by the jury.[25]

A finding of court is entitled to the same weight as a verdict of a jury, and one of fact, and is conclusive here. Clark *v.* United States, 131 U. S., appx. lxxxv, 18 L. Ed. 915.

Construction of written instruments.—A writ of error will lie to review the judgment of an inferior court as to the construction of a written instrument. United States *v.* King, 7 How. 833, 12 L. Ed. 934.

The construction of a grant is a question of law upon which this court must review the decision of the circuit court. United States *v.* King, 7 How. 833, 12 L. Ed. 934.

With the general question of negligence we have nothing to do. The finding of the jury is conclusive upon that subject. Transportation Line *v.* Hope, 95 U. S. 297, 298, 24 L. Ed. 447.

This court has no jurisdiction to review the findings of the court below in respect to what constitutes negligence or contributory negligence. Delaware, etc., R. Co. *v.* Converse, 139 U. S. 469, 35 L. Ed. 213, citing Parsons *v.* Bedford, 3 Pet. 433, 7 L. Ed. 732; Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531.

A recital in the decree that it was assented to by the solicitor of one of the parties is equivalent to a direct finding that he had authority to do what he did, and, so far as the question is one of fact only, is binding upon this court on appeal. Pacific R. Co. *v.* Ketchum, 101 U. S. 289, 25 L. Ed. 932.

A plea of nul tiel record raises a question of law, where the supposed record is of the court in which the plea is filed. Therefore, where the record relied on is produced in such a case, and made part of the record by a statement of facts agreed on, it is a question of law whether it supports or fails to support the plea, and can be reviewed in this court. Basset *v.* United States, 9 Wall. 38, 19 L. Ed. 548.

Upon a writ of error in an exchequer proceeding, which has been tried by a jury, the evidence given at the time of the trial, is not, in a strict sense, before this court. United States *v.* 422 Casks of Wine, 1 Pet. 547, 7 L. Ed. 257.

Judgments and decrees in bankruptcy proceedings.—Decrees in equity rendered in the district court in certain cases under the jurisdiction created by the bankrupt act, it may be admitted, might be revised in the circuit court in a summary way if congress should so provide by law, but it is clear that judgments in actions at law rendered in that court, if founded upon the verdict of a jury, can never be revised in the circuit court in that way, as the constitution provides that 'no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rule of the common law.' Two modes only were known to the common law to re-examine such facts, to wit; the granting of a new trial by the court where the issue was tried or which the record was returnable, or, secondly, by the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings. 2 Story on the Constitution (3d Ed.), 584; Parsons *v.* Bedford, 3 Pet. 433, 448, 7 L. Ed. 732; Knight *v.* Cheny, 5 National Bankrupt Register, 317. All suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume to settle legal rights, are embraced in that provision. It means not merely suits which the common law recognized among its settled proceedings, but all suits in which legal rights are to be determined in that mode, in contradistinction to equitable rights and to cases of admiralty and maritime jurisdiction, and it does not refer to the particular form of procedure which may be adopted. United States *v.* Wonson, 1 Gallison, 20. Insurance Co. *v.* Comstock, 16 Wall. 258, 269, 21 L. Ed. 493.

A judicial recommendation.—In one case the court has expressed its dissatisfaction with appeals being made whose only effect is to throw upon it the burden of making minute investigations and analysis of evidence in controversies where the case turned in every point upon simple questions of fact, and where there is not a doubtful question of law involved in the entire record. And declaring its conviction that the time of this court, due to other parties and to more important interests, should not be consumed in writing and delivering opinions which if they attempted to go into examination of the facts to justify the decision of the court, would be equally tedious and useless, confines itself to announcing its judgment of affirmance without the exhibition through its delivered opinion of the mental processes and arguments by which it has reached its conclusion. Mann *v.* Rock Island Bank, 11 Wall. 650, 20 L. Ed. 188.

Presumptions on appeal.—Where the parties below agreed to submit the cause to the court, both on the facts and the law, this court must presume that the court below founded its judgment upon proof of the fact as to the manner in which the holder received it, and must therefore affirm the judgment of the court below. Prentice *v.* Zane, 8 How. 470, 12 L. Ed. 1161, citing Hyde *v.* Booraem, 16 Pet. 169, 10 L. Ed. 925.

25. Carter *v.* Ruddy, 166 U. S. 493, 41 L. Ed. 1160, 1090.

is conclusive, on appeal, unless plainly against the evidence.[27] Before the finding of facts upon evidence submitted upon a hearing by the court can be re-examined on a writ of error, they must be brought into the record by a bill of exceptions, or an agreed statement of facts, or a special finding in the nature of a special verdict, or in some other way known to the practice of courts of error for the accomplishment of that purpose.[28]

Statement of Rule by Mr. Justice Baldwin.—Where the evidence in a cause conduces to prove a fact in issue before a jury, it is competent in law, to establish such fact; a jury may infer any fact from such evidence, which the law authorizes a court to infer on a demurrer to the evidence. After a verdict in favor of either party on the evidence, he has a right to demand of a court of error that they look to the evidence for only one purpose, and with the single eye to ascertain whether it was competent in law to authorize the jury to find the facts which make out the right of the party, on a part or the whole of his case. If, in its judgment, the appellate court should hold that the evidence was competent, then they must found their judgment on all such facts as were legally inferrible therefrom; in the same manner, and with the same legal results as if they had been found and definitely set out in a special verdict. So, on the other hand, the finding of the jury on the whole evidence in a cause, must be taken as negativing all facts which the party against whom their verdict is given, has attempted to infer from, or establish by the evidence.[29]

It is a fatal objection to a bill of exceptions to so frame the exceptions as to secure a re-examination of the facts in this court.[30]

Statement of Facts by Court.—Where, on writ of error, the record is sent up with the evidence annexed, but no statement of facts by the court, this precludes the court from considering the evidence, as a statement of facts. If there is no statement, the consequence follows that there can be no error, and the decree will be affirmed.[31]

Affirmance.—On an appeal to this court from the circuit court, where there is no disputed question of law and the only controversy is as to the facts, the judgment will be affirmed.[32]

New Trial in Ejectment.—The case of enforcing, in a court of the United States, a statute of a state giving one new trial, as of right, in an action of ejectment, is quite exceptional, and such a statute does not enlarge, but restricts, the rules of the common law as to re-examining facts once tried by a jury, for by the common law a party was not concluded by a single verdict and judgment

27. Cliff *v.* United States, 195 U. S. 159, 49 L. Ed. 139.

28. Storm *v.* United States, 94 U. S. 76, 81, 24 L. Ed. 42; Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978; Baltimore, etc., R. Co. *v.* Trustees Sixth Presbyterian Church, 91 U. S. 127, 130, 23 L. Ed. 260; England *v.* Gebhardt, 112 U. S. 502, 505, 28 L. Ed. 811.

When there is no demurrer to the declaration, or other exception to the sufficiency of the pleadings, no exception to the rulings of the court in the progress of the trial, in the admission or exclusion of evidence, or otherwise, no request for a ruling upon the legal sufficiency or effect of the whole evidence, or on motion in arrest of judgment, and the only matter presented by the bill of exceptions which this court is asked to review arises upon the exception to the general finding by the court for the plaintiff upon the evidence adduced at the trial, no qustion of law is presented which the court here can review. Martinton *v.* Fairbanks, 112 U. S. 670, 28 L. Ed. 862.

29. Hepburn *v.* Dubois, 12 Pet. 345, 9 L. Ed. 1111.

30. The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100.

31. Statement of facts by court.—Jennings *v.* Perseverance, 3 Dall. 336, 1 L. Ed. 625; United States *v.* Hooe, 1 Cranch 318, 2 L. Ed. 121; Wiscart *v.* D'Auchy, 3 Dall. 321, 1 L. Ed. 619.

Where the court below decides the facts, a statement of them should appear upon the record; but if such a statement be filed after judgment is entered and a writ of error sued out, it cannot be considered a part of the record, which is disclosed against it. United States *v.* King, 7 How. 833, 12 L. Ed. 934.

32. Steever *v.* Rickman, 154 U. S. App. 678, 27 L. Ed. 1052.

in ejectment, but might bring as many successive ejectments as he pleased, unless restrained by a court of equity after repeated verdicts against him.[33]

Distinction between Appeals and Writs of Error.—But it is well to bear in mind here the distinction drawn between appeals and writs of error in a previous section in this article, in which it was stated that appeals, the remedy for transferring equity and admiralty cases, bring up for review facts as well as law. So that the rules just stated are restricted to common-law actions brought up by writ of error.[34] While appeals from final judgments and decrees of the circuit courts of the United States extend to an examination of the facts as well as the law, and while upon such review this court will generally accept the concurrent conclusions of the trial and appellate courts, yet "there has always been recognized the right and duty of this court to examine the record, and if it finds that the conclusions are wholly unwarranted by the testimony it will set the verdict or report aside and direct a re-examination."[35]

2. CONSTITUTIONAL AND STATUTORY PROVISIONS.—The seventh amendment to the constitution provides that "no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."[36] This is a prohibition to the courts of the United States to re-examine any facts, tried by a jury, in any other manner. The only modes known to the common law to re-examine such facts are the granting of a new trial by the court in which the issue was tried, or to which the record was properly returnable; or the award of a venire facias de novo by an appellate court, for some error of law which intervened in the proceedings.[37] It must therefore be

33. Bac. Ad. Ejectment, 1; Equator Co. *v.* Hall (1882), 106 U. S. 86, 27 L. Ed. 114; Smale *v.* Mitchell, 143 U. S. 99, 36 L. Ed. 90; Capital Traction Co. *v.* Hof, 174 U. S. 1, 13, 43 L. Ed. 873.

34. The remedy by appeal brings before the supreme court the facts as well as the law. The San Pedro, 2 Wheat. 132, 142, 4 L. Ed. 202, 205.

The statute of Louisiana, requiring their courts to have the testimony taken down in all cases where an appeal lies to the supreme court, and the adoption of this rule by the court of the United States, included only cases where an appeal (technically speaking) lies, and not the cases which are carried to an appellate court by writ of error. "In considering, then, the propriety of the ruling of the court here, it is first to be noticed, that, by the words of the statute, this testimony is to be taken down and filed only in those cases 'where an appeal lies.' That means, of course, a technical appeal, where the facts are to be reviewed and reconsidered, for in such an one only is there any use in taking them down. But in the present case no appeal of that character lay to this court, but merely a writ of error to bring the law and not the facts here for re-examination. To construe the act of 1824 as if meaning to devolve on this court such a re-examination of facts, without a trial by jury, in a case at law, like this, and not one in equity or admiralty, would be to give to it an unconstitutional operation, dangerous to the trial by jury, and at times subversive of the public liberties. Parsons *v.* Bedford, 3 Pet. 433, 448, 7 L. Ed. 732. In a case of chancery or admiralty jurisdiction it might be different, as in those, by the law of the land, a technical appeal lies, and the facts are there open to reconsideration in this court. Livingston *v.* Story, 9 Pet. 632, 9 L. Ed. 255; McCollum *v.* Eager, 2 How. 61, 64, 11 L. Ed. 179." Phillips *v.* Preston, 5 How. 278, 12 L. Ed. 152.

Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and upon an appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us. Hecht *v.* Boughton, 105 U. S. 235, 236, 26 L. Ed. 1018.

35. De La Rama *v.* De La Rama, 201 U. S. 303, 309, 50 L. Ed. 765, citing Beyer *v.* LeFevre, 186 U. S. 114, 46 L. Ed. 1080.

36. Constitutional and statutory provisions.—Boogher *v.* New York Life Co., 103 U. S. 90, 95, 26 L. Ed. 310.

37. Barreda *v.* Sisbee, 21 How. 146, 166, 16 L. Ed. 86; The Justices *v.* Murray, 9 Wall. 274, 277, 19 L. Ed. 658; Miller *v.* Life Ins. Co., 12 Wall. 285, 300, 20 L. Ed. 398; Insurance Co. *v.* Comstock, 16 Wall. 258, 269, 21 L. Ed. 493; Insurance Co. *v.* Folsom, 18 Wall. 237, 249, 21 L. Ed. 827; Railroad Co. *v.* Fraloff, 100 U. S. 24, 31, 25 L. Ed. 531; Lincoln *v.* Power, 151 U. S. 436, 438, 38 L. Ed. 224; Chicago, etc., R. Co. *v.* Chicago, 166 U. S. 226, 246, 41 L. Ed. 979; Capital Traction Co. *v.* Hof, 174 U. S. 1, 9, 43 L. Ed. 873; Martinton *v.* Fairbanks, 112 U. S. 670, 674, 28 L. Ed. 862; Barney *v.* Schneider, 9

taken as established, by virtue of the seventh amendment of the constitution, that either party to an action at law (as distinguished from suits in equity or in admiralty) in a court of the United States, where the value in controversy exceeds twenty dollars, has the right to a trial by jury; that, when a trial by jury has been had in an action at law, in a court either of the United States or of a state, the facts there tried and decided cannot be re-examined in any court of the United States, otherwise than according to the rules of the common law of England; that by the rules of that law, no other mode of re-examination is allowed than upon a new trial, either granted by the court in which the first trial was had or to which the record was returnable, or ordered by an appellate court for error in law; and therefore that, unless a new trial has been granted in one of those two ways, facts once tried by a jury cannot be tried anew, by a jury or otherwise, in any court of the United States.[38]

Territories.—This provision of the constitution is in full force in all the territories, therefore this court, on appeal from a territorial court, has no authority to pass upon any question of fact involved in the consideration of a motion for a new trial.[39]

District of Columbia.—Congress, in every case where the value in controversy exceeds five dollars, has authorized either party to appeal from the judgment of the justice of the peace, although entered upon the verdict of a jury, to the supreme court of the District of Columbia, and to have a trial by jury in that court; and the trial by a jury of twelve, as permitted by congress to be had before a

Wall. 248, 19 L. Ed. 648; Parsons *v.* Bedford, 3 Pet. 433, 448, 7 L. Ed. 732.

The constitution provides that no fact tried by the jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law. 2 Story on the Constitution, § 1770. Facts so tried could only be re-examined, under the rules of the common law, either by the granting of a new trial by the court where the issue was tried or to which the record was returnable, or by the award of a venire facias de novo by an appellate court for some error of law which intervened in the proceedings. Parsons *v.* Belford, 3 Pet. 433, 448, 7 L. Ed. 732; 2 Story on the Constitution, § 1770. Matters of fact found by the circuit court under such a submission cannot be re-examined here, as by the express language of the act the review, when the finding is general, is confined to the rulings of the court in the progress of the trial, and even when the finding is special nothing else is open to review except the inquiry whether the facts found are sufficient to support the judgment. Miller *v.* Life Ins. Co., 12 Wall. 285, 300, 20 L. Ed. 398.

"The only modes known to the common law to re-examine the facts are the granting of a new trial by the court where the issue is tried, or to which the record is properly returnable, or the award of a venire de novo by an appellate court for some error of law which intervened in the proceedings." Parsons *v.* Bedford, 3 Pet. 433, 448, 7 L. Ed. 732. By the constitution, Amend. VII, no fact tried by a jury can be otherwise re-examined in any court of the United States than according to the rules of the common law. The Abbotsford, 98 U. S. 440, 445, 25 L. Ed. 168.

If the jury erred, the remedy was by a motion for a new trial, and not by a writ of error. Schurchardt *v.* Allens, 1 Wall. 359, 371, 17 L. Ed. 642.

For the purposes of any examination of the case which it is competent for this court to make under the constitution of the United States and the laws of congress, it must be assumed that the facts of the case have been correctly found by the jury. Repeated decisions of this court have affirmed the doctrine, which is but a repetition of the constitutional provision upon the subject, that no fact tried by a jury shall be otherwise re-examinable in any court of the United States than according to the rules of the common law; and it is well known that the only modes known to the common law of re-examining the facts of a case, after they have been found by a jury, are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or by the award of a venire facias de novo by an appellate court, for some error of law which intervened in the proceedings. Parsons *v.* Bedford, 3 Pet. 433, 447, 7 L. Ed. 732; United States *v.* King, 7 How. 833, 845, 12 L. Ed. 934; Penhallow *v.* Doane, 3 Dall. 54, 102; United States *v.* Eliason, 16 Pet. 291, 301, 10 L. Ed. 968; Phillips *v.* Preston, 5 How. 278, 289, 12 L. Ed. 152; Barreda *v.* Silsbee, 21 How. 146, 166, 16 L. Ed. 86.

38. Capital Traction Co. *v.* Hof, 174 U. S. 1, 13, 43 L. Ed. 873.

39. Webster *v.* Reid, 11 How. 437, 13 L. Ed. 761; Kennon *v.* Gilmer, 131 U. S. 22, 29, 33 L. Ed. 110.

justice of the peace, is not, and the trial by jury in the appellate court is, a trial by jury, within the meaning of the common law, and of the seventh amendment to the constitution; and therefore the trial of facts by a jury before the justice of the peace does not prevent those facts from being re-examined by a jury in the appellate court.[40]

Section 1011, Rev. Stat., continues in force and forbids a reversal of the judgment of the circuit court for any error of fact.[41]

3. Concurrent Decisions of Two Inferior Courts—a. *In General.*—The settled doctrine of this court is that the concurrent decisions of two courts in the same case upon a question of fact will be followed unless shown to be clearly erroneous.[42] Where issues are mainly those of fact, in the absence of clear show-

40. Capital Traction Co. *v.* Hof, 174 U. S. 1, 45, 43 L. Ed. 873.

41. Martinton *v.* Fairbanks, 112 U. S. 670, 672, 28 L. Ed. 862; Jeffries *v.* Mutual Life Ins. Co., 110 U. S. 305, 28 L. Ed. 156; Miles *v.* United States, 103 U. S. 304, 313, 26 L. Ed. 481; Rev. Stat., § 1011.

42. Concurrent decisions of two inferior courts in general.—Compania La Flecha *v.* Brauer, 168 U. S. 104, 42 L. Ed. 398; Stuart *v.* Hayden, 169 U. S. 1, 42 L. Ed. 639; Baker *v.* Cummings, 169 U. S. 189, 198, 42 L. Ed. 711; The Carib Prince, 170 U. S. 655, 658, 42 L. Ed. 1181; Morewood *v.* Enequist, 23 How. 491, 16 L. Ed. 516; The Richmond, 103 U. S. 540, 26 L. Ed. 313; The Conqueror, 166 U. S. 110, 136, 41 L. Ed. 937; Workman *v.* New York City, 179 U. S. 552, 555, 45 L. Ed. 314; The Germanic, 196 U. S. 589, 593, 49 L. Ed. 610; The Iroquois, 194 U. S. 240, 48 L. Ed. 955; Chin Bak Kan *v.* United States, 186 U. S. 193, 201, 46 L. Ed. 1121; United States *v.* Meng, 196 U. S. 636, 49 L. Ed. 632; Abson *v.* United States, 200 U. S. 611, 50 L. Ed. 626; Brainard *v.* Buck, 184 U. S. 99, 105, 46 L. Ed. 449; Busch *v.* Jones, 184 U. S. 598, 604, 46 L. Ed. 707; Towson *v.* Moore, 173 U. S. 17, 43 L. Ed. 597; The Baltimore, 8 Wall. 377, 382, 19 L. Ed. 463; The S. B. Wheeler, 20 Wall. 385, 386, 22 L. Ed. 385; Smith *v.* Burnett, 173 U. S. 430, 436, 43 L. Ed. 756; Raub *v.* Carpenter, 187 U. S. 159, 163, 47 L. Ed. 119; Hy-Yu-Tse-Mil-Kin *v.* Smith, 194 U. S. 401, 413, 48 L. Ed. 1039.

When two courts have reached the same conclusion on a question of fact, their finding will not be disturbed unless it be clear that their conclusion was erroneous. Baker *v.* Cummings, 169 U. S. 189, 198, 42 L. Ed. 711, following Stuart *v.* Hayden, 169 U. S. 1, 42 L. Ed. 639.

The rule is well established that successive and concurrent decisions of two courts in the same case, upon a mere question of fact, are not to be reversed, unless clearly shown to be erroneous. Towson *v.* Moore, 173 U. S. 17, 24, 43 L. Ed. 597.

It is well settled that when the trial and the appellate courts agree as to the facts established on the trial, the supreme court of the United States will accept their conclusion and not attempt to weigh conflicting testimony. Stuart *v.* Hayden, 169 U. S. 1, 14, 42 L. Ed. 639; Beyer *v.* LeFevre, 186 U. S. 114, 119, 46 L. Ed. 1080.

Establishment of trust.—The concurrent decisions of the courts upon the establishment of a trust is a question of fact, which will be followed unless shown to be clearly erroneous. Brainard *v.* Buck, 184 U. S. 99, 46 L. Ed. 449.

Where in an action on an insurance policy the jury found that the deceased did not commit suicide and its finding was approved by the trial court and by the circuit court of appeals, the supreme court of the United States will not disturb it. Pythias Knights' Supreme Lodge *v.* Beck, 181 U. S. 49, 45 L. Ed. 741, citing Patton *v.* Texas, etc., R. Co., 179 U. S. 658, 45 L. Ed. 361.

Obstruction of navigation.—The concurrent finding of fact of the circuit court, and the circuit court of appeals, that piers, docks and wharves, placed in Lake Michigan by a railroad company under authority of its riparian proprietorship, do not extend in the lake beyond the point of practical navigability, will not be disturbed by this court unless clearly in conflict with the evidence. Illinois *v.* Illinois Central R. Co., 184 U. S. 77, 46 L. Ed. 440, citing Compania La Flecha *v.* Brauer, 168 U. S. 104, 123, 42 L. Ed. 398; Stuart *v.* Hayden, 169 U. S. 1, 14, 42 L. Ed. 639; Baker *v.* Cummings, 169 U. S. 189, 198, 42 L. Ed. 711; The Carib Prince, 170 U. S. 655, 42 L. Ed. 1181.

Direct appeal under act of March 3rd, 1891.—An appeal was taken from a judgment ordering the deportation of a Chinese person, rendered by a commissioner, to the judge of a district court of the United States, and upon hearing, the district court affirmed that judgment, and from the judgment of the district court an appeal to the supreme court of the United States was taken under § 5 of the act of March 3, 1891, on the ground that the construction of the treaty of 1894 with the Chinese Empire was drawn in question. It was held that the supreme court of the United States cannot properly re-examine the facts already determined by two judgments below. Chin Bak Kan *v.* United States, 186 U. S. 193, 201, 202, 46

ing of error, the findings of the lower courts will be accepted as correct.[43] And this rule of concurrence with the conclusions of the trial and appellate courts is given more weight when in the first instance the facts are found by a master or a jury.[44]

Error to State Court.—And these general rules have been held to apply equally to writs of error to state courts.[45]

Concurrent Findings of Circuit and District Courts.—And prior to the circuit court of appeals act, concurrent decisions of the district and circuit courts upon mere questions of fact, would not be disturbed unless the error was clear.[46]

Where the circuit court and the circuit court of appeals have concurred in findings of fact, the decree should not be disturbed unless it is clearly in conflict with the evidence.[47] Where the circuit court and the circuit court of appeals agree as to what were the ultimate facts established by the evidence, this court should accept their view as to the facts, unless it clearly appears that they erred as to the effect of the evidence.[48]

In Cases of Fraud.—The rule that this court will not disturb the findings of fact of the two lower courts except in a clear case is especially applicable where those findings are against a charge of fraud and where the effort is to overthrow a patent of the United States.[49]

Rule in Equity and Admiralty.—The rule that successive and concurrent decisions of two courts in the same case, upon a mere question of fact, are not to be reversed, unless clearly shown to be erroneous, although more often invoked in admiralty cases, is yet equally applicable to appeals in equity.[50] Both

L. Ed. 1121, reaffirmed in United States *v.* Ng Hong Li, 196 U. S. 636, 49 L. Ed. 629; Abson *v.* United States, 200 U. S. 611, 50 L. Ed. 619, 626.

43. Stuart *v.* Hayden, 169 U. S. 1, 42 L. Ed. 639; Dravo *v.* Fabel, 132 U. S. 487, 33 L. Ed. 421; Shappiro *v.* Goldberg, 192 U. S. 232, 240, 48 L. Ed. 419.

44. Furrer *v.* Ferris, 145 U. S. 132, 36 L. Ed. 649; Beyer *v.* LeFevre, 186 U. S. 114, 119, 46 L. Ed. 1080.

Where a disputed question of fact is referred to a master and his finding is concurred in by both the circuit court and the circuit court of appeals, the finding will not be reviewed by the supreme court. Schwartz *v.* Duss, 187 U. S. 8, 47 L. Ed. 53.

45. Error to state court.—Lammers *v.* Nissen, 154 U. S. 650, 25 L. Ed. 562, approved in Dravo *v.* Fabel, 132 U. S. 481, 490, 33 L. Ed. 421.

The case comes within the ruling in Lammers *v.* Nissen, 154 U. S. 650, 25 L. Ed. 562, where the finding of the court of original jurisdiction, upon a mere question of fact, was affirmed by the supreme court of the state. Chief Justice Waite said: "Under such circumstances, we ought not to disturb the judgment of the state court unless the error is clear. No less stringent rule should be applied in cases of this kind than that which formerly governed in admiralty appeals, when two courts had found in the same way on a question of fact." Dravo *v.* Fabel, 132 U. S. 487, 490, 33 L. Ed. 421.

46. Concurrent findings of circuit and district courts.—Dravo *v.* Fabel, 132 U. S. 487, 33 L. Ed. 421, applying Lammars *v.* Nissen, 154 U. S. 650, 25 L. Ed. 562.

47. Compania La Flecha *v.* Brauer, 168 U. S. 104, 123, 42 L. Ed. 398; Stuart *v.* Hayden, 169 U. S. 1, 14, 42 L. Ed. 639; Baker *v.* Cummings, 169 U. S. 189, 198, 42 L. Ed. 711; The Carib Prince, 170 U. S. 655, 42 L. Ed. 1181; Illinois *v.* Illinois Central R. Co., 184 U. S. 77, 98, 46 L. Ed. 440; United States *v.* Stinson, 197 U. S. 200, 49 L. Ed. 724; Oceanic Steam, etc., Co. *v.* Aitken, 196 U. S. 589, 49 L. Ed. 610; United States *v.* Clark, 200 U. S. 601, 50 L. Ed. 613.

48. Morewood *v.* Enequist, 23 How. 491, 16 L. Ed. 516; The Ship Marcellus, 1 Black 414, 417, 17 L. Ed. 217; Dravo *v.* Fabel, 132 U. S. 487, 490, 33 L. Ed. 421; Compania La Flecha *v.* Brauer, 168 U. S. 104, 123, 42 L. Ed. 398; Stuart *v.* Hayden, 169 U. S. 1, 14, 42 L. Ed. 639.

Where an action is brought in admiralty to recover damages to property alleged to be due to latent defects in the boat, and both the district court and the circuit court of appeals hold that the sole cause of the accident was a latent defect in a rivet from which the head had come off, leaving the hole through which the water poured in and upon the merchandise of the libelant, their finding will be followed by this court unless shown to be clearly erroneous. The Carib Prince, 170 U. S. 655, 42 L. Ed. 639.

49. United States *v.* Clark, 200 U. S. 601, 50 L. Ed. 613.

50. Rule in equity and admiralty.—Dravo *v.* Fabel, 132 U. S. 487, 490, 33 L. Ed. 421; Stuart *v.* Hayden, 169 U. S. 1, 14, 42 L. Ed. 639; Baker *v.* Cummings, 169 U. S. 189, 198, 42 L. Ed. 711; Townson *v.* Moore, 173 U. S. 17, 24, 43 L. Ed. 597.

The concurrent findings of two lower

in equity and admiralty cases, this court will not reverse the concurring decisions of two subordinate courts upon questions of fact, unless there be a clear preponderance of evidence against their conclusions.[51]

And under earlier statutes regulating appeals in admiralty, it was held, repeatedly, that when questions of fact only are presented by the appeal, and there is no dispute as to the law, and the district and circuit courts have both found in one way, every presumption is in favor of the decree. And there will be no reversal unless the error is clear.[52]

This court will not, in a case of collision, reverse the concurrent decrees of the courts below, upon a mere difference of opinion as to the weight and effect of conflicting testimony. To warrant a reversal, it must be clear that the lower courts have committed an error, and that a wrong has been done to the appellant.[53]

courts that loss to a cargo was due to hurried and imprudent loading will conclude us, unless clearly erroneous. The Germanic, 196 U. S. 589, 593, 49 L. Ed. 610.

Duty of master of vessel.—Where two lower subordinate courts have held that it was not the duty of the master of a ship to put into the nearest port when a seaman is severly injured in order to obtain medical assistance, the judgment will not be disturbed by this court. The Iroquois, 194 U. S. 240, 243, 48 L. Ed. 955.

Seaworthiness.—Concurrent findings of fact by the district court and the circuit court of appeals as to the seaworthiness of a vessel at the time of, and due diligence used prior to, the beginning of a voyage, will not ordinarily be disturbed by this court, and will usually be accepted as conclusive. The Wildcroft, 201 U. S. 378, 50 L. Ed. 794; The Carib Prince, 170 U. S. 655, 658, 42 L. Ed. 1181; International Nav. Co. *v.* Farr Mfg. Co., 181 U. S. 218, 45 L. Ed. 830.

51. The S. B. Wheeler, 20 Wall. 385, 22 L. Ed. 385; The Lady Pike, 21 Wall. 1, 8, 22 L. Ed. 499; The Richmond, 103 U. S. 540, 26 L. Ed. 313; Towson *v.* Moore, 173 U. S. 17, 43 L. Ed. 597; Smith *v.* Burnett, 173 U. S. 430, 436, 43 L. Ed. 756; The Iroquois, 194 U. S. 240, 247, 48 L. Ed. 955; The Quickstep, 9 Wall. 665, 19 L. Ed. 767.

52. The S. B. Wheeler, 20 Wall. 385, 22 L. Ed. 385; The Juniata, 93 U. S. 337, 23 L. Ed. 930; The Grace Girdler, 7 Wall. 196, 19 L. Ed. 113; Newell *v.* Norton, 3 Wall. 257, 18 L. Ed. 271; The Ship Marcellus, 1 Black 414, 17 L. Ed. 217; The Hypodame, 6 Wall. 216, 18 L. Ed. 794; The Lady Pike, 21 Wall. 1, 22 L. Ed. 499; Walsh *v.* Rogers, 13 How. 283, 14 L. Ed. 147.

When the district and circuit courts have agreed in their estimate of the damages in a collision case, this court will not set aside their conclusion without satisfactory evidence that they were mistaken. The Commerce, 16 Wall. 33, 21 L. Ed. 465.

Where a cause in admiralty turns on a question of fact, and the evidence is conflicting, and both the courts below decide the same way, it is not for this court to hear arguments whether eleven deponents ought to be believed on one side rather than ten on the other, for the weight of testimony is not always with numbers. The Water Witch, 1 Black 494, 17 L. Ed. 155.

53. The "Juniata," 93 U. S. 337, 23 L. Ed. 930.

This court will not readily reverse in a case of collision, depending on a mere difference of opinion as to the weight and effect of conflicting testimony, where both the district and circuit courts have agreed. The Grace Girdler, 7 Wall. 196, 19 L. Ed. 113.

"The court, seeing no reason to doubt the correctness of a decision below, again declares what it has often before decided, that it will not reverse from doubt where the issue is one entirely of fact, depending on the credibility of witnesses who differ in their statements, and where the district and circuit courts have concurred in viewing the merits. And it announces emphatically that in cases where both courts below concur, parties need not bring appeals here with the expectation of reversal because they can find in a mass of conflicting testimony enough to support the appellant's allegation if the testimony of the other side be wholly rejected, or by attacking the character of witnesses and so raising a mere doubt as to what justice required." Newell *v.* Norton, 3 Wall. 257, 18 L. Ed. 271.

In a case of collision between two seagoing vessels, where the only question proposed by the pleadings is one of fact, where there is much discrepancy between the witnesses as to every averment, and where both the courts below have concurred in their decision, it is not to be expected that this court will reverse the decree upon a mere doubt founded on the number or credibility of the witnesses. In such a case the appellant has all presumptions against him, and the burden of proof is thrown on him to show affirmatively that an error has been committed, and if there be sufficient evidence on the record to support the decree which

On the other hand, it was equally well settled that where, after execution, this court was convinced that both the courts below were wrong, there would be a reversal.[54]

b. *Limitations of General Rule.*—While upon such review this court will generally accept the concurrent conclusions of the trial and appellate court, yet, as was said by Mr. Justice Brewer: "There has always been recognized the right and the duty of this court to examine the record, and if it finds that the conclusions are wholly unwarranted by the testimony, it will set the verdict or report aside and direct a re-examination."[55] Accordingly, where the premises upon which both lower courts acted in making a finding of fact with respect to fraud, is without any support in the evidence and, in fact, rests upon a mistaken assumption, the finding is not conclusive on the supreme court.[56]

4. WHAT LAW GOVERNS—a. *In General.*—Upon a writ of error, this court, as is well settled, cannot review a decision of a question of fact, even if by the local practice, as in Louisiana, the law and the facts are tried together by the judge without a jury.[57]

b. *Louisiana Practice.*—According to the practice of Louisiana, where cases are carried to an appellate tribunal, in which the court below has decided questions of fact as well as of law, the appellate tribunal also reviews and decides both classes of questions. But this practice is not applicable to the courts of the United States. A writ of error in them brings up only questions of law, and questions of fact remain as unexaminable as if they had been decided by a jury below.[58]

was made, the appellant cannot get it reversed by establishing a theory supported by some of the witnesses, on which a different decree might have been rendered. The Ship Marcellus, 1 Black, 414, 17 L. Ed. 217.

In cases of collision depending on fact, where the evidence is conflicting, this court will not readily reverse a decree made by the district, and affirmed by the circuit court. It declares that the district court, which can examine witnesses ore tenus, and summon, if it pleases, experienced masters of vessels to help them, as Trinity masters do the English courts in cases depending on nautical experience, has better opportunities than any other courts can have for examining such cases, and for forming correct conclusions on them. The Hypodame, 6 Wall. 216, 18 L. Ed. 794, citing Newell *v.* Norton, 3 Wall. 257, 267, 18 L. Ed. 271.

54. Though on appeals in admiralty, involving issues of fact alone, this court will not, except in a clear case, reverse where both the district and the circuit court have agreed in their conclusions, yet in a clear case it will reverse even in such circumstances. The Lady Pike, 21 Wall. 1, 22 L. Ed. 499.

Appeals in admiralty, it may be admitted, are not favored where it appears that the subordinate courts have both concurred in the same view of the merits of the controversy. The Lady Pike, 21 Wall. 1, 8, 22 L. Ed. 499.

Although where the circuit and district court both agree on a question of alleged fault in a vessel libelled for collision, this court will not readily reverse, yet it will do so where after examination its conviction is that both the courts below were wrong. The Ariadne, 13 Wall. 475, 20 L. Ed. 512.

55. Limitations of general rule.—The Ariadne, 13 Wall. 475, 20 L. Ed. 542; Beyer *v.* LeFevre, 186 U. S. 114, 119, 46 L. Ed. 1080; De La Rama *v.* De La Rama, 201 U. S. 303, 309, 50 L. Ed. 765.

Where both courts below have found a particular state of facts, we do not disregard them except upon the conviction that the lower courts clearly erred in their conception of the weight of the evidence. Darlington *v.* Turner, 202 U. S. 195, 220, 50 L. Ed. 992.

56. Darlington *v.* Turner, 202 U. S. 195, 220, 50 L. Ed. 992.

57. What law governs in general.—Dower *v.* Richards, 151 U. S. 658, 664, 38 L. Ed. 305.

58. Louisiana practice.—United States *v.* King, 7 How. 833, 12 L. Ed. 934.

In Parsons *v.* Bedford, 3 Pet. 433, 7 L. Ed. 732, this court, on writ of error to a lower court of the United States, held that it had no power to re-examine facts tried by a jury in the court below, although that court was held in Louisiana, where congress had enacted that the mode of proceeding should conform to the laws directing the mode of practice in the district courts of the state, and a statute of the state authorized its supreme court to try anew on appeal facts tried by a jury in a district court. Capital Traction Co. *v.* Hof, 174 U. S. 1, 8, 43 L. Ed. 873.

Under the Louisiana practice, which was adopted by this act for the courts of the United states in that district, trials

5. AGREEMENT OF PARTIES.—Nor is it competent for the parties by agreement

were allowed by the court without a jury, and almost immediately questions arose as to the manner in which such cases should be brought to this court for review by writ of error. There was much difficulty in reaching a settlement of the practice, but in United States *v.* King, 7 How. 833, 845, 12 L. Ed. 934, it was decided unanimously "that the decision of the circuit court upon the questions of fact must, like the finding of a jury, be regarded as conclusive; that the writ of error can bring up nothing but questions of law." Following this was the case of Bond *v.* Brown, 12 How. 254, 256, 13 L. Ed. 977, where Mr. Chief Justice Taney said: "And whether the fact was rightly decided or not according to the evidence is not open to inquiry in this court. The decision of the court below in this respect is as conclusive as the verdict of a jury when the case is brought here by writ of error." Other cases to the same effect may be found. Such is now the settled law with reference to trials of issues of fact in Louisiana, when a review is sought in this court by writ of error. The Abbotsford, 98 U. S. 440, 442, 25 L. Ed. 168.

By the Louisiana practice, if neither party claims a trial by jury, the whole case is decided by the court; matters of fact as well as of law. Where, upon such a trial, no testimony is objected to, and it does not appear that any question of law arose or was decided, and the case is brought to this court by writ of error, the judgment of the court below must be affirmed. The decision of the court below, upon questions of fact, is as conclusive upon this court as the verdict of a jury would be. Bond *v.* Brown, 12 How. 254, 13 L. Ed. 977.

In Louisiana, the supreme court of the state reviews the questions of fact as well as of law which are brought up from the court below; and when it reverses a judgment upon either ground, it gives the judgment which the inferior court ought to have given. But where a case is brought before this court by a writ of error, it can only review questions of law; and, therefore, where the validity of a verdict of a jury is brought into question, the practice which prevails in the state courts of Louisiana is inapplicable in the courts of the United States. Hence, where a jury found a verdict in general for the plaintiff in a suit upon a promissory note, without finding the amount due, which the laws and practice of Louisiana require them to do, and the court then gave judgment for the amount of the note, this would have been adjudged to be cause of reversal of the judgment by the supreme court of the state, but cannot be so held by this court. Parks *v.* Turner, 12 How. 39, 13 L. Ed. 883.

This action was instituted in the district court of the United States for the eastern district of Louisiana, according to the forms of proceedings adopted and practiced in the courts of that state. The cause was tried by a special jury, and a verdict was rendered for the plaintiff. On the trial, the counsel for the defendant moved the court to direct the clerk of the court to take down in writing the testimony of the witnesses examined in the cause, that the same might appear on record; such being the practice of the state courts of Louisiana; and which practice the counsel for the defendant insisted was to prevail in the courts of the United States, according to the act of congress of the 26th of May, 1824; which provides that the mode of proceeding in civil causes, in the courts of the United States established in Louisiana, shall be conformable to the laws directing the practice in the district court of the state, subject to such alterations as the judges of the courts of the United States should establish by rules. The court refused to make the order, or to permit the testimony to be put down in writing; the judge expressing the opinion that the courts of the United States are not governed by the practice of the courts of the state of Louisiana. The defendant moved for a new trial, and the motion being overruled and judgment entered for the plaintiff on the verdict, the defendant brought a writ of error to this court. Under the laws of Louisiana, on the trial of a cause before a jury, if either party desires it, the verbal evidence is to be taken down in writing by the clerk, to be sent to the supreme court, to serve as a statement of facts in case of appeal; and the written evidence produced on the trial is to be filed with the proceedings. This is done to enable the appellate court to exercise the power of granting a new trial, and of revising the judgment of the inferior court. Held, that the refusal of the judge of the district court of the United States to permit the evidence to be put in writing, could not be assigned for error in this court, the cause having been tried in the court below and a verdict given on the facts by a jury; if the same had been put in writing, and been sent up to this court with the record, this court, proceeding under the constitution of the United States and of the amendment thereto which declares, "no fact once tried by a jury shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law," is not competent to redress any error by granting a new trial. Parsons *v.* Bedford, 3 Pet. 433, 7 L. Ed. 732.

In a petitory action, in the nature of ejectment, to recover land in Louisiana,

to impose upon this court the duty of considering matters of fact.[59]

6. CONSTRUCTION OF STATUTE.—Where words in an act limiting the reviewing power of this court, in cases where the facts have been found below, "to a determination of the questions of law arising upon the record and to the rulings of the court excepted to," have acquired, through judicial interpretation, a definite meaning, by which that power, on exceptions, is confined to questions of law, they will, when found in a subsequent act, be presumed to be used in the same sense, unless a contrary intention appears from the act.[60]

the subject was fully explained by Chief Justice Taney, who (according to the original opinion on file, misprinted in some particulars in the official report) said: "According to the laws of that state, unless one of the parties demurs on trial by jury, the court decides the fact as well as the law; and if the judgment is removed to a higher court for revision, the decision upon the fact as well as the law is open for examination in the appellate court. The record transmitted to the superior court, therefore, in the state practice necessarily contains all the evidence offered in the inferior court. And as there is no distinction between courts of law and courts of equity, the legal and equitable rights of the parties are tried and decided in the same proceeding. In the courts of the United States, however, the distinction between courts of law and of equity is preserved in Louisiana as well as in the other states. And the removal of the case from the circuit court to this court is regulated by act of congress, and not by the practice of Louisiana; and the writ of error, by which alone a case can be removed from a circuit court when sitting as a court of law, brings up for revision here nothing but questions of law; and if the case has been tried according to the Louisiana practice, without the intervention of a jury, the decisions of the circuit court upon questions of fact are as conclusive as if they had been found by the jury." United States *v.* King, 7 How. 833, 12 L. Ed. 934, 937; Dower *v.* Richards, 151 U. S. 658, 665, 38 L. Ed. 305.

Construction of act of 1824.—The statute of Louisiana, requiring their courts to have the testimony taken down in all cases where an appeal lies to the supreme court, and the adoption of this rule by the court of the United States, includes only cases where an appeal (technically speaking) lies, and not cases which are carried to an appellate court by writ of error. "To construe the act of 1824, making the practice existing in Louisiana the guide to that in the courts of the United States, when sitting in that state, as if meaning to devolve on this court such a re-examination of facts, without a trial by jury, in a case at law, like this, and not one in equity or admiralty, would be to give to it an unconstitutional operation, dangerous to the trial by jury, and at times subversive of the public liberties. Parsons *v.* Bedford, 3 Pet. 433, 448, 7 L. Ed. 732. In a case of chancery or admiralty jurisdiction, it might be different, as in those, by the law of the land, a technical appeal lies, and the facts are there open to reconsideration in this court. Livingston *v.* Story, 9 Pet. 632, 9 L. Ed. 255; McCollum *v.* Eager, 2 How. 61, 64, 11 L. Ed. 179." Phillips *v.* Preston, 5 How. 278, 288, 12 L. Ed. 152, cited in Arthurs *v.* Hart, 17 How. 6, 15 L. Ed. 30.

"No court ought, unless the terms of an act of congress render it unavoidable, to give a construction to the act which should, however unintentional, involve a violation of the constitution. The terms of the act of 1824 may well be satisfied by limiting its operation to modes of practice and proceeding in the courts below, without changing the effect or conclusiveness of the verdict of a jury upon the facts litigated on the trial. The party may bring the facts into review before the appellate court, so far as they bear upon questions of law, by bill of exceptions. If there be any mistake of the facts, the court below is competent to redress it by granting a new trial." Parsons *v.* Bedford, 3 Pet. 433, 7 L. Ed. 732.

"Was it the intention of congress, by the general language of the act of 1824, to alter the appellate jurisdiction of this court, and to confer on it the power of granting a new trial by a re-examination of the facts tried by the jury—to enable it, after trial by jury, to do that in respect to the courts of the United States, sitting in Louisiana, which is denied to such courts sitting in all the other states in the Union? We think not." Parsons *v.* Bedford, 3 Pet. 433, 448, 7 L. Ed. 732, 737.

59. Agreement of parties.—"This case came before the court under an unusual agreement of the parties, by which matters of fact, property cognizable before a jury, are submitted to the judgment of the court. The court desire to be understood as not admitting that it is competent for the parties by any such agreement to impose this duty upon them. The peculiar circumstances of this case furnish a sufficient apology for this agreement, but it is not to be drawn into precedent." Shankland *v.* Washington, 5 Pet. 390, 8 L. Ed. 166.

60. Construction of statute.—The Abbottsford, 98 U. S. 440, 25 L. Ed. 168.

7. Weight and Sufficiency of Evidence.—It is well settled that it is not our province on a writ of error to determine the weight to be given to the evidence. In such case we are confined to the consideration of exceptions taken at the trial, to the admission or rejection of evidence, and to the charge of the court and its refusal to charge. We have no concern with questions of fact, or the weight to be given to the evidence which will properly admit it.[61]

If the findings of the jury are against the weight of the evidence, the remedy is by motion for new trial, and where that is not done, this court cannot exercise a function which was that of a jury.[62]

Effect of Evidence and Burden of Proof.—A determination by the court

61. Weight and sufficiency of evidence.—Minor *v.* Tillottson, 2 How. 392, 11 L. Ed. 312; Zeller *v.* Eckert, 4 How. 289, 11 L. Ed. 979; Dirst *v.* Morris, 14 Wall. 484, 20 L. Ed. 722; Prentice *v.* Zane, 8 How. 470, 12 L. Ed. 1160; Wilson *v.* Everett, 139 U. S. 616, 35 L. Ed. 286; Ætna Life Ins. Co. *v.* Ward, 140 U. S. 76, 35 L. Ed. 371; Corinne Mill, etc., Co. *v.* Toponce, 152 U. S. 405, 409, 38 L. Ed. 493; Case *v.* Marchand, 154 U. S., appx. 642, 38 L. Ed. 1090; Generes *v.* Campbell, 11 Wall. 193, 199, 20 L. Ed. 110; Dower *v.* Richards, 151 U. S. 658, 38 L. Ed. 305; Nashua Savings Bank *v.* Anglo-American, etc., Co., 189 U. S. 221, 231, 47 L. Ed. 782.

This court cannot review verdicts of the jury upon the weight of the evidence. New York, etc., R. Co. *v.* Estill, 147 U. S. 591, 597, 617, 37 L. Ed. 298, citing Zeller *v.* Eckert, 4 How. 289, 11 L. Ed. 979; Express Co. *v.* Ware, 20 Wall. 543, 22 L. Ed. 422; Lancaster *v.* Collins, 115 U. S. 222, 29 L. Ed. 373; Chicago, etc., R. Co. *v.* Ohle, 117 U. S. 123, 29 L. Ed. 837.

This court cannot review the weight of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff on the question of variance, or because there was no evidence to sustain the verdict rendered. Lancaster *v.* Collins, 115 U. S. 222, 225, 29 L. Ed. 373.

Our examination must be restricted to the question of law involved in the ruling of the court below, and where issues of fact were fairly submitted to the jury, this court must assume on writ of error, when the evidence is conflicting, that the verdict of the jury is correct. Hall *v.* Cordell, 142 U. S. 115, 35 L. Ed. 956.

Where the jury were fully and properly instructed in respect to every aspect of the case, we have no authority to set aside their verdict, even if it does not appear to be justified by the evidence. Shauer *v.* Alterton, 151 U. S. 607, 626, 38 L. Ed. 286, citing Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 131; Lincoln *v.* Power, 151 U. S. 436, 38 L. Ed. 224.

An assignment of error that the evidence conclusively showed that the transactions upon which the plaintiffs below claimed a right to recover were wagering and gambling contracts, and that the court erred in not so holding and the jury in not so finding, is of course without merit, since it asks us to determine the weight of proof and thus usurp the province of the jury. Hansen *v.* Boyd, 161 U. S. 397, 40 L. Ed. 746.

Although it should appear that were this court to usurp functions of the jury, and determine the weight to be given to the evidence, we might arrive at different conclusions, yet this is not our province on a writ of error. "In such a case we are confined to the consideration of exceptions, taken at the trial, to the admission or rejection of evidence and to the charge of the court and its refusals to charge. We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted. Minor *v.* Tillotson, 2 How. 392, 393, 11 L. Ed. 312; Zeller *v.* Eckert, 4 How. 289, 299, 11 L. Ed. 979; Dirst *v.* Morris, 14 Wall. 484, 490, 20 L. Ed. 722; Prentice *v.* Zane, 8 How. 470, 485, 12 L. Ed. 1160; Wilson *v.* Everett, 139 U. S. 616, 35 L. Ed. 286." Ætna Life Ins. Co. *v.* Ward, 140 U. S. 76, 77, 35 L. Ed. 371.

As stated by us in Ætna Life Ins. Co. *v.* Ward: "It may be that if we were to usurp the functions of the jury and determine the weight to be given to the evidence, we might arrive at a different conclusion. But that is not our province on a writ of error. In such a case we are confined to the consideration of exceptions, taken at the trial, to the admission or rejection of evidence and to the charge of the court and its refusals to charge. We have no concern with questions of fact, or the weight to be given to the evidence which was properly admitted." Washington, etc., R. Co., 140 U. S. 91, 35 L. Ed. 339, citing numerous cases. New York, etc., R. Co. *v.* Winter, 143 U. S. 60, 75, 36 L. Ed. 71.

Where an exception to a denial of a motion or request, that the jury be instructed to find for defendants or either of them, is duly saved, it is open to the court to consider whether there is any evidence to sustain the verdict, though not to pass upon its weight or sufficiency. Wiborg *v.* United States, 163 U. S. 632, 658, 41 L. Ed. 289.

62. Hedden *v.* Iselin, 142 U. S. 676, 35 L. Ed. 1155.

below of questions as to the effect of evidence and burden of proof, even if necessary to the decision of the case, is final and cannot be reviewed here.[63] If the finding depends upon the weighing of conflicting evidence, it is a decision on the facts, the revision of which is forbidden to this court by § 1011.[64] In other words, when the evidence is conflicting, there being evidence to sustain the decree, this court will not ordinarily interfere.[65]

An exception to the denial of a motion for a new trial upon the ground that the verdict was not supported by the amount and character of evidence that is required by law, is untenable under repeated rulings of this court.[66]

Refusal to Direct Verdict.—The question of the sufficiency of the evidence for the plaintiff to support his action cannot be considered by this court. It has repeatedly been decided that a request for a ruling that, upon the evidence introduced, the plaintiff is not entitled to recover, cannot be made by the defendant, as a matter of right, unless at the close of the whole evidence; and that if the defendant, at the close of the plaintiff's evidence, and without resting his own case, requests and is refused such a ruling, the refusal cannot be assigned for error.[67]

63. Effect of evidence and burden of proof.—Marsh *v.* Insurance Co., 131 U. S., appx., 213, 25 L. Ed. 9.

The weight of evidence and the extent to which it was contradicted or explained away by witnesses, are questions exclusively for the jury, and not reviewable upon writ of error. Crumpton *v.* United States, 138 U. S. 361, 363, 34 L. Ed. 958.

To present a question to this court, the subordinate tribunal must ascertain the facts upon which the judgment, or opinion excepted to, is founded; for this court cannot determine the weight or effect of evidence, nor decide mixed questions of law and fact. Zeller *v.* Eckert, 4 How. 289, 11 L. Ed. 979; York, etc., R. Co. *v.* Myers, 18 How. 246, 251, 15 L. Ed. 380.

"We have no concern, on a writ of error, with questions of fact, or whether the finding of the jury accords with the weight of the evidence. The law has provided another remedy for errors of this description, namely, a motion in the court below for a new trial, on a case made." Zeller *v.* Eckert, 4 How. 289, 298, 11 L. Ed. 979, 983.

If the question was whether all the evidence was sufficient in law to warrant a finding for the plaintiff, he should have presented that question, by a request for a definite ruling upon that point. Martinton *v.* Fairbanks, 112 U. S. 670, 672, 28 L. Ed. 862.

Where a party has a verdict given against him on insufficient evidence, his remedy is by motion for new trial. He has no remedy in a court of error. The City *v.* Babcock, 3 Wall. 240, 18 L. Ed. 31.

Whether a witness called to testify to any matter of opinion has such qualifications and knowledge as to make his testimony admissible is a preliminary question for the judge presiding at the trial; and his decision of it is conclusive, unless clearly shown to be erroneous in matter of law. Stillwell Manufacturing Co. *v.* Phelps, 130 U. S. 520, 527, 32 L. Ed. 1035.

This court is precluded from considering an assignment of errors that the verdict was against the weight of evidence, if there was any evidence proper to go to the jury in support of the verdict. Humes *v.* United States, 170 U. S. 210, 42 L. Ed. 1011, citing Crumpton *v.* United States, 138 U. S. 361, 34 L. Ed. 959; Moore *v.* United States, 150 U. S. 57, 37 L. Ed. 996.

A plaintiff may prove, by admission of a defendant, that all the steps necessary to charge him as an indorser or drawer of a bill of exchange have been taken. Proof of an acknowledgment of his liability to pay the bill, is competent evidence to go to a jury as evidence of notice of dishonor. The effect of such evidence in the particular case must be determined by the jury, and their decision cannot be reviewed by an appellate court. Hyde *v.* Stone, 20 How. 170, 15 L. Ed. 874.

When the evidence upon a boundary line, between two Mexican grants, is conflicting and irreconcilable, this court will not interfere with the decision of the court below. Alviso *v.* United States, 8 Wall. 337, 19 L. Ed. 305.

64. Martinton *v.* Fairbanks, 112 U. S. 670, 672, 28 L. Ed. 862; Smith *v.* Burnett, 173 U. S. 430, 436, 43 L. Ed. 756; Crossman *v.* Burrill, 179 U. S. 100, 115, 45 L. Ed. 106; McKinley, etc., Min. Co. *v.* Alaska, etc., Min. Co., 183 U. S. 563, 569, 46 L. Ed. 331.

65. Smith *v.* Burnett, 173 U. S. 430, 436, 43 L. Ed. 756; Michigan Central R. Co. *v.* Powers, 201 U. S. 245, 50 L. Ed. 744.

66. Moore *v.* United States, 150 U. S. 57, 37 L. Ed. 996; Crumpton *v.* United States, 138 U. S. 361, 34 L. Ed. 958; Wilson *v.* Everett, 139 U. S. 616, 35 L. Ed. 386; Van Stone *v.* Stilwell, etc., Mfg. Co., 142 U. S. 128, 35 L. Ed. 961.

67. Grand Trunk R. Co. *v.* Cummings, 106 U. S. 700, 27 L. Ed. 266; Accident Ins. Co. *v.* Crandal, 120 U. S. 527, 30 L. Ed.

But it is well settled that exceptions to alleged findings of facts, because unsupported by evidence, present questions of law reviewable in courts of error.[68]

8. Excessiveness of Damages.—**In General.**—This court is without authority to disturb an order of the circuit court overruling a motion for a new trial upon the ground that the damages are excessive; our power is restricted to the determination of questions of law arising upon the record.[69] The correction of that error, if there is any, lies with the court below upon a motion for a new trial, the granting or refusal of which is not assignable for error here.[70]

Report of Commissioners in Condemnation Proceedings.—"An appellate court will not interfere with the report of commissioners to correct the amount of damages except in cases of gross error, showing prejudice or corruption. The commissioners hear the evidence and frequently make their principal evidence out of a view of the premises, and this evidence cannot be carried up so as to correct the report as being against the weight of evidence. Hence, for an error in the judgment of commissioners in arriving at the amount of damages, there can be no correction, especially where the evidence is conflicting. Commissioners are not bound by the opinions of experts or by the apparent weight of evidence, but may give their own conclusions."[71]

9. Limitations of and Exceptions to General Rule—a. *In General.*—This court has the right to consider under what instructions and definitions given by the trial court, the jury found their verdict. To this extent the decision of the jury is not binding upon the appellate court.[72]

b. *Appeals in Admiralty.*—In 1803, congress substituted an appeal from the circuit court to this court, instead of a writ of error, in cases in equity and in admiralty; and upon such an appeal the facts as well as the law were open to review in both those classes of cases until 1875, when the appeal in admiralty was restricted to questions of law.[73]

740; Northern Pac. R. Co. *v.* Mares, 123 U. S. 710, 31 L. Ed. 296; Robertson *v.* Perkins, 129 U. S. 233, 32 L. Ed. 686; Columbia, etc., R. Co. *v.* Hawthorne, 144 U. S. 202, 206, 36 L. Ed. 405.

68. Laing *v.* Rigney, 160 U. S. 531, 540, 40 L. Ed. 525.

69. Excessiveness of damages in general.—Wabash R. Co. *v.* McDaniels, 107 U. S. 454, 27 L. Ed. 605, citing Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531.

The principal ground of complaint by the defendant seems to be that the jury had no basis for finding a verdict for $10,000, but that their verdict should have been for either $5,000 or $15,000. But this was a question to be reached only through a motion for a new trial; and we cannot, on this writ of error, review any error committed in that respect by the jury, if there were one. Nor can we take cognizance of the complaint that the court overruled the motion for a new trial, or that the verdict of the jury was contrary to law and not warranted by the testimony. The case was fairly submitted to the jury, and the issues involved were passed upon by them. Wilson *v.* Everett, 139 U. S. 616, 621, 35 L. Ed. 286.

70. New York, etc., R. Co. *v.* Winter, 143 U. S. 60, 75, 36 L. Ed. 71.

It is not permitted for this court, sitting as a court of errors, in a case wherein damages have been fixed by the verdict of a jury, to take notice of an assignment of error that the damages found by the jury are excessive, and appear to have been given under the influence of passion and prejudice. An error of the jury in allowing an unreasonable amount is to be redressed by a motion for a new trial. Lincoln *v.* Power, 151 U. S. 436, 38 L. Ed. 224, citing Parsons *v.* Bedford, 3 Pet. 433, 7 L. Ed. 732; Railroad Co. *v.* Fraloff, 100 U. S. 24, 25 L. Ed. 531.

71. Shoemaker *v.* United States, 147 U. S. 282, 306, 37 L. Ed. 170.

72. Limitations of and exceptions to general rule in general.—Leovy *v.* United States, 177 U. S. 621, 44 L. Ed. 914.

73. Appeals in admiralty.—Act of March 3, 1803, c. 40, 2 Stat. 244; The San Pedro, 2 Wheat. 132, 4 L. Ed. 202, 203; The Baltimore, 8 Wall. 377, 19 L. Ed. 463; Rev. Stat., § 692; Act of February 16, 1875, c. 77, § 1; 18 Stat. 315; The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100; Dower *v.* Richards, 151 U. S. 658, 664, 38 L. Ed. 305.

"Power to reverse for error, in fact, any judgment or decree of a circuit court brought here for revision, being absolutely prohibited, it became necessary to prescribe some mode by which the facts in equity suits and in cases of admiralty and maritime jurisdiction should be ascertained and embodied in the record,

But under the act of February 16, 1875, which took effect May 1, of that year, entitled "An act to facilitate the disposition of cases in the supreme court of the United States, and for other purposes," "the finding of facts in the circuit court is conclusive, and that the only rulings which can be presented for review here by bill of exceptions are those made upon questions of law. Such has been the construction given by this court to statutes of a similar character in a long line of decisions, commencing soon after the court was organized."[74]

Where the trial court had found the ultimate facts a mere failure or refusal to find mere incidental facts which only amount to evidence bearing on the ultimate facts of the case, is not error. Questions depending on the weight of evidence are to be conclusively settled below; and the fact in respect to which such an exception may be taken must be one of the material facts on which the correct determination of the cause depends.[75]

c. *Appeals in Equity.*—Upon an appeal in equity, the facts as well as the law are to be determined by this court.[76] In chancery cases, or in any other class of cases where all the evidence becomes part of the record in the highest court of the state, the same record being brought here, this court can review the decision of that court on both the law and the fact, so far as may be necessary to determine the validity of the right so set up under the act of congress.[77] But this

and it was accordingly provided in the 19th section of the judiciary act, that it should be the duty of the circuit courts in such cases to cause the facts on which they founded their sentence or decree fully to appear upon the record in some one of the modes therein described, and while that provision remained in force this court had no more right to re-examine the facts found in such a case than the court possesses in a common-law suit where the facts are found by the verdict of a jury. 1 Stat. at L. 84; 2 Stat. at L. 244." The Baltimore, 8 Wall. 377, 382, 19 L. Ed. 463.

74. The Abbottsford, 98 U. S. 440, 25 L. Ed. 168.

When the act of 1875 was passed, words in a statute limiting the power of this court in the review of cases where the facts had been found below "to a determination of the questions of law arising upon the record and to the rulings of the court excepted to," had acquired, through judicial interpretation, a well understood legislative meaning, and that they confined our jurisdiction to the re-examination of questions of law alone. The Abbottsford, 98 U. S. 440, 444, 25 L. Ed. 168.

75. The Francis Wright, 105 U. S. 381, 26 L. Ed. 1100; Merchants' Ins. Co. *v.* Allen, 121 U. S. 67, 30 L. Ed. 858; The John H. Pearson, 121 U. S. 469, 30 L. Ed. 979; The City of New York, 147 U. S. 71, 76, 37 L. Ed. 84; Hathaway *v.* Cambridge First Nat. Bank, 134 U. S. 494, 498, 33 L. Ed. 1004; The E. A. Packer, 140 U. S. 360, 365, 35 L. Ed. 453.

In the case of Francis Wright, 105 U. S. 381, 26 L. Ed. 1100, it was ruled, p. 387, and, as we are satisfied, correctly, "that if the circuit court neglects or refuses, on request, to make a finding one way or the other, on a question of fact material to the determination of the cause, when evidence has been adduced on the subject, an exception to such refusal, taken in time and properly presented by a bill of exceptions, may be considered here on appeal. So, too, if the court, against remonstrance, finds a material fact which is not supported by any evidence whatever, and an exception is taken, a bill of exceptions may be used to bring up for review the ruling in that particular. In the one case, a refusal to find would be equivalent to a ruling that the fact was immaterial; and, in the other, that there was some evidence to prove what is found, when in truth there was none." "But," it was added, "this rule does not apply to mere incidental facts which only amount to evidence bearing on the ultimate facts of the case. Questions depending on the weight of evidence are, under the law as it now stands to be conclusively settled below; and the fact in respect to which such an exception may be taken must be one of the material and ultimate facts on which the correct determination of the cause depends." Merchants' Ins. Co. *v.* Allen, 121 U. S. 67, 71, 30 L. Ed. 858.

76. Appeals in equity.—Dodge *v.* Knowles, 114 U. S. 430, 434, 29 L. Ed. 144; The San Pedro, 2 Wheat. 132, 141, 4 L. Ed. 202.

77. Republican, etc., Bridge Co. *v.* Kansas, etc., R. Co., 92 U. S. 315, 317, 23 L. Ed. 515; Elliott *v.* Toeppner, 187 U. S. 327, 334, 47 L. Ed. 200.

In equity cases, which come up on appeal, and where the evidence on which the court below acted is presented here, the action of that court can be readily reviewed. Wetmore *v.* Rymer, 169 U. S. 115, 120, 42 L. Ed. 682.

court will not disturb the decision of the court below in such case, unless the error is clear.[78]

The rule in regard to the findings of fact by the court of claims has no reference to a case of equity jurisdiction conferred in a special case by a special act; and in such a case, where an appeal lies and is taken under § 707 of the Revised Statutes, this court must review the facts and the law as in other cases of equity appealed from other courts.[79]

10. Decisions of Land Department.—The rule is that in the administration of the public lands, the decision of the land department upon questions of fact is conclusive, and only questions of law are reviewable in the courts.[80] It is well

78. Morewood *v.* Enequist, 23 How. 491, 16 L. Ed. 516; Gumaer *v.* Colorado Oil Co., 152 U. S. 88, 38 L. Ed. 365.

In considering exceptions to a master's report in matters of fact, questioning his conclusions in respect to the amount of the defendant's profits, those conclusions, depending on the weighing of conflicting testimony, will not be set aside or modified, unless there clearly appears to have been error or mistake on his part. Callaghan *v.* Myers, 128 U. S. 617, 32 L. Ed. 547, citing Tilghman *v.* Proctor, 125 U. S. 136, 149, 31 L. Ed. 664; Kimberly *v.* Arms, 129 U. S. 512, 32 L. Ed. 764; Camden *v.* Stuart, 144 U. S. 104, 36 L. Ed. 363; Evans *v.* State Bank, 141 U. S. 107, 35 L. Ed. 654; Crawford *v.* Neal, 144 U. S. 585, 36 L. Ed. 552; Furrer *v.* Ferris, 145 U. S. 132, 36 L. Ed. 649.

79. Harvey *v.* United States, 105 U. S. 671, 26 L. Ed. 1206; La Abra Silver Min. Co. *v.* United States, 175 U. S. 423, 465, 44 L. Ed. 223; United States *v.* Old Settlers, 148 U. S. 427, 37 L. Ed. 509.

80. Decisions of land department.—Johnson *v.* Towsley, 13 Wall. 72, 20 L. Ed. 485; Warren *v.* Van Brunt, 19 Wall. 646, 22 L. Ed. 219; Shepley *v.* Cowan, 91 U. S. 330, 23 L. Ed. 424; Moore *v.* Robbins, 96 U. S. 530, 24 L. Ed. 848; Marquez *v.* Frisbie, 101 U. S. 473, 25 L. Ed. 800; Vance *v.* Burbank, 101 U. S. 514, 25 L. Ed. 929; Quinby *v.* Conlan, 104 U. S. 420, 26 L. Ed. 800; Smelting Co. *v.* Kemp, 104 U. S. 636, 26 L. Ed. 875; Steel *v.* Smelting Co., 106 U. S. 447, 27 L. Ed. 226; Baldwin *v.* Stark, 107 U. S. 463, 27 L. Ed. 526; United States *v.* Minor, 114 U. S. 233, 29 L. Ed. 110; Lee *v.* Johnson, 116 U. S. 48, 29 L. Ed. 570; Wright *v.* Roseberry, 121 U. S. 488, 30 L. Ed. 1039; Cragin *v.* Powell, 128 U. S. 691, 32 L. Ed. 566; Knight *v.* United States Land Ass'n, 142 U. S. 161, 35 L. Ed. 974; United States *v.* California, etc., Land Co., 148 U. S. 31, 37 L. Ed. 354; Barden *v.* Northern Pac. R. Co., 154 U. S. 288, 327, 38 L. Ed. 919; Catholic Bishop *v.* Gibbon, 158 U. S. 155, 166, 39 L. Ed. 931; Burfenning *v.* Chicago, etc., R. Co., 163 U. S. 321, 41 L. Ed. 175; Johnson *v.* Drew, 171 U. S. 93, 99, 42 L. Ed. 88; Gardner *v.* Bonestell, 180 U. S. 362, 45 L. Ed. 574; Bates *v.* Payne, 194 U. S. 106, 48 L. Ed. 894; Estes *v.* Timmons, 199 U. S. 391, 50 L. Ed. 241; De Cambra *v.* Rogers, 189 U. S. 119, 47 L. Ed. 734; Gertgens *v.* O'Connor, 191 U. S. 237, 240, 48 L. Ed. 163; Potter *v.* Hall, 189 U. S. 292, 47 L. Ed. 817; Moss *v.* Dowman, 176 U. S. 413, 415, 44 L. Ed. 526.

It has been repeatedly decided in this court, that the decisions of the land department are conclusive everywhere as regards all questions of fact. Baldwin *v.* Stark, 107 U. S. 463, 27 L. Ed. 526, citing Johnson *v.* Towsley, 13 Wall. 72, 20 L. Ed. 485; Gibson *v.* Chouteau, 13 Wall. 92, 20 L. Ed. 534; Shepley *v.* Cowan, 91 U. S. 330, 23 L. Ed. 424; Marquez *v.* Frisbie, 101 U. S. 473, 25 L. Ed. 800; Carr *v.* Fife, 156 U. S. 494, 501, 38 L. Ed. 508.

It is settled by an unbroken line of decisions of this court in land jurisprudence that the decisions of that department upon matters of fact within its jurisdiction, are, in the absence of fraud or imposition, conclusive and binding on the courts of the country. Johnson *v.* Towsley, 13 Wall. 72, 20 L. Ed. 485; Smelting Company *v.* Kemp, 104 U. S. 636, 26 L. Ed. 875; Steel *v.* Smelting Co., 106 U. S. 447, 27 L. Ed. 226; United States *v.* Minor, 114 U. S. 233, 29 L. Ed. 110; and many other cases. We are of opinion, therefore, that the decision of the land department on a question of the actual physical character of certain lands is not subject to review by the courts. Heath *v.* Wallace, 138 U. S. 573, 585, 34 L. Ed. 1063.

Under the laws of the United States prescribing the manner in which portions of the public domain may be acquired by settlers, it is provided that from the rulings of the officers of the land department, an appeal lies to the commissioner of the general land office and from him to the secretary of the interior. "For mere errors of judgment as to the weight of evidence on these subjects, by any of the subordinate officers, the only remedy is by an appeal to his superior of the department. The courts cannot exercise any direct appellate jurisdiction over the rulings of those officers or of their superior in the department in such matters, nor can they reverse or correct them in a collateral proceeding between private parties." Quinby *v.* Conlan, 104 U. S. 420, 26 L. Ed. 800.

The land department of the United States is administrative in its character,

settled that in the absence of fraud or imposition, the findings of the land department on matters of fact are conclusive upon the courts.[81] The courts do not assume any direct appellate jurisdiction over the rulings of the land department, and they accept the findings of that department as conclusive upon questions of fact.[82] But this court is not concluded by determinations of the land department upon questions of law.[83]

11. Effect of Bankruptcy Act.—Section 24b of the bankruptcy act is: "The several circuit courts of appeal shall have jurisdiction in equity, either interlocutory or final, to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy within their jurisdiction. Such power shall be exercised on due notice and petition by any party aggrieved." This is confined to questions of law and does not contemplate a review of the facts.[84] Congress did not attempt by § 25 of the bankrupt act, which provides that appeals, as in equity cases, may be taken in bankruptcy proceedings from the courts of bankruptcy to the circuit court of appeals of the United States, from a judgment adjudging or refusing to adjudge the defendant a bankrupt, "to empower the appellate court to re-examine the facts determined by a jury under § 19 otherwise than according to the rules of the common law. The provision applies to judgments 'adjudging or refusing to adjudge the defendant a bankrupt,' when trial by jury is not demanded, and the court of bankruptcy proceeds on its own findings of fact. In such case, the facts and the law are re-examinable on appeal, while the verdict of a jury on which judgment is entered concludes the issues of fact and the judgment is reviewable only for error of law. And it follows that alleged errors 'in instructions given or refused or in the admission or rejection of evidence,' must appear by exceptions duly taken and preserved by bill of exceptions."[85]

12. How Findings of Fact by the Court May Be Reviewed—a. *In General.*—Before the finding of a fact upon evidence submitted upon a hearing by the court can be re-examined on a writ of error, they must be brought into the record by a bill of exceptions, or an agreed statement of facts, or a special finding in the nature of a special verdict, or in some other way known to the practice of courts of error for the accomplishment of that purpose.[86]

b. *Review of Findings of Court*—(1) *Rule Prior to Statute*—aa. *In General.*—Before the passage of the act of March 3rd, 1865, ch. 86, § 4, re-enacted in the

and it has been frequently held by this court that, in the administration of the public land system of the United States, questions of fact are for the consideration and judgment of the land department, and its judgment thereon is final. Burfenning *v.* Chicago, etc., R. Co., 163 U. S. 321, 41 L. Ed. 175; Johnson *v.* Drew, 171 U. S. 93, 99, 42 L. Ed. 88; Gardner *v.* Bonestell, 180 U. S. 362, 45 L. Ed. 574; American School *v.* McAnnulty, 187 U. S. 94, 108, 47 L. Ed. 90.

81. Johnson *v.* Towsley, 13 Wall. 72, 20 L. Ed. 485; Lee *v.* Johnson, 116 U. S. 48, 29 L. Ed. 570; Lake Superior, etc., Co. *v.* Cunningham, 155 U. S. 354, 375, 38 L. Ed. 183; Burfenning *v.* Chicago, etc., R. Co., 163 U. S. 321, 323, 41 L. Ed. 175; Gonzales *v.* French, 164 U. S. 338, 41 L. Ed. 458; Johnson *v.* Drew, 171 U. S. 93, 99, 42 L. Ed. 88; Love *v.* Flahive, 205 U. S. 195, 198, 51 L. Ed. 768.

82. Shepley *v.* Cowan, 91 U. S. 330, 23 L. Ed. 424; Quinby *v.* Conlan, 104 U. S. 420, 26 L. Ed. 800; Clark *v.* Herington, 186 U. S. 206, 210, 46 L. Ed. 1128.

83. Wisconsin Central R. Co. *v.* Forsythe, 159 U. S. 46, 40 L. Ed. 71, citing Johnson *v.* Towsley, 13 Wall. 72, 20 L. Ed. 485; Shepley *v.* Cowan, 91 U. S. 330, 23 L. Ed. 424; Quinby *v.* Conlan, 104 U. S. 420, 26 L. Ed. 800; Doolan *v.* Carr, 125 U. S. 618, 624, 31 L. Ed. 844; Lake Superior, etc., Co. *v.* Cunningham, 155 U. S. 354, 38 L. Ed. 183; American School *v.* McAnnulty, 187 U. S. 94, 108, 47 L. Ed. 90.

84. Effect of bankruptcy act.—Mueller *v.* Nugent, 184 U. S. 1, 9, 46 L. Ed. 405; Elliott *v.* Toeppner, 187 U. S. 327, 334, 47 L. Ed. 200. See the title BANKRUPTCY.

85. Elliott *v.* Toeppner, 187 U. S. 327, 334, 47 L. Ed. 200.

86. How findings of fact by the court may be reviewed in general.—Storm *v.* United States, 94 U. S. 76, 81, 24 L. Ed. 43; Suydan *v.* Williamson, 20 How. 427, 15 L. Ed. 978; Baltimore, etc., R. Co. *v.* Trustees Sixth Presbyterian Church, 91 U. S. 127, 130, 23 L. Ed. 260; England *v.* Gebhardt, 112 U. S. 502, 505, 28 L. Ed. 811.

Revised Statutes, it had been settled by repeated decisions that in any action at law in which the parties waived a trial by jury and submitted the facts to the determination of the circuit court upon the evidence, its judgment was valid; but that this court had no authority to revise its opinion upon the admission or rejection of testimony, or upon any other question of law growing out of the evidence, and therefore, when no other error appeared on the record, must affirm the judgment.[87]

87. Rule prior to statute in general.— Guild *v.* Frontin, 18 How. 135, 15 L. Ed. 290; Kelsey *v.* Forsyth, 21 How. 85, 16 L. Ed. 32; Campbell *v.* Boyreau, 21 How. 223, 16 L. Ed. 96; Kearney *v.* Case, 12 Wall. 275, 20 L. Ed. 395; Bond *v.* Dustin, 112 U. S. 604, 28 L. Ed. 835; Rogers *v.* United States, 141 U. S. 548, 35 L. Ed. 853; Suydam *v.* Williamson, 20 How. 427, 432, 15 L. Ed. 978; Andes *v.* Slauson, 130 U. S. 435, 32 L. Ed. 989; Glenn *v.* Fant, 134 U. S. 398, 33 L. Ed. 969.

The judiciary act of 1789, c. 20, § 12 (1 Stat. 80), provided that the trial of issues of fact in the circuit courts should in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury; but it has always been held that if the parties waived a jury a judgment after trial by the court would not be erroneous. Kearney *v.* Case, 12 Wall. 275, 20 L. Ed. 395. Such a judgment, however, would not be reviewable here. Boogher *v.* Insurance Co., 103 U. S. 90, 95, 26 L. Ed. 310.

"Parties may, by consent, waive the trial of issues of fact by a jury, and submit the trial of both facts and law to the court. It will not be a mistrial. But if they wish the judgment of the court to be reviewed on a writ of error, a special verdict or agreed statement of facts must be put on record. The issues of fact must be ascertained and made certain, before a court of error can review the decision of an inferior court. If the verdict do not find all the issues, or the agreed statement in the nature of a special verdict be imperfect or incomplete, this court may order a venire de novo, because of the mistrial, as in the case of Graham *v.* Bayne, at this term. But having jurisdiction of the cause, and no error appearing on the face of the record, the judgment of the court below must be affirmed. The case of Prentice *v.* Zane, 8 How. 470, 12 L. Ed. 1160, is directly in point on this subject." Guild *v.* Frontin, 18 How. 135, 15 L. Ed. 290.

The finding of issues in fact by the court upon the evidence is altogether unknown to a common-law court, and cannot be recognized as a judicial act. Such questions are exclusively within the province of the jury; and if, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an arbitrator. And this court, therefore, cannot regard the facts so found as judicially determined in the court below, nor examine the questions of law, as if those facts had been conclusively determined by a jury or settled by the admission of the parties. Campbell *v.* Boyreau, 21 How. 223, 16 L. Ed. 97.

Nor can any exception be taken to an opinion of the court upon the admission or rejection of testimony, or upon any other question of law which may grow out of the evidence, unless a jury was actually impaneled, and the exception reserved while they were still at the bar. The statute which gives the exception in a trial at common law gives it only in such cases. And as this court cannot regard the facts found by the judge as having been judicially determined in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal. Consequently, as the circuit court had jurisdiction of the subject matter and the parties, and there is no question of law or fact open to our re-examination, its judgment must be presumed to be right, and on that ground only affirmed. Campbell *v.* Boyreau, 21 How. 223, 16 L. Ed. 97.

If the parties agree to submit the trial both of fact and law to the judge, they constitute him an arbitrator, or referee, whose award must be final and conclusive between them; but no consent can constitute this court appellate arbitrators. When the error alleged does not appear on the face of the record, or on a demurrer, a bill of exceptions to the ruling of the court on questions of law, either in admitting or rejecting testimony, or in their instructions to the jury, constitutes the only mode of bringing a case before this court for review. It is true, that when there is no dispute as to the facts, counsel may agree on a case stated in the nature of a special verdict; and the judgment of the court below on such case stated, or verdict, may be reviewed here on a writ of error. Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 266. See Stimpson *v.* Baltimore, etc., R. Co., 10 How. 329, 13 L. Ed. 441.

Where the parties waive a trial by jury, and substitute the court, none of the questions, whether of fact or of law, decided by the court below, can be re-examined and revised in this court upon a writ of error, because by the established

The reason for this, as stated by Mr. Chief Justice Taney, is that by the established and familiar rules and principles which govern common-law proceedings, no question of the law can be reviewed and re-examined in an appellate court upon writ of error (except only where it arises upon the process, pleadings, or judgment, in the cause), unless the facts are found by a jury, by a general or special verdict, or are admitted by the parties, upon a case stated in the nature of a special verdict stating the facts, and referring the questions of law to the court.[88] Therefore, where the proceeding in the court below was not according to the act of March 3, 1865, this court has no power to examine any ruling of the court below excepted to during the progress of the trial.[89]

bb. *Bill of Exceptions*—aaa. *Necessity for Bill of Exceptions.*—Where the court below decides both law and fact, no bill of exceptions need be taken. The case then becomes like one at common law, where a special verdict is found or a case is stated, in neither of which there is any necessity for a bill of exceptions.

and familiar rules of principles which govern common law proceedings, no question of law can be reviewed and re-examined in an appellate court upon a writ of error (except only where it arises from the process, pleading, or judgment in the case), unless the facts are found by a jury, by a general or special verdict, or are admitted by the parties upon a case stated in the nature of a special verdict, stating the facts, and referring the questions at law to the court. Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678, citing Guild *v.* Frontin, 18 How. 135, 15 L. Ed. 290; Suydam *v.* Williamson, 20 How. 427, 432, 15 L. Ed. 978; Kelsey *v.* Forsyth, 21 How. 85, 16 L. Ed. 32.

Prior to the enactment of the act of March 3, 1865, it was held, by this court, "that when the case is submitted to the judge to find the facts without the intervention of a jury, he acts as a referee by consent of the parties, and no bill of exceptions will lie to his reception or rejection of testimony, nor to his judgment on the law." Weems *v.* George, 13 How. 190, 14 L. Ed. 108, and that "no exception can be taken where there is no injury and where the question of law is decided in delivering the final judgment of the court." United States *v.* King, 7 How. 833, 853, 12 L. Ed. 934; See, also, Craig *v.* Missouri, 4 Pet. 410, 427, 7 L. Ed. 903; Martinton *v.* Fairbanks, 112 U. S. 670, 675, 28 L. Ed. 862.

Counsel may agree to submit both fact and law to the decision of the court; but they cannot, by agreement, introduce a new practice into this court, or compel us to adopt the provisions of the 22d section of the practice act of Illinois, permitting matters of both fact and law to be tried by the court, if both parties agree as to the mode in which such cases shall be reviewed in error. The practice of this court is regulated by the common law and acts of congress only. Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 266, citing Bayard *v.* Lombard, 9 How. 530, 13 L. Ed. 245.

88. Campbell *v.* Boyreau, 21 How. 223, 226, 16 L. Ed. 96; Bond *v.* Dustin, 112 U. S. 604, 606, 28 L. Ed. 835.

As was said by Mr. Chief Justice Taney, in Campbell *v.* Boyreau, 21 How. 223, 16 L. Ed. 96: "If, by agreement of parties, the questions of fact in dispute are submitted for decision to the judge upon the evidence, he does not exercise judicial authority in deciding, but acts rather in the character of an abitrator. * * * And as this court cannot regard facts found by the judge as having been judicially determined in the court below, there are no facts before us upon which questions of law may legally and judicially have arisen in the inferior court, and no questions, therefore, open to our revision as an appellate tribunal." Boogher *v.* Insurance Co., 103 U. S. 90, 95, 26 L. Ed. 310.

By the established familiar rules of principles which govern common-law proceedings, no question of law can be reviewed and re-examined in an appellate court upon a writ of error (except only where it arises upon the process, pleadings, or judgment in the case), unless the facts are found by a jury, by a general or special verdict, or are admitted by the parties upon a case stated in the nature of a special verdict, stating the facts, and referring the questions of law to the court. This shows that the act of congress of March 3d, 1865, was essential in order to preserve to the parties submitting a cause to a trial before a court, both as to law and fact, the benefit of a review or re-examination of questions of law in the appellate court. Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678, citing Campbell *v.* Boyreau, 21 How. 223, 16 L. Ed. 96; Guild *v.* Frontin, 18 How. 135, 15 L. Ed. 290; Suyden *v.* Williamson, 20 How. 427, 432, 15 L. Ed. 978; Kelsey *v.* Forsyth, 21 How. 85, 15 L. Ed. 32.

89. Campbell *v.* Boyreau, 21 How. 223, 224, 15 L. Ed. 96; Guild *v.* Frontin, 18 How. 135, 15 L. Ed. 290; Kearney *v.* Case, 12 Wall. 275, 20 L. Ed. 395; Dickinson *v.* The Planters' Bank, 16 Wall. 250, 21 L. Ed. 278; Gilman *v.* Illinois, etc., Tel. Co., 91 U. S. 603, 23 L. Ed. 405.

No exception can be taken where there is no jury, and where the question of law is decided in delivering the final judgment of the court. Even in a court of common law, an exception is never taken to the judgment of the court upon a case stated, or on a special verdict; yet the judgment is subject to revision in the appellate court. The same rule must prevail where the facts upon which the inferior court decided appear in the record; like a case stated, the question in the superior court necessarily is, whether the judgment of the court below was erroneous or not upon the facts before it, as they are certified in the record.[90]

bbb. *Review of Admission and Exclusion of Evidence.*—Where the court decides questions both of law and fact, the admission of improper testimony is not the subject of a bill of exceptions, although the exclusion of proper testimony is so.[91]

ccc. *Separation of Questions of Law from Questions of Fact.*—As a bill of exceptions lies only upon some point arising either upon the admission or refusal of evidence, or is a matter of law arising from a fact found, or not denied, and which has been overruled by the court, a difficult question arises in cases where the facts as well as the law are submitted to the court in reviewing on exceptions the correctness of the ruling of the law involved in rendering the judgment. Where both questions of law and questions of fact are submitted to the court, and both determined at the same time, and by the same tribunal, the separation of questions of law from questions of fact is more difficult. "'It may be, that, if upon the case stated by the parties or by the judge, it appears to the court of appeals that the decision which has been come to can be sustained by a particular view of the facts which does not render it necessary to arrive at the conclusion that he has erroneously decided the point of law before him, this court may have no power to review the judgment; yet that, where it is manifest from the facts stated, that in order to arrive at the conclusion he has arrived at, the judge must have decided a matter of law in a certain way, that will be a determination in point of law, with respect to which an appeal will lie. So, that, supposing there be a judgment which can be sustained, consistently with the law, by any view that can be taken of the facts stated, such a judgment probably cannot be reversed; yet, still, where the judge states the facts which were before him, and these facts will sustain his judgment upon one view of the law only, and that an incorrect one, this court may have jurisdiction to entertain the appeal.' This view is directly applicable to the case of a bill of exceptions where the jury has been dispensed with, and the judge substituted in its place, to pass upon the facts as well as the law, and furnishes the rule by which the point of law may be ascertained that was decided in rendering the judgment intended to be reviewed. In order, however, to disembarrass the proceedings as far as practicable in this peculiar mode of the trial of a common-law case, and to enable the appellate court to re-examine the point or points of law involved, the counsel,

90. Necessity for bill of exceptions.—United States *v.* King, 7 How. 833, 12 L. Ed. 934.

91. Review of admission and exclusion of evidence.—Arthurs *v.* Hart, 17 How. 6, 15 L. Ed. 30; Field *v.* United States, 9 Pet. 182, 9 L. Ed. 94.

While it has been held, in many cases, that in a cause where the trial by jury has been waived, the objection to the admission of evidence is not properly the subject of a bill of exceptions, still the case of the refusal "of proper evidence on the trial is subject to very different considerations from those applicable to the improper admission of it. The exclusion of the evidence might change the legal features of the cause, and lead to a determination of it upon principles wholly inapplicable, in case the evidence had been admited; nor, can we assume that the testimony offered, and rejected, would have been proved, if it had not been excluded, and revise the judgment of the court upon that assumption, because the offer of evidence to prove a fact, and the ability to make the proof, are very different matters. If the court instead of rejecting had allowed the evidence, the party might have failed in the proof, and the case in the result remain the same as before the improper exclusion." Arthurs *v.* Hart, 17 How. 6, 15 L. Ed. 30, citing Field *v.* United States, 9 Pet. 182, 9 L. Ed. 94.

after the close of the evidence, should present the propositions of law which, it is claimed, should govern the decision; and the court should state the rulings thereon, or in coming to its determination. And, in the return to the writ of error so much of the evidence, and no more, should be incorporated in the bill of exceptions as was deemed necessary to present the points of law determined against the party bringing the writ. No technical exception need be stated except in the case of the rejection or admission of evidence. As the rulings in the final determination do not take place upon the trial, or need not, the exception would be impracticable."[92]

cc. *Louisiana Practice.*—The practice in Louisiana is an exception to this general rule, that where the parties agree that the court shall decide questions both of law and fact, none of the questions decided, either of fact or law, can be reviewed by this court on a writ of error, as that practice is sanctioned by the act of congress which requires the courts of the United States to conform to the practice of the state courts. "As, by the laws of Louisiana, the facts, by consent of parties, may be tried and found by the court without the intervention of a jury, this court is bound, upon a writ of error, to regard them as judicially determined, and treat them as if they had been found by the special verdict; and the questions of law which arise on them are consequently open to the revision of this court."[93] According to the practice in Louisiana, the facts of the case are stated by the court below in the nature of a special verdict, and the judge below finds facts and not evidence of those facts.[94]

Review of Admission or Rejection of Evidence.—In a trial in Louisiana, where the judge tried the whole case without the intervention of a jury, a bill of exceptions to the admission of testimony by the judge, could not be sustained in this court.[95]

92. Separation of questions of law from questions of fact.—Arthurs *v.* Hart, 17 How. 6, 15 L. Ed. 30, 33.

93. Louisiana practice.—Campbell *v.* Boyreau, 21 How. 223, 16 L. Ed. 96; Newell *v.* Nixon, 4 Wall. 572, 581, 18 L. Ed. 305.

Where testimony is taken, and the cause is submitted to the court without the intervention of a jury, although there was no jury trial, still the rulings of the court, under the peculiar practice in the Louisiana district, may be examined in this court upon writ of error, and the judgment reversed or affirmed by a bill of exceptions, in the same manner as if there had been a jury trial. They may also be revised here upon a state of facts found by the court, but the question presented in the court below and decided by the court must be clearly stated. Arthurs *v.* Hart, 17 How. 6, 15, 15 L. Ed. 30; Newell *v.* Nixon, 4 Wall. 572, 581, 18 L. Ed. 305.

94. Cucullu *v.* Emmerling, 22 How. 83, 16 L. Ed. 300.

Difficulties encountered.—The act passed May 26th, 1824, relating to the courts in Louisiana, directed that the mode of proceeding in civil causes, in the federal courts in Louisiana, should be the same as the practice and modes of proceeding in the district courts of the state, subject to certain modifications mentioned in the act. The practice in these courts of the state was according to civil-law proceedings, and the trial of issues of fact could take place before the court by consent of the parties. This act unfortunately, not prescribing the mode of procedure when a jury was waived, and the trial before the court, as in the act of 1865, leaving the court to grope its way as best it could under the practice in civil-law proceedings, the case to come up ultimately for re-examination before a common-law appellate tribunal, has led to the most painful and oftentimes protracted litigation at nearly every term since its passage, and that, too, not upon questions involving the merits, but questions of mere practice. As observed by Mr. Justice Grier in Graham *v.* Bayne, 18 How. 60, 61, 15 L. Ed. 265: "The very numerous cases on this subject, from Field *v.* United States, 9 Pet. 182, 9 L. Ed. 94, to Arthurs *v.* Hart, 17 How. 6, 15 L. Ed. 30, show the difficulties we have had to encounter in reconciling our modes of review to the civil code of practice as used in the courts of Louisiana;" and these cases have not diminished since the delivery of the opinion in that case. Flanders *v.* Tweed, 9 Wall. 425, 430, 19 L. Ed. 678, following in Flanders *v.* Tweed, 154 U. S. 569, 19 L. Ed. 680.

95. Review of admission or rejection of evidence.—Weems *v.* George, 13 How. 191, 14 L. Ed. 108, citing Field *v.* United States, 9 Pet. 182, 202, 9 L. Ed. 94; United State *v.* King, 7 How. 835, 12 L. Ed. 934.

It has been frequently decided by this court, that notwithstanding there is no distinction between suits at law and equity in the courts of Louisiana, in those of the United States this distinction must be

Statement of Facts by Judge.—Where the judge before whom the cause was heard made no statement of the facts found by him, as the usual practice is, where the circuit court in Louisiana tries the issues of fact without the intervention of a jury, the judgment will be affirmed.[96] On a writ of error to this court from the circuit court of Louisiana a statement of facts by the judge may be drawn up and ordered to be filed nunc pro tunc.[97] It was held, repeatedly, upon error to the circuit court of Louisiana, that a statement of facts signed by counsel, and not made nor filed until after judgment, cannot be noticed upon error.[98]

dd. *Waiver of Jury.*—Where the law permits a waiver of a trial by a jury, it is too late to raise an objection that the waiver was not made a matter of record, after the case has proceeded to a hearing.[99] Where the case has been submitted to the court and argued by the counsel of both parties, it is to be taken that both parties waived the trial by jury, and they are bound accordingly.[1]

(2) *Statutory Rule*—aa. *In General.*—To get rid of this difficulty and give parties the right of review here, if they submitted their issues to a trial by the court, the act of 1865, c. 86, § 4 (13 Stat. 501; Rev. Stat., §§ 649, 700), was

preserved. When the case is submitted to the judge, to find the facts without the intervention of a jury, he acts as a referee, by consent of the parties, and no bill of exceptions will lie to his reception or rejection of testimony, nor to his judgment on the law. In such case, when a party feels aggrieved by the decision of the court, a case should be made up, stating the facts as found by the court, in the nature of a special verdict, and the judgment of the court thereon. If testimony has been received after objection, or overruled, as incompetent or irrelevant, it should be stated, so that this court may judge whether it was competent, relevant, or material, in a just decision of the case. See Craig *v.* Missouri, 4 Pet. 410, 427, 7 L. Ed. 903. In Field *v.* United States, 9 Pet. 182, 202, 9 L. Ed. 94, Marshall, Ch. J., in delivering the opinion of the court, says: "As the case was not tried by the jury, the exception to the admission of evidence was not properly the subject of a bill of exceptions. But if the district court improperly admitted the evidence, the only effect would be, that this court would reject that evidence, and proceed to decide the cause as if it were not on the record. It would not, however, of itself, constitute any ground for the reversal of the judgment." And again in United States *v.* King, 7 How. 833, it is decided, that "no exception can be taken where there is no jury, and where the question of law is decided in delivering the final decision of the court." And, "when the court decided the fact without the intervention of a jury, the admission of illegal testimony, even if material, is not of itself a ground for reversing the judgment, nor is it properly the subject of a bill of exceptions." Weems *v.* George, 13 How. 197, 14 L. Ed. 110; Arthurs *v.* Hart, 17 How. 6, 15 L. Ed. 30.

96. Statement of facts by judge.—New Orleans *v.* Gaines, 22 How. 141, 16 L. Ed. 295.

97. McGavock *v.* Woodlief, 20 How. 221, 15 L. Ed. 884, cited in Kock *v.* Emmerling, 22 How. 69, 73, 16 L. Ed. 292.

98. Bethell *v.* Mathews, 13 Wall. 1, 20 L. Ed. 556, citing Generes *v.* Bonemer, 7 Wall. 564, 19 L. Ed. 227; Avendano *v.* Gay, 8 Wall. 376, 19 L. Ed. 422; Kearney *v.* Case, 12 Wall. 275, 276, 20 L. Ed. 395.

A statement of facts, made and filed by the judge several days after the issue and service of the writ of error in the case, is a nullity. "To permit the judge to make a statement of facts, on which the case shall be heard here, after the case is removed to this court by the service of the writ of error, or even after it is issued, would place the rights of parties, who have judgments of record, entirely in the power of the judge, without hearing and without remedy." Avendano *v.* Gay, 8 Wall. 376, 19 L. Ed. 422, affirming Generes *v.* Bonemer, 7 Wall. 564, 19 L. Ed. 227; Hunnicutt *v.* Peyton, 102 U. S. 333, 354, 26 L. Ed. 113.

A judgment affirmed in a case where the only ruling of the court, to be found in the record, was a judgment rendered in favor of a plaintiff for the recovery of a sum of money; where there was no question raised in the pleadings, no bill of exceptions, and no instructions or ruling of the court; and where what purported to be a statement of facts, signed by the judge, was filed more than two months after the writ of error was allowed and filed in the court, and nearly a month after the citation was issued. Generes *v.* Bonemer, 7 Wall. 564, 19 L. Ed. 227.

99. Waiver of jury.—Phillips *v.* Preston, 5 How. 278, 12 L. Ed. 152.

1. Gilman *v.* Illinois, etc., Tel. Co., 91 U. S. 603, 614, 23 L. Ed. 405, citing Phillips *v.* Preston, 5 How. 278, 12 L. Ed. 152; Campbell *v.* Boyreau, 21 How. 223, 224, 16 L. Ed. 96; Kelsey *v.* Forsyth, 21 How. 85, 86, 16 L. Ed. 32.

passed. In this way it was provided that issues of fact in civil cases in the circuit court might be tried and determined by the court, without the intervention of a jury, "whenever the parties, or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts * * * shall have the same effect as the verdict of a jury." Provision was made also for presenting for review here by bill of exceptions the rulings of the court in the progress of the trial, and, when the finding was special, for extending the review to the determination of the sufficiency of the facts found to support the judgment.[2]

2. Statutory rule in general.—Boogher *v.* Insurance Co., 103 U. S. 90, 96, 26 L. Ed. 310; Dickinson *v.* Planters' Bank, 16 Wall. 250, 252, 21 L. Ed. 278.

Much protracted litigation attended the settlement of mere questions of practice under the act passed in 1824, 4 Stat. at Large 62, authorizing the trial of issues of fact by the courts of the United States, with the consent of parties, in Louisiana. To avoid a like experience under the act of 1865, it was deemed important by this court "to settle the practice under it at an early day with a precision and distinctness that could not be misunderstood," and to "require in all cases, where the parties saw fit to avail themselves of the privileges of the act, a reasonably strict compliance with its provisions." Flanders *v.* Tweed, 9 Wall. 425, 430, 19 L. Ed. 678; Insurance Co. *v.* Sea, 21 Wall. 158, 160, 22 L. Ed. 511.

History of enactments.—The provisions of the acts of congress which relate to the trial of issues of fact by the court are found in section 22 of the act of September 24, 1789, "An act to establish the judicial courts of the United States," 1 Stat. 73, ch. 20, § 22, and in the act of March 3, 1865, "An act regulating proceedings in criminal ceses, and for other purposes," 13 Stat. 500, ch. 86, § 4. The provision in the act of 1789 is reproduced in § 1011 of the Revised Statutes as follows: "There shall be no reversal in the supreme court or in any circuit court upon a writ of error * * * for any error of fact." The provisions of the act of 1865 are reproduced in §§ 649, 700 of the Revised Statutes, as follows: Sec. 649. "Issues of fact in civil cases in any circuit court may be tried and determined by the court, without the intervention of a jury, whenever the parties or their attorneys of record, file with the clerk a stipulation in writing waiving a jury. The finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." Sec. 700. "When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon appeal; and, when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment." Martinton *v.* Fairbanks, 112 U. S. 670, 671, 28 L. Ed. 862.

Necessity for compliance with statute.—The question arises on act of March 3rd, 1865 whether this mode of submitting a case to the court without a jury was intended to be exclusive of all other modes, so that if there is no stipulation in writing waiving a jury, there is error, for which the judgment must be reversed. The court decided this as follows: "We cannot believe that congress intended to say that the parties shall not, as heretofore, submit their cases to the court unless they do so by a written stipulation, but that it was the intention to enact that if parties who consent to waive a jury desire to secure the right to a review in the supreme court of any question of law arising in the trial, they must first file their written stipulation, and must then ask the court to make a finding of such facts as they deem essential to the review, and ask the ruling of the court on points to which they wish to except. If this is not done the parties consenting to waive a jury stand as they did before the statute, concluded by the judgment of the court on all matters submitted to it. This we understand to be the effect of the opinion in Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678." Kearney *v.* Case, 12 Wall. 275, 20 L. Ed. 395.

Effect of act allowing removal of causes.—The concluding clause of the third section of the act of March 3, 1875, "to determine the jurisdiction of the circuit courts of the United States, and to regulate the removal of causes from state courts, and for other purposes," does not repeal the previous law, authorizing a trial by the court, without the intervention of a jury, upon a stipulation by the parties waiving a jury filed under the act of congress. It was only intended to conserve to parties in the cases removed to the circuit courts the same right of jury trial which parties possess in cases brought originally in those courts, not to prevent the waiver of a jury by consent. The provision is similar to the one in the judiciary act of 1879. 18 Stat. 471; Kearney *v.* Case, 12 Wall. 275, 281, 20 L. Ed. 395; Phillips *v.* Moore, 100 U. S. 208, 213, 25 L. Ed. 603.

Section 700 of the Revised Statutes is the only enactment providing for the review here of a civil case where an issue of fact has been tried in the circuit court otherwise than by a jury.[3]

Strict Compliance with Statute Required.—And this court has expressed itself as disposed to hold parties who, under this statute, waive a trial by jury and substitute the court for the jury, to a reasonably strict conformity to the regulations of the act, if they desire to save themselves all the rights and privileges which belong to them in trials by jury at the common law.[4]

Review of Law Involved in Case.—The act of March 3d, 1865, "while it provides specially the mode of submission, takes care to secure to the parties the right of review as it respects all questions of law arising out of the facts found by the court, giving to this finding the effect as if found by a jury, preserving, at the same time, the right of exceptions to the rulings of the court in the progress of the trial; and, when the finding is special, a right to the appellate court to determine the sufficiency of the facts found to support the judgment."[5] If the parties desire a review of the law involved in the case, they must either get the court to make a special finding which raises the legal propositions, or they must present to the court their propositions of law and require a ruling on them.[6]

bb. *To What Courts Applicable.*—This provision binds the federal courts sitting in Louisiana as elsewhere.[7] But there is no statute in existence which provides for the trial in the district court by the court without a jury. It is provided by § 566 of the Revised Statutes that "the trial of issues of fact in the district courts, in all causes except cases in equity and cases of admiralty and maritime jurisdiction, and except as otherwise provided in proceeding in bankruptcy, shall be by jury." The provision for waiving a jury, in § 649 of the Revised Statutes, applies only to the circuit court, as does also a special provision of § 700, in regard to the review by this court of a case tried in the circuit court by the court without a jury. There are no similar provisions in regard to trials

3. Boogher *v.* Insurance Co., 103 U. S. 90, 26 L. Ed. 310.

The act of 1865 was not repealed. On the contrary, that act, as well as the one of 1872, was brought into the Revised Statutes, and it is now, as § 700, the only statute which provides for a review here of cases where an issue of fact in a civil cause has been tried in the circuit court otherwise than by a jury. Boogher *v.* Insurance Co., 103 U. S. 90, 96, 26 L. Ed. 310.

4. Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678.

In a suit brought in a circuit court on a judgment in the courts of a sister state, the objection cannot be made there, and collaterally, against the jurisdiction of the court rendering the judgment, that the record shows that the cause was tried without the intervention of a jury, and did not show that a jury had been waived as provided by statute. Maxwell *v.* Stewart, 21 Wall. 71, 72, 22 L. Ed. 564.

5. Flanders *v.* Tweed, 9 Wall. 425, 430, 19 L. Ed. 678.

6. Insurance Co. *v.* Sea, 21 Wall. 158, 160, 22 L. Ed. 511, following Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Flanders *v.* Tweed, 9 Wall. 425, 430, 19 L. Ed. 678; Martinton *v.* Fairbanks, 112 U. S. 670, 673, 28 L. Ed. 862; Insurance Co. *v.* Tweed, 7 Wall. 44, 19 L. Ed. 65; Walnut *v.* Wade, 103 U. S. 683, 688, 26 L. Ed. 526.

The objections to the ruling of the court on propositions of law must appear by bill of exceptions. Insurance Co. *v.* Sea, 21 Wall. 158, 22 L. Ed. 511; Flanders *v.* Tweed, 9 Wall. 425, 430, 19 L. Ed. 678; Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608.

7. To what courts applicable.—Insurance Co. *v.* Tweed, 7 Wall. 44, 19 L. Ed. 65; Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678; Generes *v.* Campbell, 11 Wall. 193, 20 L. Ed. 110.

Under the act of March 3d, 1865 (13 Stat. at Large 501), which provides by its fourth section a mode by which parties who submit cases to the court, without the intervention of a jury, may have the rulings of the court reviewed here, and also what may be reviewed in such cases, binds the federal courts sitting in Louisiana as elsewhere, and this court cannot disregard it. Insurance Co. *v.* Tweed, 7 Wall. 44, 19 L. Ed. 678.

The act of March 3d, 1865, providing for a trial without a jury, and a review by this court of the facts found by the judge, either generally or specially, by a sufficient bill of exceptions, is general in its terms as to the scope of its operation, and embraces the state of Louisiana. Generes *v.* Campbell, 11 Wall. 193, 20 L. Ed. 110.

without a jury in the district courts, to those found in §§ 649 and 700 in respect to circuit courts.[8]

cc. *Nature of Finding.*—A finding of facts by the circuit court is strictly analogous to a special verdict.[9]

dd. *Kinds of Findings.*—The first thing to be observed in the enactment made by the 4th section of the act of March 3d, 1865, allowing parties to submit issues of fact in civil cases to be tried and determined by the court, is that it provides for two kinds of findings in regard to the facts, to wit, general and special. This is in perfect analogy to the findings by a jury, for which the court is in such cases substituted by the consent of the parties. In other words, the court finds a general verdict on all the issues for plaintiff or defendant, or it finds a special verdict.[10] If the case is tried by the circuit court, without a jury, under §§ 649, 700, Rev. Stat., the finding must be "either general or special." It cannot be both.[11]

ee. *Necessity for Presence of Counsel.*—It is not competent for a circuit court to determine, without the intervention of a jury, an issue of fact in the absence of the counsel of the party and without any written agreement to waive a trial by jury.[12]

ff. *Form and Sufficiency of Finding*—aaa. *In General.*—The findings of the court under §§ 649, 700, Rev. Stat., are treated as a special verdict, and gauged by the rules applicable to them.[14] But because the order of the court below embraces both a finding and a judgment, they are not for that reason a nullity.[15] The finding of facts by the circuit court which is full, and is introduced by the words: "Upon said trial, the following facts were found to have been proved

8. Rogers *v.* United States, 141 U. S. 548, 554, 35 L. Ed. 853.

It is true that, in the district court, in a suit otherwise triable by a jury, the parties may, by stipulation, waive a jury and agree on a statement of facts, and submit the case to the court thereon, for its decision as to the law. Henderson's Distilled Spirits, 14 Wall. 44, 53, 20 L. Ed. 815. That might have been done also in the circuit court, without any statute to that effect. Campbell *v.* Boyreau, 21 How. 223, 226, 227, 15 L. Ed. 96. This, however, is not the finding of issues of fact by the court upon the evidence. The provisions of §§ 649 and 700 relate wholly to such finding, and not at all to the action of the court upon an agreed statement of facts. Rogers *v.* United States, 141 U. S. 548, 554, 35 L. Ed. 853.

9. Nature of finding.—Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Martinton *v.* Fairbanks, 112 U. S. 670, 28 L. Ed. 862; Raimond *v.* Terrebonne Parish, 132 U. S. 192, 32 L. Ed. 309; Davenport *v.* Paris, 136 U. S. 580, 33 L. Ed. 548; The E. A. Packer, 140 U. S. 360, 35 L. Ed. 453.

10. Kinds of findings.—Norris *v.* Jackson, 9 Wall. 125, 127, 19 L. Ed. 608; Morris *v.* Shriner, 131 U. S. appx. xci, 19 L. Ed. 303; Insurance Co. *v.* Folsom, 18 Wall. 237, 21 L. Ed. 827.

By the terms of the act of congress permitting issues of fact in civil cases to be tried and determined by the court without the intervention of a jury, it is provided that the finding of the court upon the facts may be either general or special, and that the finding shall have the same effect as the verdict of a jury. 13 Stat. at Large 501. Insurance Co. *v.* Folsom, 18 Wall. 237, 248, 21 L. Ed. 827.

11. British Queen Mining Co. *v.* Baker Silver Mining Co., 139 U. S. 222, 35 L. Ed. 147.

12. Necessity for presence of counsel.—Morgan *v.* Gay, 19 Wall. 81, 22 L. Ed. 100, citing Kearney *v.* Case, 12 Wall. 275, 20 L. Ed. 395.

Unless it appears that the parties were present at the trial in person or by counsel, or made no demand for a jury, or otherwise gave consent, it is error, for which the judgment must be reversed, to try issues of fact in actions of law without a jury. Kearney *v.* Case, 12 Wall. 275, 20 L. Ed. 395, reaffirmed in Miller *v.* Life Ins. Co., 12 Wall. 285, 20 L. Ed. 398.

14. Form and sufficiency of finding in general.—The E. A. Packer, 140 U. S. 360, 35 L. Ed. 453; Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Copelin *v.* Insurance Co., 9 Wall. 461, 19 L. Ed. 739; Supervisors *v.* Kennicott, 103 U. S. 554, 26 L. Ed. 486.

15. O'Reilly *v.* Campbell, 116 U. S. 418, 29 L. Ed. 669; Morgan *v.* Eggers, 127 U. S. 63, 32 L. Ed. 56.

For example, where an order in an action of ejectment plainly indicates a general finding for the plaintiff only as to part of the land in controversy, that is, as to the part described in the order, and the judgment is for a recovery only of the possession of the premises so described, such judgment is proper. Morgan *v.* Eggers, 127 U. S. 63, 32 L. Ed. 56.

and to be true," is sufficient.[16]

bbb. *Facts Must Be Found by Circuit Court.*—All matters of fact, under such a submission, must be found by the circuit court and not by the supreme court, as the act of congress provides that the issues of fact may be tried and determined by the circuit court where the suit is brought.[17] Such a submission necessarily implies that the facts shall be found by the court.[18]

ccc. *Ultimate Facts.*—A finding of facts by the circuit court is strictly analogous to a special verdict, and must state the ultimate facts of the case, presenting questions of law only, and not be a recital of evidence or of circumstances, which may tend to prove ultimate facts, or from which they may be inferred.[19]

ddd. *Completeness of Findings.*—**In General.**—The findings must contain all the facts and circumstances necessary to a proper determination of the questions involved; and in default thereof, the judgment of the court below will be reversed, and the case sent back for a new trial.[20] The general rule that wherever the trial court finds facts and the conclusions of law therefrom, it is bound to find every fact material to its conclusion, and a refusal to do so, if properly excepted to, is a ground for reversal, is applicable also to proceedings in admiralty.[21] But where the circuit court has found the ultimate facts, the refusal of

16. Sire *v.* Ellithorpe Air Brake Co., 137 U. S. 579, 34 L. Ed. 801.

17. Facts must be found by circuit court.—Insurance Co. *v.* Folsom, 18 Wall. 237, 249, 21 L. Ed. 827.

Inferences of fact must also be drawn by the circuit court, as it is the circuit court and not the supreme court which, by the agreement of the parties, is substituted for a jury. Tancred *v.* Christy, 12 Meeson & Welsey, 323. Insurance Co. *v.* Folsom, 18 Wall. 237, 249, 21 L. Ed. 827.

Issues of fact cannot be found by this court, as the act of congress requires that such issues shall be found by the circuit court. Consequently there can be no review of the finding of the circuit court where the finding is general, nor of the conclusions of the circuit court embodied in the general finding. Cooper *v.* Omohundro, 19 Wall. 65, 70, 22 L. Ed. 47.

18. Miller *v.* Life Ins. Co., 12 Wall. 285, 295, 20 L. Ed. 398.

Under the act of March 3d, 1865, authorizing the trial of facts by circuit courts, the court must itself find the facts in order to authorize a writ of error to its judgment. A statement of facts signed by counsel and filed after the judgment is insufficient. Bethel *v.* Mathews, 13 Wall. 1, 20 L. Ed. 556.

19. Ultimate facts.—Raimond *v.* Terrebonne Parish, 132 U. S. 192, 32 L. Ed. 309; Glenn *v.* Fant, 134 U. S. 398, 33 L. Ed. 969; Davenport *v.* Paris, 136 U. S. 580, 33 L. Ed. 548; Wilson *v.* Merchants' Loan & Trust Co., 183 U. S. 121, 46 L. Ed. 113.

The act of congress requires that the facts must be found by the circuit court. Norris *v.* Jackson, 9 Wall. 125, 127, 19 L. Ed. 608. Inferences of fact must be drawn by the circuit court, which, by the agreement of the parties, is substituted for a jury, and cannot be drawn by this court, which sits as a court of errors. Tancred *v.* Christy, 12 Meeson & Welsby, 323. Conclusions of fact cannot be found by this court when sitting as a court of errors under the act of congress authorizing the circuit courts to try and determine issues of fact in civil cases. What is required is that the findings of the circuit court shall contain the conclusions of fact, or, as the rule is stated in a recent decision of this court, a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest, and it is well-settled law that the finding must be sufficient in itself without inferences or comparisons, or balancing of testimony or weighing evidence. Burr *v.* Des Moines, etc., Co., 1 Wall. 99, 102, 17 L. Ed. 561; Miller *v.* Life Ins. Co., 12 Wall. 285, 301, 20 L. Ed. 398.

In Graham *v.* Bayne, 18 How. 60, 63, 15 L. Ed. 265, "if a special verdict be ambiguous or imperfect—if it find but the evidence of facts, and not the facts themselves, or finds but part of the facts in issue, and is silent as to others, it is a mistrial, and the court of errors must order a venire de novo. They can render no judgment on an imperfect verdict, or case stated." The E. A. Packer, 140 U. S. 360, 365, 35 L. Ed. 453.

20. Completeness of findings.—The E. A. Packer, 140 U. S. 360, 366, 35 L. Ed. 453.

21. The E. A. Packer, 140 U. S. 360, 35 L. Ed. 453, citing Tyng *v.* Grinnell, 92 U. S. 467, 23 L. Ed. 733; Ex parte French, 91 U. S. 423, 23 L. Ed. 249.

The rule is general, that wherever the trial court finds the facts and the conclusions of law therefrom, it is bound to find every fact material to its conclusion, and a refusal to do so, if properly excepted to, is a ground for reversal. Thus, in cases tried by the court without a jury, under Rev. Stat., §§ 649 and 700, the findings of the circuit court are conclusive upon this court, and the power of this court to re-

the court to find certain facts specified by the plaintiff, and certain propositions of law based on those facts, where they were either immaterial facts or incidental facts amounting only to evidence bearing on the ultimate facts found, cannot be reviewed on writ of error.[22] In other words, it is only the ultimate facts which the court is bound to find, and this court will not take notice of a refusal to find the mere incidental facts, which only amount to evidence from which the ultimate fact is to be obtained.[23]

If the court below neglects or refuses to make a finding, one way or the other, as to the existence of a material fact, which has been established by uncontradicted evidence, or if it finds such a fact when not supported by any evidence whatever, and an exception be taken, the question may be brought up for review in that particular. In the one case the refusal to find would be equivalent to finding that the fact was immaterial; and, in the other, that there was some evidence to prove what is found, when in truth there was none. Both of these are questions of law, and proper subjects for review in an appellate court.[24]

After a great lapse of time, it is within the discretion of the court below to refuse to make additional findings; but if the court does in fact make such findings this court is compelled to accord it its proper weight.[25]

gg. *Waiver of the Jury*—aaa. *Constitutional Right to Waive Jury Trial.*—There is no constitutional objection to the waiver of a jury trial under this section.[26]

bbb. *Necessity for Waiver.*—Without a waiver of the right of trial by jury, by consent of parties, the court errs if it substitutes itself for the jury, and pass-

view extends only to the sufficiency of the facts found to support the judgment, Tyng *v.* Grinnell, 92 U. S. 467, 23 L. Ed. 733, and if not sufficient, the case may be remanded for trial upon other issues involved therein. Ex Parte French, 91 U. S. 423, 23 L. Ed. 249; The E. A. Packer, 140 U. S. 360, 365, 35 L. Ed. 453.

22. Hathaway *v.* Cambridge Nat. Bank, 134 U. S. 494, 499, 33 L. Ed. 1004, citing The Frances Wright, 105 U. S. 381, 389, 26 L. Ed. 1100; McClure *v.* United States, 116 U. S. 145, 152, 29 L. Ed. 572; Union Pac. R. Co. *v.* United States, 116 U. S. 154, 157, 29 L. Ed. 584; Merchants' Ins. Co. *v.* Allen, 121 U. S. 67, 71, 30 L. Ed. 858.

23. The Frances Wright, 105 U. S. 381, 26 L. Ed. 1100; Merchants' Ins. Co. *v.* Allen, 121 U. S. 67, 71, 30 L. Ed. 858; The John H. Pearson, 121 U. S. 469, 30 L. Ed. 979; The City of New York, 147 U. S. 72, 76, 77, 37 L. Ed. 84.

24. The Frances Wright, 105 U. S. 381, 387, 26 L. Ed. 1100; The E. A. Packer, 140 U. S. 360, 35 L. Ed. 453; The City of New York, 147 U. S. 72, 77, 37 L. Ed. 84.

25. The Martello, 153 U. S. 64, 38 L. Ed. 637.

26. Constitutional right to waive jury trial.—The judiciary act of 1789, § 12, declares that the trial of issues in fact in the circuit courts shall, in all suits, except those of equity and of admiralty and maritime jurisdiction, be by jury. This provision and that found in the seventh amendment of the constitution, adopted after the judiciary act, namely, "that in suits at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved," constituted the only legislative rule for the federal courts, except in Louisiana, until the act of 1865. Undoubtedly both the judiciary act and the amendment to the constitution secured the right to either party in a suit at common law to a trial by jury, and we are also of opinion that the statute of 1789 intended to point out this as the mode of trial in issues of fact in such cases. Numerous decisions, however, had settled that this right to a jury trial might be waived by the parties, and that the judgment of the court in such cases should be valid. Bank of Columbia *v.* Okely, 4 Wheat. 235, 4 L. Ed. 559; Hiriart *v.* Ballon, 9 Pet. 156, 9 L. Ed. 85; Parsons *v.* Armor, 3 Pet. 413, 425, 7 L. Ed. 724; United States *v.* Rathbone, 2 Paine 578; Guild *v.* Frontin, 18 How. 135, 15 L. Ed. 290; Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978; Kelsey *v.* Forsyth, 21 How. 85, 15 L. Ed. 32; Campbell *v.* Boyreau, 21 How. 223, 16 L. Ed. 96; Burr *v.* Des Moines, etc., Co., 1 Wall. 99, 102, 17 L. Ed. 561; Kearney *v.* Case, 12 Wall. 275, 281, 20 L. Ed. 395.

The right of trial by jury in the courts of the United States is expressly secured by the seventh article of amendment to the constitution, and congress has, by statute, provided for the trial of issues of fact in civil cases by the court without the intervention of a jury, only when the parties waive their right to a jury by a stipulation in writing. Rev. Stat., §§ 648, 649. Baylis *v.* Travellers' Ins. Co., 113 U. S. 316, 321, 28 L. Ed. 989.

ing upon the effect of the evidence, finds the facts involved in the issue, and renders judgment thereon.[27]

ccc. *What Constitutes a Waiver*—aaaa. *In General.*—Notwithstanding, however, the number of cases in which the waiver of this right is mentioned, and either expressly or tacitly held to be no objection to the judgment, it is remarkable that so little is said as to the mode in which this waiver shall be made to appear. In most of the cases it is somewhere in the record stated affirmatively that the parties did waive a jury, or did consent to the trial by the court without a jury.[28] A stipulation in writing, signed by the parties and filed with the clerk, that the cause shall be tried by the court, is equivalent to their waiver of a jury, although it contains no express waiver.[29]

bbbb. *Statement of Facts by Judge as Evidence of Waiver.*—The statement of facts made out of court is no evidence before this court of the facts stated.[30]

cccc. *Presumption as to Waiver.*—Parties will be presumed in this court to have waived their right to a trial by jury of issues of fact, whenever it appears that they were present at the trial in person or by counsel, and made no demand for a jury. But unless it appears that they were so present, or otherwise gave consent, it is error, for which the judgment must be reversed, to try such issues in actions at law without a jury.[31]

27. Necessity for waiver.—Balis *v.* Travellers' Ins. Co., 113 U. S. 316, 320, 28 L. Ed. 989.

28. What constitutes a waiver in general.—Kearney *v.* Case, 12 Wall. 275, 281, 20 L. Ed. 395.

In the case of Bank of Columbia *v.* Okley, 4 Wheat. 235, 4 L. Ed. 559, the court held, that there was an implied waiver of this right when the defendant made his note negotiable at the Bank of Columbia, there being in the charter of that bank a provision authorizing the collection of such debts by a summary proceeding, which did not admit of a jury trial.

In Hiriart *v.* Ballon, 9 Pet. 156, 9 L. Ed. 85, where a summary judgment was rendered against a surety in an appeal bond, it was held, that the defendant, by becoming surety in a court whose rules provided for such summary judgment, had waived his right to a trial by jury. It seems, therefore, that both by express agreement in open court, and by implied consent, the right to a jury trial could be waived. See Phillips *v.* Preston, 5 How. 278, 280, 290, 12 L. Ed. 152.

Where the only evidence of a waiver of a jury is in the statement in the record that when the case came on for trial "the issue joined by consent is tried by the court, a jury being waived;" and in the recital at the beginning of the bill of exceptions, "the above cause coming on for trial, by agreement of parties, by the court, without the intervention of a jury," it was held, that the record did not sufficiently show any stipulation in writing waiving a jury. The case cannot be distinguished, in any particular favorable to the plaintiffs in error, from those of Madison County *v.* Warren, 106 U. S. 622, 27 L. Ed. 311, and Alexander County *v.* Kimball, 106 U. S. 623, 27 L. Ed. 220, the latest adjudications upon the subject, both of which came up from the same court as the present case. In one of those cases, the statement in the record was "the parties having stipulated to submit the case for trial by the court, without the intervention of a jury;" and, in the bill of exceptions, "said cause being tried by the court without a jury, by agreement of parties." In the other case, the statement in the record was in the very same words as in the case at bar; and in the bill of exceptions was in these words: "Upon the trial of this cause before the Hon. S. H. Treat, sitting as circuit Judge, a jury being waived by both parties." Bond *v.* Dustin, 112 U. S. 604, 608, 28 L. Ed. 835.

29. Bamberger *v.* Terry, 103 U. S. 40, 26 L. Ed. 317; Supervisors *v.* Kennicott, 103 U. S. 554, 26 L. Ed. 486.

30. Statement of facts by judge as evidence of waiver.—Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678.

Where the statement of facts by the judge is filed nearly three months after the rendition of the judgment, this is an irregularity for which this court is bound to disregard it, and to treat it as no part of the record. Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678.

31. Presumption as to waiver.—Kearney *v.* Case, 12 Wall. 275, 20 L. Ed. 395, citing Phillips *v.* Preston, 5 How. 278, 280, 290, 12 L. Ed. 152; Perego *v.* Dodge, 163 U. S. 160, 41 L. Ed. 113.

In Supervisors *v.* Kennicott, 103 U. S. 554, 26 L. Ed. 486, this court held, that when a stipulation in writing was filed with the clerk, by which it was provided that the case might be submitted to the court on an agreed statement of facts, but which contained no express waiver of a jury, yet this amounted to a waiver sufficient to meet the requirements of § 649. And though the right of trial by jury is

ddd. *The Written Stipulation*—aaaa. *Necessity for Filing.*—Unless there is a written stipulation of the waiver of a jury filed with the clerk, there can be no review here of a case tried by the court. Such a stipulation in writing is a prerequisite to our right to re-examine. Though, if it affirmatively appears in any part of the record proper that such a writing was made and filed by the parties, this court may take jurisdiction, even though the stipulation itself, or a copy of it, should not be sent up with the transcript.[32] However, parties may still waive a jury as they could before the act of 1865, without filing a written stipulation, but in such case no error can be considered in the action of the court on such trial; but the judgment will be held valid unless other errors are apparent in the record.[33]

a constitutional one, yet this court has declared that when it simply appeared by the record that a party was present by counsel and had gone to trial before the court without objection or exception, a waiver of his right to a jury trial would be presumed, and he would be held in this court to the legal consequences of such waiver. Kearney *v.* Case, 12 Wall. 275, 20 L. Ed. 395; United States *v.* Harris, 106 U. S. 629, 635, 27 L. Ed. 290.

The practice act of Missouri declares that an issue of fact in any action may, upon the written consent of the parties, be referred. Where, therefore, the record states that, after a case was called for trial and a jury sworn to try the issue joined, a juror was, by "consent of parties," withdrawn and the case referred to A., this court must assume that such consent, as well as that to waive a jury, was in writing. Boogher *v.* Insurance Co., 103 U. S. 90, 26 L. Ed. 310.

"It nowhere expressly appears in this case that a stipulation was filed, but inasmuch as an action of this kind could not, under the practice act of Missouri, be referred without the written consent of the parties, and this was referred by consent, we think we must assume that a consent was given in such form as to authorize what was done under it. The withdrawal of a juror, after the trial was begun, and the consent to a reference necessarily implied a waiver of a jury; and as this consent to be available must have been in writing, it follows that the waiver which flowed from the consent was also in writing. We think, therefore, it sufficiently appears that the stipulation which the act of congress requires was entered into." Boogher *v.* Insurance Co., 103 U. S. 90, 97, 26 L. Ed. 310.

"The rulings at the trial of an action at law by the circuit court without a jury, when there had been no waiver of a jury, as the statute requires, by stipulation in writing, signed by the parties or their attorneys, and filed with the clerk, are not reviewable here. Bond *v.* Dustin, 112 U. S. 604, 28 L. Ed. 835, and the cases there cited. The concession on both sides that there was actually no consent in writing to the order of reference, distinguishes this case materially from Boogher *v.* Insurance Co., 103 U. S. 90, 26 L. Ed. 310, where the existence of a stipulation in writing, waiving a jury, was presumed under the circumstances which were there presented." Dundee, etc., Co. *v.* Hughes, 124 U. S. 157, 160, 31 L. Ed. 357.

"In civil cases, other than those in equity and admiralty, and except where it is otherwise provided in bankruptcy proceedings, 'the trial of issues of fact'—that is, of all the material issues of fact—'in the circuit court shall be by jury,' unless the parties, or their attorneys of record, stipulate in writing for the waiver of a jury. Rev. Stat., §§ 648, 649. There is no such stipulation in this case, and there is nothing in the record from which such stipulation or waiver may be inferred. It has been often said by this court that the trial by jury is a fundamental guarantee of the rights and liberties of the people. Consequently, every reasonable presumption should be indulged against its waiver." Hodges *v.* Easton, 106 U. S. 408, 412, 27 L. Ed. 169.

32. Necessity for filing.—Kearney *v.* Case, 12 Wall. 275, 20 L. Ed. 395; Boogher *v.* Insurance Co., 103 U. S. 90, 96, 26 L. Ed. 310; Miller *v.* Life Ins. Co., 12 Wall. 285, 20 L. Ed. 398.

The condition upon which, according to the act of March 3d, 1865, the parties are authorized to waive a trial by jury, and substitute the court, and, at the same time, save to themselves all the rights and privileges which belong to them in trials by jury at common law, is the filing with the clerk a written stipulation, signed by the parties, or their attorneys. Flanders *v.* Tweed, 9 Wall. 425, 428, 19 L. Ed. 678.

It is not competent for a circuit court to determine, without the intervention of a jury, an issue of fact without any written agreement to waive a trial by jury. Morgan *v.* Gay, 19 Wall. 81, 22 L. Ed. 100.

33. Kearney *v.* Case, 12 Wall. 275, 20 L. Ed. 395.

By the fourth section of the act of congress of March 3, 1865 (13 Stat. 500, c. 86), carried forward into §§ 649 and 700 of the Revised Statutes, it was enacted that "issues of fact in civil cases may be tried and determined by the circuit court without the intervention of a jury, whenever the parties, or their attorneys of rec-

Presumption.—The filing of a written stipulation is often supplied by presumption, where it does not so expressly appear.[34] But every reasonable presumption should be indulged against its waiver, because the trial by jury is a fundamental guarantee of the rights and liberties of the people.[35]

bbbb. *Form and Sufficiency of Stipulation.*—A stipulation, signed by the parties or their attorneys, and filed with the clerk of the circuit court, submitting a civil cause for trial on an agreed statement of facts, is "a stipulation in writing waiving a jury," within the meaning of § 649 of the Revised Statutes.[36] So it has been held, that a written consent of the parties, after a trial by jury has begun, to withdraw a juror and refer the case to a referee, in accordance with a statute of the state, authorizing this course, is a sufficient stipulation in writing waiving a jury; and that when the court has authority to refer a case upon consent in writing only, an order expressed to be made "by consent of parties," that the case be referred, necessarily implies that such consent was in writing.[37] But a statement of facts signed by counsel cannot be noticed upon error, especially where it does not appear to have been made and filed until after judgment.[38] A request, made to the court by each party to instruct the jury to render a verdict in his favor, is not equivalent to a submission of the case to the court, without the intervention of a jury, within the intendment of the Revised Statutes, §§ 649, 700.[39]

cccc. *How Existence of Stipulation Shown.*—**In General.**—The most appropriate evidence of a compliance with the statute is a copy of the stipulation in writing filed with the clerk. But the existence of the condition upon which a review is allowed is sufficiently shown by a statement, in the finding of facts by the court, or in the bill of exceptions, or in the record of the judgment entry, that such a stipulation was made in writing.[40]

ord, file a stipulation in writing with the clerk of the court waiving a jury." In Kearney *v.* Case, 12 Wall. 275, 20 L. Ed. 395, this statute was considered, and it was held, that parties might waive a jury, as they could before the act was passed, without filing a written stipulation, but that in such case no error could be considered in the action of the court on such trial, and that parties would be presumed in this court to have waived their right to trial by jury of issues of fact whenever it appeared that they were present at the trial in person or by counsel and made no demand for a jury. See, also, Bond *v.* Dustin, 112 U. S. 604, 28 L. Ed. 835; Perego *v.* Dodge, 163 U. S. 160, 166, 41 L. Ed. 113.

34. Boogher *v.* Insurance Co., 103 U. S. 90, 26 L. Ed. 310; Dundee Mortgage, etc., Co. *v.* Hughes, 124 U. S. 157, 31 L. Ed. 357.

35. Hodges *v.* Easton, 106 U. S. 408, 27 L. Ed. 169.

36. Form and sufficiency of stipulation.—Supervisors *v.* Kennicott, 103 U. S. 554, 26 L. Ed. 486.

37. Boogher *v.* Insurance Co., 103 U. S. 90, 26 L. Ed. 310. See, also, United States *v.* Harris, 106 U. S. 629, 634, 27 L. Ed. 290; Bond *v.* Dustin, 112 U. S. 604, 607, 28 L. Ed. 835.

38. Bethel *v.* Matthews, 13 Wall. 1, 20 L. Ed. 556, citing Generes *v.* Bonemer, 7 Wall. 564, 19 L. Ed. 227; Andano *v.* Gay, 8 Wall. 376, 19 L. Ed. 422; Kearney *v.* Case, 12 Wall. 275, 276, 20 L. Ed. 395.

A paper found in the record, purporting to be a statement of facts agreed to by the parties, and filed with the clerk after the writ of error is issued, or after the case is disposed of by the circuit court, cannot be noticed here on writ of error though both parties consent. Kearney *v.* Case, 12 Wall. 275, 20 L. Ed. 395, distinguishing Insurance Co. *v.* Tweed, 7 Wall. 44, 19 L. Ed. 65.

39. Buetell *v.* Magone, 157 U. S. 154, 157, 39 L. Ed. 654.

40. How existence of stipulation shown.—Kearney *v.* Case, 12 Wall. 275, 283, 284, 20 L. Ed. 395; Dickinson *v.* Planters' Bank, 16 Wall. 250, 21 L. Ed. 278; Bond *v.* Dustin, 112 U. S. 604, 607, 28 L. Ed. 835.

Under the act of March 3rd, 1865, allowing parties to an action of law to submit the issues of fact to be tried by a court without the action of the jury, there can be no review of the ruling of the court in such case, unless the record shows that such an agreement was signed and filed with the clerk. But the existence of such a writing may be shown in this court: 1st, by a copy of the agreement; or 2d, by a statement in the finding of facts by the court that it was executed; or 3d, by such statement in the record entry of the judgment; or 4th, by such statement in the bill of exceptions. Unless it appears that such an agreement was filed, the judgment must be affirmed, unless error appears in other parts of the record that the finding of facts and judg-

Must Be Shown by Record.—Since the passage of this statute, it is well settled by a series of decisions that this court cannot consider the correctness of rulings at the trial of an action by the circuit court without a jury, unless the record shows such a waiver of a jury as the statute requires, by stipulation in writing, signed by the parties or their attorneys, and filed with the clerk.[41] And a copy of the stipulation of the parties, or attorneys, filed with the clerk, waiving the jury, should come up with the transcript in the return to the writ of error, so that the court could see that the act had been complied with.[42]

hh. *Review of General Findings*—aaa. *In General.*—Where a jury is waived, and the issues of fact in civil cases are tried and determined by the court without the intervention of a jury, where the finding is general the parties are concluded by the determination of the court, except in cases where exceptions are taken to the rulings of the court in the progress of the trial. Such rulings, if duly presented by a bill of exceptions, may be reviewed here, even though the finding is general, but the finding of the court, if general, cannot be reviewed in this court by bill of exceptions, or in any other manner, as the act of congress provides that the finding "shall have the same effect as the verdict of a jury" in a case where no such waiver is made.[43] An exception to a general finding of the

ment of the court thereon. Kearney *v.* Case, 12 Wall. 275, 20 L. Ed. 395, reaffirmed in Miller *v.* Life Ins. Co., 12 Wall. 285, 20 L. Ed. 398.

41. Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678; Kearney *v.* Case, 12 Wall. 275, 20 L. Ed. 395; Gilman *v.* Illinois, etc., Tel. Co., 91 U. S. 603, 614, 23 L. Ed. 405; Madison County *v.* Warren, 106 U. S. 622, 27 L. Ed. 311; Alexander County *v.* Kimball, 106 U. S. 623, 27 L. Ed. 311; Bond *v.* Dustin, 112 U. S. 604, 606, 28 L. Ed. 835.

Where a case is tried and determined by the court without the intervention of a jury, the rule is well settled, that if a written stipulation waiving a jury is not in some way shown affirmatively in the record, none of the questions decided at the trial can be re-examined here on writ of error. Kearney *v.* Case, 12 Wall. 275, 20 L. Ed. 395; Gilman *v.* Illinois, etc., Tel. Co., 91 U. S. 603, 23 L. Ed. 405; Boogher *v.* New York Life Ins. Co., 103 U. S. 90, 26 L. Ed. 310; Hodges *v.* Easton, 106 U. S. 408, 27 L. Ed. 169; County of Madison *v.* Warren, 106 U. S. 622, 27 L. Ed. 311.

Under § 649 of the Revised Statutes, which provides that a jury may be waived "whenever the parties or their attorneys of record file with the clerk a stipulation in writing waiving a jury," this court has decided that the fact that the stipulation was in writing and filed with the clerk must appear of record in order to entitle the party to the review of the rulings of the court in the progress of the trial provided by § 700. But § 649 expressly requires that the waiver of the jury shall be in writing and filed with the clerk. United States *v.* Harris, 106 U. S. 629, 634, 27 L. Ed. 290.

No error can be examined in the rulings of the court at the trial of a cause by the court without a jury by agreement of parties, if there is no allegation in the record that the stipulation was in writing, as required by the statute. Bond *v.* Dustin, 112 U. S. 604, 28 L. Ed. 835, and Dundee Mortgage, etc., Co. *v.* Hughes, 124 U. S. 157, 31 L. Ed. 357, followed in Spalding *v.* Manasse, 131 U. S. 65, 32 L. Ed. 86.

An assignment of error that the issue on one of the exceptions was tried by the court, not by the jury, no agreement to waive a trial by jury appearing in the record, is not well taken where the record explicitly states that "the exception in this cause was called for trial by the court, the jury having been waived in writing." In the absence of anything to the contrary, this is conclusive that the proper agreement was made. Fleitas *v.* Cockrem, 101 U. S. 301, 25 L. Ed. 954.

42. Flanders *v.* Tweed, 9 Wall. 425, 431, 19 L. Ed. 678.

43. Review of general findings.—13 Stat. 501; Insurance Co. *v.* Folsom, 18 Wall. 237, 21 L. Ed. 827; Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Insurance Co. *v.* Sea, 21 Wall. 158, 22 L. Ed. 511; Copelin *v.* Insurance Co., 9 Wall. 461, 19 L. Ed. 739; Miller *v.* Insurance Co., 12 Wall. 285, 297, 20 L. Ed. 398; Coddington *v.* Richardson, 10 Wall. 516, 19 L. Ed. 981; Buetell *v.* Magone, 157 U. S. 154, 39 L. Ed. 654; Lehnen *v.* Dickson, 148 U. S. 71, 37 L. Ed. 373; Runkle *v.* Burnham, 153 U. S. 216, 38 L. Ed. 694; Gleason *v.* White, 199 U. S. 54, 60, 59 L. Ed. 87; Martinton *v.* Fairbanks, 112 U. S. 670, 673, 28 L. Ed. 862; St. Louis *v.* Western Union Tel. Co., 166 U. S. 388, 41 L. Ed. 1044; Otoe County *v.* Baldwin, 111 U. S. 1, 28 L. Ed. 331; British Queen Min. Co. *v.* Baker Silver Min. Co., 139 U. S. 222, 35 L. Ed. 147; Santa Anna *v.* Frank, 113 U. S. 339, 340, 28 L. Ed. 978.

In Insurance Co. *v.* Folsom, 18 Wall. 237, 21 L. Ed. 827, the court said: "Where the finding is general, the parties are concluded by the determination of the

court on a trial without a jury brings up no question for review. The finding is conclusive, and there must be exceptions taken to the rulings of the court during

court, except in cases where exceptions are taken to the rulings of the court in the progress of the trial. * * * Where a case is tried by the court without a jury, the bill of exceptions brings up nothing for revision except what it would have done had there been a jury trial." Martinton *v.* Fairbanks, 112 U. S. 670, 673, 28 L. Ed. 862.

Where the parties waive the intervention of a jury, and submit the cause to the court, according to the statute regulating the practice in such cases, the finding of the court upon the facts may be either general or special, and shall have the same effect as the finding of the jury. When the finding is special, the review by this court may extend to the sufficiency of the facts found to support the judgment. But where the finding is general, this court may look to the bill of exceptions as if the finding had been by a jury for the action of the court on the ground upon which it is sought to reverse the judgment. And the court can look no further than the exceptions in the bill. Morris *v.* Shriner, 131 U. S. appx. xci, 19 L. Ed. 303.

Under the act of March 3d, 1865, authorizing parties to submit the issues of fact in civil cases to be tried and determined by the court, this court will not review a general finding upon a mass of evidence brought up; if a party desires to have the finding reviewed, he must have the court find the facts specially, so that the case may come here as on a special verdict or case stated. Coddington *v.* Richardson, 10 Wall. 516, 19 L. Ed. 981, following Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678.

Section 4 of the act of March 3, 1865, was passed to allow the parties, where, a jury being waived, the cause was tried by the court, a review of such rulings of the court in the progress of the trial as were excepted to at the time, and duly presented by bill of exceptions, and also a review of the judgment of the court upon the question whether the facts specially found by the court were sufficient to support its judgment. In other respects, the old law remained unchanged, and therefore the general finding is conclusive of the issues of fact. Martinton *v.* Fairbanks, 112 U. S. 670, 675, 28 L. Ed. 862.

Issues of fact in civil causes pending in the circuit courts may, if the parties so agree, be tried and determined by the court without the intervention of a jury, but such a submission necessarily implies that the facts shall be found by the court, and the act provides that the finding may be either general or special, and that it shall have the same effect as the verdict of a jury. Consequently where the finding is general nothing is open to review but the rulings or, perhaps, the instructions of the court as presented in a bill of exceptions, which is sufficient to show that nothing is open to re-examination in this case except the ruling of the court in sustaining the demurrer of the plaintiff to the second plea of the defendants. Miller *v.* Life Ins. Co., 12 Wall. 295, 20 L. Ed. 398; 13 Stat. at Large 501; Bond *v.* Brown, 12 How. 254, 13 L. Ed. 977; Saulet *v.* Shepherd, 4 Wall. 502, 18 L. Ed. 442; Richmond *v.* Smith, 15 Wall. 429, 437, 21 L. Ed. 200.

Where an action of law is tried by a circuit court, without a jury, and the facts on which, on a writ of error, the plaintiff in error seeks to raise a question of law, are not admitted in the pleadings, or specially found by the court, and there is a general finding for the defendant in error on the cause of action which involves such question of law, and there is no exception by the plaintiff in error to any ruling of the court in regard to such question, this court can make no adjudication in regard to it. Otoe County *v.* Baldwin, 111 U. S. 1, 28 L. Ed. 331.

Where the cause was tried by the court below without the intervention of a jury, but the facts were not agreed upon and there was no special findings, and no exceptions were taken to the ruling of the court in the progress of the trial, if the only error assigned is that the general finding of the court was in favor of the defendant below when it should have been for the plaintiff, a bill of exceptions cannot be used to bring up the whole testimoney for review. Betts *v.* Mugridge, 154 U. S. 644, 25 L. Ed. 157.

Where the parties waive the intervention of a jury and submit the cause to the court, under the act of March 3, 1865, § 4, 13 Stat. 501, and the finding is general, that the defendants were not guilty, etc., this court can look to the bill of exceptions alone as if the finding had been by a jury, for the action of the court, and the grounds upon which it is sought to reverse the judgment. Therefore, if there is but a single exception in the bill, and that exception is not well taken, we will examine the case no further. Morris *v.* Shriner, 131 U. S. appx. xci, 19 L. Ed. 303.

Mixed questions of law and fact.—A party, by excepting to the general finding, does not except to such conclusions of law as the general finding implies, for § 649, Rev. Stat., provides that the finding of the court, whether general or special, shall have the same effect as the verdict of a jury. The general verdict of a jury concludes mixed questions of law and fact, except so far as they may be

the trial in order to permit a review thereof.[44] And since the general finding of the court shall have the same effect as the verdict of a jury, then it follows that the finding can only be re-examined either by a motion for a new trial in the court where the finding was made, or by the award of a venire facias de novo in the appellate court, which has already been pointed out.[45]

Review of Error in Admitting or Excluding Testimony.—When the finding is special, the review may also extend to the determination of the sufficiency of the facts found to support the judgment; but "if the jury is waived, and the court chooses to find generally for one side or the other, the losing party," says Mr. Justice Bradley, "has no redress, on error, except for the wrongful admission or rejection of evidence."[46] But that objection to the admission or exclusion of evidence, or to such ruling on the propositions of law as the party may ask, must appear by bill of exceptions.[47]

Limitations of Rule.—While the rule is not doubted that where the finding is general, according to a strict construction of the statute, the only questions reviewable by this court are those which arise during the progress of the trial, and which are presented by bill of exceptions.[48] It has also been held, that where there was an agreed statement of facts submitted to the trial court and upon which its judgment was founded, such agreed statement would be taken as an equivalent of a special finding of facts.[49] But as such equivalent, there must of course be a finding or an agreement upon all ultimate facts and the statement must not

saved by some exception which the party has taken to the ruling of the court upon a question of law. "By excepting to the general finding of the court, it is in the same position as if it had submitted its case to the jury, and, without any exceptions taken during the course of the trial, had, upon a return of the general verdict for the plaintiff, embodied in a bill of exceptions all the evidence, and then excepted to the verdict because the evidence did not support it." Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Martinton *v.* Fairbanks, 112 U. S. 670, 674, 28 L. Ed. 862.

When a court in a case where a jury is waived under the act of March 5th, 1865 (see Revised Statutes of the United States, § 649), and the case is submitted to it without the intervention of a jury, finds, as a fact, that a conveyance was made to certain persons as trustees, and then finds as a conclusion of law, that the legal title remained in those trustees, that finding does not bind this court as a finding of fact; such findings of facts are regarded in this court in the light of special verdicts. French *v.* Edwards, 21 Wall. 147, 22 L. Ed. 534.

44. Insurance Co. *v.* Folsom, 18 Wall. 237, 21 L. Ed. 827; Wilson *v.* Merchants' Loan, etc., Co., 183 U. S. 121, 127, 46 L. Ed. 113.

45. See ante, "Review of Questions of Fact," IV, E.

46. Dirst *v.* Morris, 14 Wall. 484, 20 L. Ed. 722.

47. Martinton *v.* Fairbanks, 112 U. S. 670, 673, 28 L. Ed. 862, following Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Town of Ohio *v.* Marcy, 18 Wall. 552, 21 L. Ed. 813; Santa Anna *v.* Frank, 113 U. S. 339, 28 L. Ed. 978; Insurance Co. *v.* Sea, 21 Wall 158, 22 L. Ed. 511; Flanders *v.* Tweed, 9 Wall. 425, 430, 19 L. Ed. 678.

If a jury is waived and the court chooses to find generally for one side or the other, the losing party has no redress on error, except for the wrongful admission or rejection of evidence. Dirst *v.* Morris, 14 Wall. 484, 491, 20 L. Ed. 722.

When a court sits in the place of a jury, and finds the facts, this court cannot review that finding. If there is any error in such a case, shown by the record, in admitting or rejecting testimony, it can be reviewed here; but when the court, by permission of the parties, takes the place of the jury, its finding of facts is conclusive, precisely as if a jury had found them by verdict. Bassett *v.* United States, 9 Wall. 38, 19 L. Ed. 548.

48. Wilson *v.* Merchants' Loan, etc., Co., 183 U. S. 121, 46 L. Ed. 113, citing Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Insurance Co. *v.* Folsom, 18 Wall. 237, 21 L. Ed. 827; Martinton *v.* Fairbanks, 112 U. S. 670, 28 L. Ed. 862; Lehnen *v.* Dickson, 148 U. S. 71, 37 L. Ed. 373; St Louis *v.* Western Union Tel. Co., 166 U. S. 388, 41 L. Ed. 1044.

"In Martinton *v.* Fairbanks, 112 U. S. 670, 28 L. Ed. 862, which was a trial before the judge without the intervention of a jury and where there was only a general finding of facts and a judgment for the plaintiff below, the court decided that an exception to the general finding of the court for the plaintiff upon the evidence adduced at the trial presented no question of law which the court could review. In that case there was no agreed statement of facts." Wilson *v.* Merchants' Loan, etc., Co., 183 U. S. 121, 127, 46 L. Ed. 113.

49. Supervisors *v.* Kennicott, 103 U. S. 554, 26 L. Ed. 486.

merely present evidence from which such facts or any of them may be inferred.[50] Accordingly, although there is a general finding in favor of the defendant, yet if there is a statement of facts which contains certain ultimate facts together with certain other facts, evidential in their nature, from which an important and ultimate fact might be inferred, but in regard to which there is no agreement or finding whatever, it would not be proper to regard the agreed statement as a sufficient finding of ultimate facts within the statute.[51] An agreed statement of facts which is so defective as to present, in addition to certain ultimate facts, other and evidential facts upon which a material ultimate fact might have been but which was not agreed upon or found, cannot be regarded even as a substantial compliance with the statutes.[52]

bbb. *Assignment of Error on General Finding.*—No error can be assigned on a general finding.[53]

ii. *Review of Special Findings*—aaa. *Nature of Special Finding.*—A special finding of facts is, under § 649 of the Revised Statutes, equivalent to the special verdict of a jury.[54]

bbb. *Duty to Make Special Finding.*—The court to which a case is submitted, without a jury, cannot be required to find special issues of fact.[55] On the other hand, where a case is tried by a circuit court, without a jury, and that court makes a special finding of facts, but omits to find certain facts which a stipulation between the parties, made after the entry of judgment, states were shown by proof at the trial, this court, on a writ of error, can take notice only of the facts contained in the special finding. This court is authorized under § 700 of the Revised Statutes, to determine whether the facts specially found by the cir-

50. Wilson *v.* Merchants' Loan, etc., Co., 183 U. S. 121, 127, 46 L. Ed. 113.

"In Raimond *v.* Terrebonne Parish, 132 U. S. 192, 32 L. Ed. 309, it was said that the agreed statement of facts by the parties or a finding of facts by the circuit court must state the ultimate facts of the case, presenting questions of law only, and not be a recital of evidence or of circumstances which may tend to prove the ultimate facts or from which they may be inferred." Wilson *v.* Merchants' Loan etc., Co., 183 U. S. 121, 128, 46 L. Ed. 113.

"In Glenn *v.* Fant, 134 U. S. 398, 33 L. Ed. 969, there was a stipulation that the case should be heard upon an agreed statement of facts annexed, with leave to refer to exhibits filed therewith. It was held that the stipulation could not be regarded as taking the place of a special verdict or of a special finding of facts, and that the court had no jurisdiction to determine the question of law arising thereon." Wilson *v.* Merchants' Loan, etc., Co., 183 U. S. 121, 128, 46 L. Ed. 113.

"Lehnen *v.* Dickson, 148 U. S. 71, 77, 37 L. Ed. 373, decided that any mere recital of the testimony, whether in the opinion of the court or in a bill of exceptions, could not be deemed a special finding of facts within the scope of the statute; and if there were a general finding and no agreed statement of facts, the court must accept that finding as conclusive and limit its inquiry to the sufficiency of the complaint and to the rulings, if any be preserved on questions of law arising during the trial." Wilson *v.* Merchants' Loan, etc., Co., 183 U. S. 121, 128, 46 L. Ed. 113.

"In St. Louis *v.* Western Union Tel. Co., 166 U. S. 388, 41 L. Ed. 1044, it was held, that the special finding of facts referred to in the acts allowing parties to submit issues of fact in civil cases to be tried and determined by the court is not a mere report of the evidence, but a finding of those ultimate facts, upon which the law must determine the rights of the parties, and if the finding of the facts be general, only such rulings made in the progress of the trial can be reviewed as are presented by a bill of exceptions, and in such case the bill cannot be used to bring up the whole testimony for review any more than in a trial by jury." Wilson *v.* Merchants' Loan, etc., Co., 183 U. S. 121, 129, 46 L. Ed. 113.

51. Wilson *v.* Merchants' Loan, etc., Co., 183 U. S. 121, 128, 46 L. Ed. 113.

52. Wilson *v.* Merchants' Loan, etc., Co., 183 U. S. 121, 129, 46 L. Ed. 113.

53. Assignment of error on general finding.—Meath *v.* Board of Commissioners, 109 U. S. 268, 27 L. Ed. 630, citing Tioga R. *v.* Blossburg, etc., R., 20 Wall. 137, 22 L. Ed. 331.

54. Nature of special finding.—Fort Scott *v.* Hickman, 112 U. S. 150, 28 L. Ed. 636, citing Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608, Copelin *v.* Insurance Co., 9 Wall. 461, 19 L. Ed. 739; Insurance Co. *v.* Folsom, 18 Wall. 237, 21 L. Ed. 827; Retzer *v.* Wood, 109 U. S. 185, 27 L. Ed. 900.

55. Duty to make special finding.—Under the act of March 3d, 1865 the circuit

cuit court are sufficient to support the judgment; but it can take no notice of any facts not thus specially found, because they were not found by the court below, and this court, as an appellate court, cannot try an issue of fact.[56]

ccc. *Form and Sufficiency.*—**In General.**—The result of the decisions under the statutes providing for a waiver of trial by jury, and the proceedings on a trial by the court, Rev. Stat., § 649, and Rev. Stat., § 700, is that when there are special findings they must be findings of what are termed ultimate facts, and not the evidence from which such facts might be but are not found. If, therefore, an agreed statement contains certain facts of that nature, and in addition thereto and as part of such statement there are other facts of an evidential character only, from which a material ultimate fact might be inferred, but which is not agreed upon or found, we cannot find it, and we cannot decide the case on the ultimate facts agreed upon without reference to such other facts. In such case we must be limited to the general finding by the court. We are so limited because the agreed statement is not a compliance with the statute.[57] Findings may be general or special; but, if special, the finding must not be a mere report of the evidence, leaving the conclusions of fact to be adjudged by the appellate tribunal, as that course is forbidden by the repeated decisions of this court. Instead of that, the requirement is that the circuit court shall state the ultimate facts, or the propositions of fact, which the evidence establishes, and not the evidence from which those ultimate facts, or propositions of fact, are derived. Such findings are intended by congress as a proper substitute for the special verdict of a jury; and it is settled law, that it is of the very essence of a special verdict that the jury shall find the facts on which the court is to pronounce the judgment, according to law; that, in order to enable the appellate court to act upon a special verdict, the jury must find the facts, and not merely state the evidence of facts; and the rule is, that when the jury states the evidence merely, without stating the conclusions of the jury, a court of error cannot act upon matters so found.[58] Doubtless, also, cases may arise in which, without a formal special finding of facts, there is presented a ruling of the court, which is distinctly a ruling upon a matter of law, and in no manner a determination of facts, or of inference from facts in which this court ought to and will review the rulings.[59]

Must State Ultimate Facts.—Where the jury is waived in writing, and the case submitted to the decision of the circuit court, the finding of facts by the circuit court must state the ultimate facts of the case presenting questions of law only, and not be a recital of evidence or of circumstances, which may tend to prove the ultimate facts, or from which they may be inferred.[60]

court is not required to make a special finding, "as the act provides that the finding of the circuit court may be either general or special, and that it shall have the same effect as the verdict of a jury. Copelin *v.* Insurance Co., 9 Wall. 461, 19 L. Ed. 739; Folsom *v.* Insurance Co., 9 Blatchford, 201." Insurance Co. *v.* Folsom, 18 Wall. 237, 249, 21 L. Ed. 827.

56. Tyre, etc., Works Co. *v.* Spalding, 116 U. S. 541, 546, 29 L. Ed. 720.

57. Form and sufficiency.—Wilson *v.* Merchants' Loan, etc., Co., 183 U. S. 121, 126, 46 L. Ed. 113; Raimond *v.* Terrebonne Parish, 132 U. S. 192, 32 L. Ed. 309; Glenn *v.* Fant, 134 U. S. 398, 33 L. Ed. 969; Lehnen *v.* Dickson, 148 U. S. 71, 77, 37 L. Ed. 373; St. Louis *v.* Western Union Tel. Co., 166 U. S. 388, 41 L. Ed. 1044; United States Trust Co. *v.* New Mexico, 183 U. S. 535, 540, 46 L. Ed. 315.

58. Norris *v.* Jackson, 9 Wall. 125, 127, 19 L. Ed. 608; Suydam *v.* Williamson, 20 How. 427, 432, 15 L. Ed. 978; Tyng *v.* Grinnell, 92 U. S. 467, 472, 23 L. Ed. 733.

59. Lehnen *v.* Dickson, 148 U. S. 71, 73, 37 L. Ed. 373, followed in St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 37 L. Ed. 380.

Where a case is tried by the circuit court, on the written waiver of a jury, and there is a bill of exceptions which sets forth the facts which were proved, that is a sufficient special finding of facts to authorize this court, under § 700 of the Revised Statutes, to determine whether the facts found are sufficient to support the judgment. Coler *v.* Cleburne, 131 U. S. 162, 32 L. Ed. 146.

60. Raimond *v.* Terrebone Parish, 132 U. S. 192, 32 L. Ed. 309, citing Burr *v.* Des Moines, etc., Co., 1 Wall. 99, 17 L. Ed. 561; Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Martinton *v.* Fairbanks, 112 U. S. 670, 28 L. Ed. 862; Wilson *v.* Merchants'

Mere Report of Evidence.—As to what is necessary in special findings or in an agreed statement of facts, the authorities are decisive. It is held, that upon a trial by the court, if special findings are made they must be not a mere report of the evidence, but a finding of those ultimate facts on which the law must determine the rights of the parties, and if the finding of facts be general, only such rulings of the court, in the progress of the trial, can be reviewed as are presented by a bill of exceptions and in such case the bill cannot be used to bring up the whole testimony for review any more than in a trial by jury.[61]

Opinion of the Court.—It has been repeatedly decided, by this court, that the opinion of the court below does not constitute the special finding contemplated by the act of congress.[62] Where the facts set forth in the special findings are

Loan, etc., Co., 183 U. S. 121, 126, 46 L. Ed. 113.

By the settled construction of the acts of congress defining the appellate jurisdiction of this court, either a statement of facts by the parties, or a finding of facts by the circuit court, is strictly analogous to a special verdict, and must state the ultimate facts of the case, presenting questions of law only, and not be a recital of evidence or of circumstances which may tend to prove the ultimate facts, or from which they may be inferred. Burr *v.* Des Moines, etc., Co., 1 Wall. 99, 17 L. Ed. 561; Norris *v.* Jackson, 9 Wall. 125, 16 L. Ed. 608; Martinton *v.* Fairbanks, 112 U. S. 670, 28 L. Ed. 862; Raimond *v.* Terrebonne Parish, 132 U. S. 192, 194, 32 L. Ed. 309; Davenport *v.* Paris, 136 U. S. 580, 33 L. Ed. 548; Miller *v.* Life Ins. Co., 12 Wall. 285, 20 L. Ed. 398.

Where the circuit court, under a written stipulation of the parties, tries the issue, its special finding should set forth the ultimate facts, and not the evidence establishing them. Where, therefore, both parties claimed under A., and the court found his ownership, the chain of conveyances by which he acquired it need not be set forth. "Whether a special finding of facts by the court must have all the requisites of a special verdict, it is not necessary now to assert or deny, for all that is essential to such a verdict is an ascertainment of the ultimate facts." Mining Co. *v.* Taylor, 100 U. S. 37, 42, 25 L. Ed. 541.

61. Mere report of evidence.—Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Wilson *v.* Merchants' Loan, etc., Co., 183 U. S. 121, 127, 46 L. Ed. 113; Raimond *v.* Terrebonne Parish, 132 U. S. 192, 32 L. Ed. 309; Glenn *v.* Fant, 134 U. S. 398, 33 L. Ed. 969; Lehnen *v.* Dickson, 148 U. S. 71, 77, 37 L. Ed. 373; St. Louis *v.* Western Union Telegraph Co., 166 U. S. 388, 41 L. Ed. 1044; United States Trust Co. *v.* New Mexico, 183 U. S. 535, 540, 46 L. Ed. 315; Grayson *v.* Lynch, 163 U. S. 468, 472, 41 L. Ed. 230.

The special finding has often been considered and described by this court. It is not a mere report of the evidence, but a statement of the ultimate facts on which the law of the case must determine the rights of the parties; a finding of the propositions of fact which the evidence establishes, and not the evidence on whch those ultimate facts are supposed to rest. Burr *v.* Des Moines, etc., Co., 1 Wall. 99, 17 L. Ed. 561; Graham *v.* Bayne, 18 How. How. 60, 62, 15 L. Ed. 265; Norris *v.* Jackson, 9 Wall. 125, 127, 19 L. Ed. 608.

A mere report of the evidence is not such a special finding or authorized statement of the case as will allow this court to pass upon the judgment given. Crews *v.* Brewer, 19 Wall. 70, 22 L. Ed. 63.

Questions of fact will not be reviewed by this court in common-law actions, nor can the questions of law presented in such case be re-examined here unless the matters of fact out of which they arise are, in some authorized form, given in the record; to which it may be added, as applicable to cases tried by the court, that a mere report of the evidence is not sufficient, as it belongs to the circuit court to find the facts, and in order to do that the circuit court must weigh the evidence and draw the inferences of fact from the whole evidence given in the case. Tancred *v.* Christy, 12 Meeson & Welsby 323. Crews *v.* Brewer, 19 Wall. 70, 72, 22 L. Ed. 63.

62. Insurance Co. *v.* Tweed, 7 Wall. 44, 19 L. Ed. 65; Dickinson *v.* Planters' Bank, 16 Wall. 250, 21 L. Ed. 278.

Under the act of March 3d, 1865 (13 Stat. at Large 501), which provides by its fourth section a mode by which parties who submit cases to the court, without the intervention of a jury, may have the rulings of the court reviewed here, and also what may be reviewed in such cases, where the counsel for both parties in this court had agreed to certain parts of the opinion of the court below as containing the material facts of the case, and to treat them here as facts found by that court, this court acted upon the agreement here as if it had been made in the court below. "We are asked in the present case to accept the opinion of the court below, as a sufficient finding of the facts within the statute, and within the general rule on this subject. But with no aid outside the record we cannot do this. The opinion only recites some parts of the testimony by way of comment in support of the judgment, and is liable to the objection often referred to in this court, that it states the

not sufficient to support the judgment, the opinion cannot be resorted to for the purpose of helping the findings out.[63]

Conditional Conclusion.—Special findings, under the act of congress, never have a conditional conclusion, and yet the review extends by the express words of the act to the determination of the sufficiency of the facts found to support the judgment.[64]

General Findings—Agreed Statement of Facts.—It is also well settled that though the finding is general, yet if there be an agreed statement of facts submitted to the trial court and upon which its judgment is founded, such agreed statement will be taken as an equivalent of a special finding of facts, thus enabling this court to review the sufficiency of the facts found to support the judgment.[65] But to be such equivalent, it must conform to the rules just stated.[66]

ddd. *Scope of Review.*—When the finding is special, the review by this court may extend to the sufficiency of the facts found, to support the judgment.[67] And

evidence and not the facts as found from that evidence. Besides, it does not profess to be a statement of facts, but is very correctly called in the transcript, 'reasons for judgment.' But the counsel for both parties in this court have agreed to certain parts of that opinion as containing the material facts of the case, and to treat them here as facts found by the court; and inasmuch as they could have made such an agreement in the court below, we have concluded to act upon it here as if it had been so made." Insurance Co. *v.* Tweed, 7 Wall, 44, 19 L. Ed. 65.

63. Dickinson *v.* Planters' Bank, 16 Wall. 250, 21 L. Ed. 278; Saltonstall *v.* Birtwell, 150 U. S. 417, 419, 37 L. Ed. 1128; De La Rama *v.* De La Rama, 201 U. S. 303, 50 L. Ed. 765.

64. Insurance Co. *v.* Piaggio, 16 Wall. 378, 21 L. Ed. 358.

65. Supervisors *v.* Kennicott, 103 U. S. 554, 26 L. Ed. 486; Lehnen *v.* Dickson, 148 U. S. 71, 73, 37 L. Ed. 373, followed in St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 37 L. Ed. 380; Wilson *v.* Merchants' Loan, etc., 183 U. S. 121, 127, 46 L. Ed. 113. See ante, "Review of General Findings."

Thus, in Insurance Co. *v.* Tweed, 7 Wall. 44, 19 L. Ed. 65, where, on the argument in this court, counsel agreed that certain recitals of fact made by the trial court in its opinion or "reasons for judgment," as it was called, were the facts in the case, and might be accepted as facts found by the court, it was held, that, as they could have made such agreement in the court below, it would be accepted and acted upon here, and the facts thus assented to would be regarded as the facts found or agreed to upon which the judgment was based; and upon an examination it was further held, that they did not support the judgment, and it was reversed. Lehnen *v.* Dickson, 148 U. S. 71, 73, 37 L. Ed. 373, followed in St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 37 L. Ed. 380.

But still, as was ruled in Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678, this court is disposed to hold parties to a reasonably strict conformity to the provisions of the statute prescribing the proceedings in the case of a trial by the court without a jury; and no mere recital of the testimony, whether in the opinion of the court or in a bill of exceptions, can be deemed a special finding of facts within its scope. Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Lehnen *v.* Dickson, 148 U. S. 71, 74, 37 L. Ed. 373, followed in St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 37 L. Ed. 380.

66. See Wilson *v.* Merchants' Loan, etc., Co., 183 U. S. 121, 126, 46 L. Ed. 113.

67. Scope of review.—Act of March 3, 1865, § 4, 13 Stat. 501. Morris *v.* Shriner, 131 U. S. appx. xci, 19 L. Ed. 303; Miller *v.* Insurance Co., 12 Wall. 285, 20 L. Ed. 398; Tyng *v.* Grinnell, 92 U. S. 467, 23 L. Ed. 733; Fort Worth City Co. *v.* Smith Bridge Co., 151 U. S. 294, 38 L. Ed. 167; Scholey *v.* Rew, 23 Wall. 331, 345, 23 L. Ed. 99; Hinckley *v.* Pittsburg Steel Co., 121 U. S. 264, 272, 30 L. Ed. 967.

This court has authority, under § 700 of the Revised Statutes, to determine, as in case of a special verdict, whether the facts set forth in such statement are sufficient in law to support the judgment, although the finding of the circuit court on them be in form general. Supervisors *v.* Kennicott, 103 U. S. 554, 26 L. Ed. 486.

When, under the act of March 3d, 1865, authorizing the parties to submit their case to the court for trial without the intervention of a jury, there have been no exceptions to rulings in the course of the trial and the court has found the facts specially and given judgment on them, the only question which this court can pass upon, is the sufficiency of the facts found to support the judgment. Any propositions of law stated by the court as having been held by it in entering its judgment, are not open to exception. Jennisons *v.* Leonard, 21 Wall. 302, 22 L. Ed. 539, citing Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608.

Although under a stipulation in writing, made by the parties to the suit, and

since, where a jury has been waived and the case tried by the court under the statute, this court can only inquire whether the facts found in the special findings, considered in connection with the pleadings, are sufficient to sustain the judgment, and whether any error was committed upon ruling on matter of law properly preserved by the bill of exceptions, a stipulation of counsel as to the evidence bearing on the findings of fact by the court, cannot be noticed here.[68] But where the case is tried by the circuit court without a jury and the finding is general, and the record contains a bill of exceptions, "but no exceptions to the rulings of the court in the progress of the trial of the cause were thereby duly presented, and although after reciting the evidence it is therein stated that 'the court thereafter and during the said term made the following findings of fact and judgment thereon,' which is followed by an opinion of the court assigning reasons for its conclusions, this cannot be treated as a special finding enabling us to determine whether the facts found support the judgment, nor can the general finding be disregarded."[69]

jj. *Rulings of Court in Progress of Trial*—aaa. *In General.*—Whether the finding is general or special, the rulings of the court during the progress of the trial if duly excepted to at the time and presented by a bill of exceptions, may be reviewed in this court.[70] But where a trial by the court below was not had

filed with the clerk of the court, in pursuance of the act of March 3d, 1865, which gives to the finding of the court ('which may be either general or special) the same effect as the verdict of a jury, this court can, where the finding is special, consider the sufficiency of the facts found to support the judgment, yet, returning in the record all the evidence in the case, where the court, in an action of assumpsit on a check or draft, does not find what the evidence proves, nor any ultimate fact except one stated in the judgment, to wit: "That the defendant did not assume and promise as the plaintiff in declaring has alleged"—does not give this court jurisdiction to consider such sufficiency. The fact that the court below, in an opinion which accompanied the judgment, has stated some of the facts of the case does not alter things; the facts stated not being stated as a special finding, but rather advanced to show why the judge came to the conclusion that the alleged promise had not been proved. Dickinson *v.* Planters' Bank, 16 Wall. 250, 21 L. Ed. 278.

68. Fort Worth City Co. *v.* Smith Bridge Co., 151 U. S. 294, 38 L. Ed. 167, citing Tyre & Spring Works *v.* Spalding, 116 U. S. 541, 29 L. Ed. 720.

69. Dickinson *v.* Planters' Bank, 16 Wall. 250, 21 L. Ed. 278; Insurance Co. *v.* Folsom, 18 Wall. 237, 21 L. Ed. 827; Norris *v* Jackson, 9 Wall. 125, 19 L. Ed. 608; Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678; Insurance Co. *v.* Tweed, 7 Wall. 44, 19 L. Ed. 65; Miller *v.* Insurance Co., 12 Wall. 285, 20 L. Ed. 398; Insurance Co. *v.* Sea, 21 Wall. 158, 22 L. Ed. 511; Martinton *v.* Fairbanks, 112 U. S. 670, 28 L. Ed. 862; Raimond *v.* Terrebone Parish, 132 U. S. 192, 32 L. Ed. 309; Glenn *v.* Fant, 134 U. S. 398, 33 L. Ed. 969; Lloyd *v.* McWilliams, 137 U. S. 576, 34 L. Ed. 788; British Queen Min. Co. *v.* Baker Silver Min. Co., 139 U. S. 222, 35 L. Ed. 147.

70. Rulings of court in progress of trial in general.—Miller *v.* Insurance Co., 12 Wall. 285, 295, 20 L. Ed. 398; Tyng *v.* Grinnell, 92 U. S. 467, 469, 23 L. Ed. 733; Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Town of Ohio *v.* Marcy, 18 Wall. 552, 21 L. Ed. 813; Boardman *v.* Toffey, 117 U. S. 271, 29 L. Ed. 898; Insurance Co. *v.* Folsom, 18 Wall. 237, 21 L. Ed. 827; 13 Stat. 501; Rev. Stat. §§ 649, 700; Bond *v.* Dustin, 112 U. S. 604, 605, 28 L. Ed. 835; Dickinson *v.* Planters' Bank, 16 Wall. 250, 21 L. Ed. 278; Fort Worth City Co. *v.* Smith Bridge Co., 151 U. S. 294, 300, 38 L. Ed. 167; Coddington *v.* Richardson, 10 Wall. 516, 19 L. Ed. 981; Cooper *v.* Omohundro, 19 Wall. 65, 22 L. Ed. 47; Martinton *v.* Fairbanks, 112 U. S. 670, 673, 28 L. Ed. 862.

Exceptions may be taken to the rulings of the court made in the progress of the trial, and, if duly taken at the time, the rulings may be reviewed here, provided the questions are properly presented by a bill of exceptions. Where a jury is waived, and the issues of fact are submitted to the court, the finding of the court may be either general or special, as in cases where the issues of fact are tried by a jury; but, where the finding is general, the parties are concluded by the determination of the court, subject to the right to bring error to review any rulings of the court to which due exception was taken during the trial. Tyng *v.* Grinnell, 92 U. S. 467, 469, 23 L. Ed. 733.

Refusal to admit evidence.—Where the trial is by the court without a jury and there is no special findings of facts the only questions presented by the bill of exceptions which we can consider are those which relate to the refusal of the court to allow certain interrogatories to

under the act of March 3, 1865 (13 Stat. 501), the rulings excepted to in the progress of such trial cannot be reviewed here.[72]

bbb. *Meaning of Phrase "Rulings of the Court in the Progress of the Trial."*—The phrase "rulings of the court in the progress of the trial" does not include the general finding of the circuit court, nor the conclusions of the circuit court embodied in such general finding.[73]

ccc. *Remedies.*—Exceptions may be taken to the rulings of the court made in the progress of the cause, and when the rulings are duly presented by a bill of exceptions, they may be re-examined in this court by writ of error, if it is an action at law, or by appeal if it is a suit in equity.[74]

kk. *Review of Findings upon Questions of Facts.*—**In General.**—The next thing to be observed is, that whether the finding be general or special, it shall have the same effect as the verdict of a jury; that is to say, it is conclusive as to the facts so found. In the case of a general verdict, which includes or may include, as it generally does, mixed questions of law and fact, it concludes both, except so far as they may be saved by some exception which the party has taken to the ruling of the court on the law.[75] When a case is tried by the court without a

be put to witnesses on the stand. The general finding prevents all inquiry by us into the special facts and conclusions of law on which that finding rests. Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Cooper *v.* Omohundro, 19 Wall. 65, 69, 22 L. Ed. 47; Martinton *v.* Fairbanks, 112 U. S. 670, 673, 28 L. Ed. 862; Boardman *v.* Toffey, 117 U. S. 271, 272, 29 L. Ed. 898.

72. Gilman *v.* Illinois, etc., Tel. Co., 91 U. S. 603, 23 L. Ed. 405, citing Campbell *v.* Boyreau, 21 How. 223, 224, 16 L. Ed. 96; Guild *v.* Frontin, 98 How. 135, 15 L. Ed. 290; Kearney *v.* Case, 12 Wall. 275, 20 L. Ed. 395; Dickinson *v.* Planters' Bank, 16 Wall. 250, 21 L. Ed. 278.

73. Meaning of phrase "rulings of the court in the progress of the trial."—Martinton *v.* Fairbanks, 112 U. S. 670, 673, 28 L. Ed. 862, citing Cooper *v.* Omohundro, 19 Wall. 65, 22 L. Ed. 47; Boardman *v.* Toffey, 117 U. S. 271, 29 L. Ed. 898.

"The case of Insurance Co. *v.* Folsom, 18 Wall. 237, (21 L. Ed. 827), and the numerous cases there cited, p. 244, affirmed, and the doctrine again declared, that where a jury is waived, and the issues of fact submitted to the circuit court under the act of March 3d, 1865 (quoted in the report of the case cited, p. 238), this court will not review the finding of the court where it is general and unaccompanied by any authorized statement of facts; and that in the case of such general finding, 'nothing is open to review by the losing party under a writ of error, except the rulings of the circuit court in the progress of the trial, and that the phrase, 'rulings of the court in the progress of the trial,' does not include the general finding of the circuit court nor the conclusions of the circuit court embodied in such general finding." Cooper *v.* Omohundro, 19 Wall. 65, 22 L. Ed. 47, reaffirmed in Crews *v.* Brewer, 19 Wall. 70, 22 L. Ed. 63.

It seems clear to us that the language "in the progress of the trial," emphasized by Mr. Justice Miller in Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608, must have application to the wrongful admission or rejection of evidence; that is, in the progress of the trial that would have had place before the jury had not the parties waived a jury. Questions arising on the settling of the pleadings are subject to review, but not by reason of the terms of § 700, because that section only saves for review such rulings "as are duly presented by a bill of exceptions." Rulings on the pleadings necessarily appear on the record without a bill of exceptions. If the party ruled against chooses to except thereto, he should do so at the time the ruling is made, and his exception should be noted in the minute that records the ruling. The words "in the progress of the trial" are clearly shown by the last clause of the section to have no relation to the findings of the court, for which express and exclusive provision is made by the words: "And, when the finding is special, the review may extend to the determination of the sufficiency of the facts found to support the judgment." See, also, Miller *v.* Insurance Co., 12 Wall. 285, 20 L. Ed. 398; Dirst *v.* Morris, 14 Wall. 484, 20 L. Ed. 722; Insurance Co. *v.* Folsom, 18 Wall. 237, 21 L. Ed. 824; Cooper *v.* Omohundro, 19 Wall. 65, 22 L. Ed. 47.

Motions in arrest of judgment at common law were made after verdict and before judgment, and it is quite clear that the refusal to grant such a motion after judgment, in a case where the finding of the circuit court is general, cannot be regarded as a ruling made in the progress of the trial. Cooper *v.* Omohundro, 19 Wall. 65, 69, 22 L. Ed. 47, reaffirmed in Crews *v.* Brewer, 19 Wall. 70, 22 L. Ed. 63.

74. Remedies.—Goodman *v.* Simonds, 20 How. 356, 365, 15 L. Ed. 937.

75. Review of findings upon questions of facts.—Norris *v.* Jackson, 9 Wall. 125,

127, 19 L. Ed. 608; Ryan *v.* Carter, 93 U. S. 78, 23 L. Ed. 807; Insurance Co. *v.* Sea, 21 Wall. 158, 22 L. Ed. 511; Bassett *v.* United States, 9 Wall. 38, 19 L. Ed. 548; River Bridge Co. *v.* Kansas Pacific Ry. Co., 92 U. S. 315, 23 L. Ed. 515; Buetell *v.* Magone, 157 U. S. 154, 157, 39 L. Ed. 654; Runkle *v.* Burnham, 153 U. S. 216, 38 L. Ed. 694; Lehnen *v.* Dickson, 148 U. S. 71, 37 L. Ed. 373.

We have universally held that a bill of exceptions cannot be used to bring up the evidence for a review of the findings of fact. The facts, as found and stated by the court below, are conclusive. The case stands here precisely the same as though they had been found by the verdict of a jury. Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Bassett *v.* United States, 9 Wall. 38, 19 L. Ed. 548; Copelin *v.* Insurance Co., 9 Wall. 461, 19 L. Ed. 739; Coddington *v.* Richardson, 10 Wall. 516, 19 L. Ed. 981; Miller *v.* Insurance Co., 12 Wall. 285, 295, 20 L. Ed. 398; Insurance Co. *v.* Folsom, 18 Wall. 237, 249, 21 L. Ed. 827; Insurance Co. *v.* Sea, 21 Wall. 158, 22 L. Ed. 511; Jennisons *v.* Leonard, 21 Wall. 302, 22 L. Ed. 539; The Abbotsford, 98 U. S. 440, 443, 25 L. Ed. 168.

When a court sits in place of a jury and finds the facts, this court cannot review that finding. If there is any error in such case, shown by the record, in admitting or rejecting testimony, it can be reviewed here. But when the court, by permission of the parties, takes the place of the jury, its finding of facts is conclusive, precisely as if a jury had found them by verdict. Bassett *v.* United States, 9 Wall. 38, 40, 19 L. Ed. 548.

Propositions of fact found by the court, in a case where the trial by jury is waived, as provided in the act of congress, are equivalent to a special verdict, and the supreme court will not examine the evidence on which the finding is founded, as the act of congress contemplates that the finding shall be by the circuit court; nor is the circuit court required to make a special finding, as the act provides that the finding of the circuit court may be either general or special, and that it shall have the same effect as the verdict of a jury. Copelin *v.* Insurance Co., 9 Wall. 461, 19 L. Ed. 739; Folsom *v.* Insurance Co., 9 Blatchford 201. Insurance Co. *v.* Folsom, 18 Wall. 237, 249, 21 L. Ed. 827.

Under the practice prevailing in the circuit courts of the United States the finding of the facts by the court makes a case in the nature of a special verdict and is conclusive as to those facts; and this although the petition sets forth a different state of facts which are neither confessed nor denied by the answer. Saulet *v.* Shepherd, 4 Wall. 502, 18 L. Ed. 442.

Where by stipulation the intervention of a jury is waived by the parties, and the cause is submitted upon the evidence to the circuit court, the general finding, although excepted to and alleged as error, when it is a conclusion of fact cannot be reviewed here. Booth *v.* Tiernan, 109 U. S. 205, 27 L. Ed. 907.

"The facts found by the court below are conclusive; that the bill of exceptions cannot be used to bring up the evidence for a review of these findings; that the only rulings, upon which we are authorized to pass, are such as might be presented by a bill of exceptions prepared as in actions at law; and that the findings have practically the same effect as the special verdict of a jury." The Abbotsford, 98 U. S. 440, 25 L. Ed. 168; The Clara, 102 U. S. 200, 26 L. Ed. 145; The Benefactor, 102 U. S. 214, 26 L. Ed. 157; The Annie Lindsley, 104 U. S. 185, 26 L. Ed. 716; Collins *v.* Riley, 104 U. S. 322, 26 L. Ed. 752; Sun Mutual Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485, 27 L. Ed. 337; Watts *v.* Camors, 115 U. S. 353, 29 L. Ed. 406; The Maggie J. Smith, 123 U. S. 349, 31 L. Ed. 175; The Gazelle, 128 U. S. 474, 32 L. Ed. 496; The City of New York, 147 U. S. 71, 72, 76, 37 L. Ed. 84.

Where a case is tried by the court without a jury, its findings upon questions of fact are conclusive here; it matters not how convincing the argument that upon the evidence the findings should have been different. Only rulings upon matters of law, when properly presented in a bill of exceptions, can be considered here, in addition to the question, when the findings are special, whether the facts found are sufficient to sustain the judgment rendered. This limitation upon our revisory power on a writ of error in such cases is by express statutory enactment. Act of March 3, 1865, 13 Stat. c. 86, § 4; Rev. Stat., § 700. Stanley *v.* Supervisors of Albany, 121 U. S. 535, 547, 30 L. Ed. 1000.

In the case of Coddington *v.* Richardson, 10 Wall. 516, 19 L. Ed. 981, a jury was waived under the act of March 3, 1865, by stipulation in writing, "and all just and legal objections and exceptions which might be made was reserved by each party." The court found the issue for the plaintiff and assessed his damages at $5,000. The defendant moved for a new trial, but his motion was overruled by the court, and judgment was entered on the finding against the defendant. He took a bill of exceptions which set out all the evidence and showed that he excepted to the rulings of the court in finding the issue for the plaintiff, in assessing the plaintiff's damages, in overruling the motion for a new trial, and in rendering judgment. No exceptions were taken during the course of the trial. Upon this state of the record this court said: "There is no question of law arising upon the pleadings or the trial. Those attempted to be raised refer to the evidence, as embodied in the record, but which, in a trial of the facts before the court, a jury being waived, we do not look into. We look

into them only when found by the court." Approved in Martinton *v.* Fairbanks, 112 U. S. 670, 675, 28 L. Ed. 862.

Section 700 provides that "when an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury, according to section six hundred and forty-nine, the rulings of the court in the progress of the trial of the cause, if excepted to at the time, and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon appeal; and when the finding is special, the review may extend to the sufficiency of the facts found to support the judgment." Under that, the rulings of the court in the trial, if properly preserved, can be reviewed here, and we may also determine whether the facts as specially found support the judgment; but if there be no special findings, there can be no inquiry as to whether the judgment is thus supported. We must accept the general finding as conclusive upon all matters of fact, precisely as the verdict of a jury. Martinton *v.* Fairbanks, 112 U. S. 670, 28 L. Ed. 862; Lehnen *v.* Dickson, 148 U. S. 71, 73, 37 L. Ed. 373, followed in St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 37 L. Ed. 380; Wilson *v.* Merchants' Loan, etc., Co., 183 U. S. 121, 127, 46 L. Ed. 113.

Seventh amendment.—In cases where the cause is tried by the court without a jury it can only review it in the same manner, and to the extent, as if it had been tried by a jury. Now the seventh amendment to the constitution expressly provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law, and in Parsons *v.* Bedford, 3 Pet. 433, 448, 7 L. Ed. 732, it was said that "the only modes known to the common law to re-examine such facts are the granting of a new trial by the court where the issue was tried, or to which the record was properly returnable, or the award of a venire facias de novo by an appellate court, for some error of law which intervened in the proceedings." See, also, Lincoln *v.* Power, 151 U. S. 436, 438, 38 L. Ed. 224; Railroad Company *v.* Fraloff, 100 U. S. 24, 31, 25 L. Ed. 531; Grayson *v.* Lynch, 163 U. S. 468, 475, 41 L. Ed. 230.

As said by Mr. Justice Blatchford, in Lancaster *v.* Collins, 115 U. S. 222, 225, 29 L. Ed. 373: "This court cannot review the weight of the evidence, and can look into it only to see whether there was error in not directing a verdict for the plaintiff on the question of variance or because there was no evidence to sustain the verdict rendered." The finding of the court, to have the same effect, must be equally conclusive, and equally remove from examination in this court the testimony given on the trial. Insurance Co. *v.* Folsom, 18 Wall. 237, 21 L. Ed. 827; Cooper *v.* Omohundro, 19 Wall. 65, 22 L. Ed. 47; Lehnen *v.* Dickson, 148 U. S. 71, 72, 37 L. Ed. 373, followed in St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 37 L. Ed. 380.

Illustrative cases.—Under the act of March 3d, 1865 (relative to the trial of issues of fact in civil causes), when on a suit on a policy of insurance the question was whether a waiver of a payment in cash of the premium had or had not been made, it was held, in a case where the court found on the evidence as a fact that it had been waived, that the correctness or incorrectness of a series of requests which were founded on an assumption that it had not been, were not subject to review here under the act. Miller *v.* Life Ins. Co., 12 Wall. 285, 20 L. Ed. 398.

Where the principal finding of the court is, "That the plaintiff has failed to establish the allegations in said complaint, that the several assessments herein referred to were at a greater rate than was assessed upon other moneyed capital in the hands of individual citizens of this state;" and the first assignment of error is, that the court erred in deciding that the plaintiff failed to establish the allegations mentioned, and the greater part of the oral argument of the plaintiff's counsel and of his printed brief was devoted to the maintenance of this proposition, this is nothing more than that the court below found against the evidence—a question not open to review or consideration in this court. Stanley *v.* Supervisors of Albany, 121 U. S. 535, 547, 30 L. Ed. 1000.

Where a case is tried by the court without a jury, and there is, as appears by the bill of exceptions, an application at the close of the trial for a declaration of law, that the plaintiff is entitled to judgment for the sum claimed, which instruction is refused, and exception taken, this presents a question of law for our consideration. St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 37 L. Ed. 380, citing Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608.

The question whether an act was duly and constitutionally passed, is, as one of law, open for the examination here. Walnut *v.* Wade, 103 U. S. 683, 689, 26 L. Ed. 526.

The question whether an alleged statute "is really a law or not, is a judicial one, and is to be settled and determined by the court and judges, and is not a question of fact to be determined by a jury." South Ottawa *v.* Perkins, 94 U. S. 260, 24 L. Ed. 154; Gardner *v.* The Collector, 6 Wall. 499, 18 L. Ed. 890; Walnut *v.* Wade, 103 U. S. 683, 689, 26 L. Ed. 526.

An action of unlawful detainer is tried by the court without a jury, and the journal entry shows simply a general finding that the defendant is guilty in manner and form as charged in the complaint,

jury, its findings on questions of fact are conclusive, although open to the contention that there was no evidence on which they could be based.[76] Where the case is submitted to the circuit court without the intervention of a jury, if there is evidence upon which such a finding might properly rest, this court must accept the findings as conclusive, and inquire no further into the testimony than we should into its sufficiency to sustain the verdict of a jury. This court is not a trier of facts.[77] Errors merely in the findings of fact by the court are not subject to revision by this court, if there was any evidence upon which such findings could be made.[78]

Where both parties ask the court to instruct a verdict, both thereby affirm that there is no disputed question of fact which could operate to deflect or control the question of law. This is necessarily a request that the court find the facts, and the parties are, therefore, concluded by the finding made by the court, upon which the resulting instruction of law was given.[79]

It is thus seen that the only use which can be made of the bill of exceptions, when there is a special finding of facts, is to present the rulings of the court in

the amount of damages sustained by the plaintiff, and the value of the monthly rents and profits, and thereon the judgment for restitution of the premises, double damages and double rents, and there is no special finding of facts, and no agreed statement of facts. Obviously, therefore, inquiry in this court must be limited to the sufficiency of the complaint and the rulings, if any be preserved, on questions of law arising during the trial. Sections 648 and 649 of the Revised Statutes, while committing generally the trial of issues of fact to the jury, authorize parties to waive a jury and submit such trial to the court, adding that "the finding of the court upon the facts, which may be either general or special, shall have the same effect as the verdict of a jury." But the verdict of the jury settles all questions of fact. Lehnen *v.* Dickson, 148 U. S. 71, 72, 37 L. Ed. 373, followed in St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 37 L. Ed. 380.

Novelty of patent.—This court cannot review a finding, in an action by a patentee for a royalty, that the invention is new and novel. It is a conclusion of fact on the evidence. St. Paul Plow Works *v.* Starling, 140 U. S. 184, 35 L. Ed. 404.

Nul tiel record.—Where a court sitting in place of a jury finds the facts, this court cannot review that finding. A plea of nul tiel record raises a question of law, where the supposed record is of the court in which the plea is filed. Therefore, where the record relied on is produced in such a case, and made part of the record by a statement of facts agreed on, it is a question of law whether it supports or fails to support the plea, and can be reviewed in this court. Bassett *v.* United States, 9 Wall. 38, 19 L. Ed. 548.

76. Ward *v.* Joslin, 186 U. S. 142, 147, 46 L. Ed. 1093.

This court will not review the finding of fact of the circuit court except to establish whether such court found any facts which were unsupported by testimony, or refused to find any fact material to the issue, when such fact was proven by uncontradicted evidence. The City of New York, 147 U. S. 72, 37 L. Ed. 84, followed in Lehnen *v.* Dickson, 148 U. S. 71, 74, 37 L. Ed. 373.

77. Case Mfg. Co. *v.* Soxman, 138 U. S. 431, 34 L. Ed. 1019.

78. The Francis Wright, 105 U. S. 381, 387, 26 L. Ed. 1100; McClure *v.* United States, 116 U. S. 145, 152, 29 L. Ed. 572; Union Pacific R. *v.* United States, 116 U. S. 154, 157, 29 L. Ed. 584; Merchants' Ins. Co. *v.* Allen, 121 U. S. 67, 71, 30 L. Ed. 858; Hathaway *v.* Cambridge Nat. Bank, 134 U. S. 494, 498, 33 L. Ed. 1004.

"Where a case is tried by the court, a jury having been waived, its findings upon questions of fact are conclusive in the courts of review, it matters not how convincing the argument that upon the evidence the findings should have been different." Stanley *v.* Supervisors, 121 U. S. 547, 30 L. Ed. 1003; Dooley *v.* Pease, 180 U. S. 126, 131, 45 L. Ed. 457.

Errors alleged in the findings of the court are not subject to revision by the circuit court of appeals, or by this court, if there was any evidence upon which such findings could be made. Hathaway *v.* Cambridge Nat. Bank, 134 U. S. 494, 498, 33 L. Ed. 1004; St. Louis *v.* Retz, 138 U. S. 226, 34 L. Ed. 941; Runkle *v.* Burnham, 153 U. S. 216, 225, 38 L. Ed. 694; Dooley *v.* Pease, 180 U. S. 126, 131, 132, 45 L. Ed. 457.

"Applying, then, the settled law of Illinois to the facts as found, the conclusion reached by the circuit court, and affirmed by the circuit court of appeals, that the sale was void as against the attaching creditors, must be accepted by this court." Dooley *v.* Pease, 180 U. S. 126, 132, 45 L. Ed. 457.

79. Buettell *v.* Magone, 157 U. S. 154, 39 L. Ed. 654.

the progress of the trial upon questions of law. The facts are conclusively settled by the finding of the court.[80]

Mixed Questions of Law and Fact.—Where the case is tried by the court without the intervention of the jury, this court cannot review the action of the circuit court in finding the facts which it did find or refusing to find the facts which it was asked to find and did not find. We can only inquire whether the facts found are sufficient to support the judgment. Where mixed questions of law and fact are submitted to the court in a trial without a jury, this court will not, on a writ of error, review such questions, any more than it will pure questions of fact.[81]

Error to State Court.—In cases where the facts are submitted to a jury, and are passed upon by the verdict, in a common-law action, this court has the same inability to review those facts in a case coming from a state court that it has in a case coming from a circuit court of the United States. This conclusiveness of the facts found extends to the finding by a state court to whom they have been submitted by waiving a jury, or to a referee, where they are so held by state laws, as well as to the verdict of a jury.[82]

Agreed Statement of Facts.—Where a case is tried by the court without a jury, in which there is no special finding of facts, but there is, as appears in the bill of exceptions, an agreement as to certain facts, which though not technically such an agreed statement as is the equivalent of a special finding of facts, yet enables us to approach the consideration of the declaration of law with a certainty as to the facts upon which it was based, this court may consider such question of law, although there is in addition to these agreed facts some oral testimony, where it appears from the opinion of the court that it made a distinct ruling upon a proposition of law not at all affected by the oral testimony.[83]

Weight and Sufficiency of Evidence.—Under the act of congress of March 3d, 1865, authorizing the trial of facts by the circuit courts, and enacting that the findings of the court upon them shall have the same effect as the verdict of a jury, this court sitting as a court of error cannot pass, as it does in equity appeals, upon the weight or sufficiency of evidence. If the court chooses to find generally for one side or the other, instead of making a special finding of the facts, the losing party has no redress on error except for the wrongful admission or rejection of evidence.[84]

Reporting Evidence in Transcript.—Matters of fact are not reviewable here under any circumstances, as appears by all the cases decided by this court, since the act was passed allowing parties to waive a jury, and to submit the law and fact to the determination of the circuit court. Consequently, it is irregular to report the evidence in the transcript, except so far as it may be necesssary to explain the legal questions reserved, as to the rulings of the court in the progress of the trial; nor is either party entitled to a bill of exceptions as to any special finding of the court, for the plain reason that the special findings of the circuit court in such a case are not the proper subject of exceptions nor of review in this court.[85]

80. Walnut *v.* Wade, 103 U. S. 683, 688, 26 L. Ed. 526.

81. St. Louis *v.* Rutz, 138 U. S. 226, 34 L. Ed. 941.

82. Boggs *v.* Mining Co., 3 Wall. 304, 18 L. Ed. 245; Republican, etc., Bridge Co. *v.* Kansas, etc., R. Co., 92 U. S. 315, 317, 23 L. Ed. 515.

83. St. Louis *v.* Western Union Tel. Co., 148 U. S. 92, 37 L. Ed. 380, reaffirmed in Wilson *v.* Merchants Loan, etc., Co., 183 U. S. 121, 129, 46 L. Ed. 113.

84. Dirst *v.* Morris, 14 Wall. 484, 20 L. Ed. 722.

"We have often held that the act of 1865 (§§ 649, 700, Rev. Stat.) does not permit us to consider the effect of the evidence in the case, but only to determine whether the facts found on the trial below are sufficient to support the judgment, and to pass on the rulings of the court in the progress of the trial presented by a bill of exceptions. For all the purposes of our review, the facts as found and stated by the court below are conclusive." The Abbotsford, 98 U. S. 440, 25 L. Ed. 168; Boogher *v.* Insurance Co., 103 U. S. 90, 97, 26 L. Ed. 310.

85. Tyng *v.* Grinnell, 92 U. S. 467, 471, 23 L. Ed. 733.

Rulings of Court in Progress of Trial.—Under the act of March 3d, 1865, which gives to the finding of the court upon the facts, which finding may be either general or special the same effect as the verdict of a jury, it has been held that though the finding was general, a ruling of the court in the progress of the trial or excepted to at the time and duly presented by bills of exception, may be reviewed by this court. But the rulings thus subject to review are decisions of law not finding of facts.[86]

When the finding is special, the re-examination can only extend to the question whether the facts found are sufficient to support the judgment. Propositions of fact found by the circuit court in such a case are equivalent to a special verdict, and, consequently, are irreviewable here except for the purpose of determining the single question whether they are sufficient to warrant the judgment.[87]

Agreement of Parties.—Parties have a right to waive a trial by jury and submit the issues of fact to the determination of the circuit court, but they cannot by any agreement make it the duty of this court to draw inferences and conclusions of fact as may be drawn from the evidence by the circuit court.[88]

II. *The Record*—aaa. *In General.*—Where the finding of the circuit court

86. Dickinson *v.* Planters' Bank, 16 Wall. 250, 21 L. Ed. 278.

87. Insurance Co. *v.* Folsom, 18 Wall. 237, 21 L. Ed. 827.

A special finding by the court upon issues of fact, where the parties or their attorneys have duly filed a stipulation, waiving a jury, has the same effect as a verdict, and is not subject to review by this court except as to the sufficiency of the facts found to support the judgment. Tyng *v.* Grinnell, 92 U. S. 467, 23 L. Ed. 733, citing Miller *v.* Insurance Co., 12 Wall. 285, 295, 20 L. Ed. 398.

Special findings under a submission of facts to the court are no more subject to review here than general findings, as the provision in respect to both is that the finding of the court shall have the same effect as the verdict of a jury. Appellate courts have no more power to review the verdict of a jury where it is special than if it be general; but they may inquire and determine whether the special verdict is the proper basis of a judgment; and the act of congress provides that the review, if the finding is special, may extend to the determination of the sufficiency of the facts found to support the judgment. Tyng *v.* Grinnell, 92 U. S. 467, 471, 23 L. Ed. 733.

"The court below, by stipulation, tried the case, and made a special finding of facts, on which it based its conclusion of law, that the plaintiffs could not recover. It is objected that some of these facts were not warranted by the evidence; but this is not a subject of inquiry here. If the parties chose to adopt this mode of trial, they are concluded by the propositions of fact which the evidence, in the opinion of that court, establishes. Whether general or special, the finding has the same effect as the verdict of a jury; and its sufficiency to sustain the judgment is the only matter for review in this court. Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678; Kearney *v.* Case, 12 Wall. 275, 20 L. Ed. 395; Miller *v.* Insurance Co., 12 Wall. 285, 20 L. Ed. 398." Ryan *v.* Carter, 93 U. S. 78, 81, 23 L. Ed. 807.

When a court below makes a special finding, this court will not go into an examination of the evidence on which it was founded to ascertain whether or not it was right. The finding is equivalent to a special verdict. Copelin *v.* Insurance Co., 9 Wall. 461, 462, 19 L. Ed. 739.

Where facts are specially found by the court below without a jury, the evidence on which this finding was made cannot be considered here. Durand *v.* Martin, 120 U. S. 366, 30 L. Ed. 675.

88. Shankland *v.* Washington, 5 Pet. 390, 397, 8 L. Ed. 166; Suydam *v.* Williamson, 20 How. 427, 434, 15 L. Ed. 978; Richmond *v.* Smith, 15 Wall. 429, 437, 21 L. Ed. 200.

The parties now went to trial, when they agreed to waive a jury and to submit all questions of fact to the court, "with authority to draw all inferences and conclusions that a jury is authorized to draw from the evidence, and with liberty to either party to except to the judgment in the same manner and to the same extent that he might except to the verdict of a jury, and to object to the same for the same reasons and with the right to appeal from the same." The court found for the plaintiff generally. Held, that the defendant could not under the agreement raise any questions as to the effect of evidence, etc., in this court, with a view of making this court find as true the facts set forth in the special plea, which plea, as above mentioned, if true, was declared to be no defense. Richmond *v.* Smtih, 15 Wall. 429, 21 L. Ed. 200.

is general, and there is no authorized statement of facts in the record, no review of the questions of law can be had in this court, except such as arise from the rulings of the court made in the progress of the trial, as it would impose upon this court the duty of hearing the whole case, law and fact, as on an appeal in chancery or in an admiralty suit, which would operate as a repeal of the provision in the act of congress, that issues of fact in such cases may be tried and determined by the circuit court; and would also violate that clause of the twenty-second section of the judiciary act, which prohibits this court reversing any judgment "for any error of fact."[89]

Finding Must Appear on the Record.—In short under this act of congress which authorizes trials by court, there must be a finding of facts, either general or special, in order to authorize a judgment; and that finding must appear on the record.[90] Where under the act of congress authorizing trial by court, it does not appear on the record whether the finding was general or special, such defect in the record it is competent for the court to supply by amendment.[91] The court at a subsequent term, may by an order, correct the record by incorporating into it nunc pro tunc, a special finding of the facts upon which the judgment had been rendered.[92]

bbb. *Necessity of Bill of Exceptions.*—**In General.**—No bill of exceptions is required, or is necessary, to bring upon the record the findings, whether general or special. They belong to the record as fully as do the verdicts of a jury. If the finding be special, it takes the place of a special verdict; and, when judgment is entered upon it, no bill of exceptions is needed to bring the sufficiency of the finding up to review. But there must be a finding of facts, either general or special, in order to authorize a judgment; and that finding must appear on the record. If the special finding of facts is properly upon the record, or is rightfully supplied, the judgment of the court is subject to review independently of any bill of exceptions, the only office of which is to bring upon record rulings that without it would not appear.[93] Where a case is tried by the court without a jury, the bill of exceptions brings up nothing for revision except what it would have done had there been a jury trial.[94] We have often decided that a bill of exceptions cannot be used to bring up the whole testimony for review when the case has been tried by the court, any more than when there has been a trial by jury.[95]

Where Finding Is Special.—No exception is necessary, in case of special findings by the court, to raise the question whether the facts found support the judgment.[96] But where the record contains a special findings of fact and there

89. The record in general.—1 Stat. at Large 85; Insurance Co. *v.* Folsom, 18 Wall. 237, 21 L. Ed. 827; Dirst *v.* Morris, 14 Wall. 484, 490, 20 L. Ed. 722; Bassett *v.* United States, 9 Wall. 38, 40, 19 L. Ed. 548; Miller *v.* Insurance Co., 12 Wall. 285, 297, 20 L. Ed. 398; Crews *v.* Brewer, 19 Wall. 70, 72, 22 L. Ed. 63.

90. Insurance Co. *v.* Boon, 95 U. S. 117, 24 L. Ed. 395.

91. Insurance Co. *v.* Boon, 95 U. S. 117, 24 L. Ed. 395.

92. Insurance Co. *v.* Boon, 95 U. S. 117, 24 L. Ed. 395.

93. Necessity of bill of exceptions.—Insurance Co. *v.* Boon, 95 U. S. 117, 124, 24 L. Ed. 395.

94. Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Coddington *v.* Richardson, 10 Wall. 516, 19 L. Ed. 981; Miller *v.* Insurance Co., 12 Wall. 285, 20 L. Ed. 398; Insurance Co. *v.* Folsom, 18 Wall. 237, 250, 21 L. Ed. 827.

95. Norris *v.* Jackson, 9 Wall. 125, 128, 19 L. Ed. 608; Insurance Co. *v.* Sea, 21 Wall. 158, 22 L. Ed. 511; Betts *v.* Mugridge, 154 U. S. App. 644, 25 L. Ed. 157.

96. St. Louis *v.* Ferry Co., 11 Wall. 423, 428, 20 L. Ed. 192; Tyng *v.* Grinnell, 92 U. S. 467, 469, 23 L. Ed. 733; Insurance Co. *v.* Boon, 95 U. S. 117, 125, 24 L. Ed. 395; Allen *v.* St. Louis Bank, 120 U. S. 20, 30, 30 L. Ed. 573; Seeberger *v.* Schlesinger, 152 U. S. 581, 586, 38 L. Ed. 560; Cutler *v.* Huston, 158 U. S. 423, 428, 39 L. Ed. 1040.

When a jury is waived in writing, and the case tried by the court, the court's finding of facts, whether general or special, has the same effect as the verdict of a jury; and although a bill of exceptions is the only way of presenting rulings made in the progress of the trial, the question whether the facts set forth in a special finding of the court, which is equivalent to a special verdict, are sufficient in law

is no bill of exceptions in the record, the errors of law relied upon by the plaintiff in error must be considered and determined upon the special findings of fact.[97]

Appeals in Admiralty.—A bill of exceptions is not necessary to give this court jurisdiction of an appeal in admiralty under the provisions of the act of Feb. 16, 1875, c. 77 (18 Stat., pt. 3, p. 315), providing that the review here shall extend to the determination of the questions of law arising upon the record, and to such rulings of the court, excepted to at the time, as may be presented by a bill of exceptions, prepared as in actions at law.[98]

Review of Rulings in Progress of Trial.—The office of a bill of exceptions, where the facts are tried by the court, is pointed out by § 700, Revised Statutes: "The rulings of the court in the progress of the trial of the cause, if excepted to at the time and duly presented by a bill of exceptions, may be reviewed by the supreme court upon a writ of error or upon appeal."[99] Objection to the admission or exclusion of evidence, or to such ruling on the propositions of law as the party may ask, must appear by bill of exceptions.[1] If the finding be general, only such rulings of the court in the progress of the trial can be reviewed as are presented by bill of exceptions, or as may arise upon the pleadings.[2] In such cases, a bill of exceptions cannot be used to bring up the whole

to support the judgment, may be reviewed on writ of error without any bill of exceptions. Act of March 3, 1865, c. 86, § 4, 13 Stat. 501; Rev. Stat., §§ 649, 700; French *v.* Edwards, 21 Wall. 147, 22 L. Ed. 534; Ex parte French, 91 U. S. 423, 23 L. Ed. 249; Allen *v.* St. Louis Bank, 120 U. S. 20, 30, 30 L. Ed. 573.

Where a jury is waived in writing, and the case tried by the court, and the judgment is for more than $5,000, the question whether a special finding of facts by the court is sufficient to support the judgment below, may be reviewed on a writ of error without any bill of exceptions, nor is it necessary to consider whether such questions are duly stated in the certificate of division of opinion. Allen *v.* St. Louis Bank, 120 U. S. 20, 30 L. Ed. 573, following Williamsport Bank *v.* Knapp, 119 U. S. 357, 30 L. Ed. 446.

Where the court tried the issues of fact, and its opinion, embodying its findings and the conclusions of law thereon, was filed concurrently with the entry of the judgment, but there was no formal finding of facts, and the court, at the next following term, upon a rule awarded, and, after hearing the parties, made an order that a special finding, with the conclusions of law conformable to that opinion so filed, be entered nunc pro tunc, and made part of the record as of the term when the judgment was rendered, held, that the order was within the discretion of the court, and that by it such special finding became a part of the record of the cause, and that the judgment upon it is, without a bill of exceptions, subject to review here. Insurance Co. *v.* Boon, 95 U. S. 117, 24 L. Ed. 395.

97. Chicago, etc., R. Co. *v.* Hoyt, 149 U. S. 1, 11, 37 L. Ed. 625.

98. At law a bill of exceptions is only used to put into the record that which would not appear without. The findings which the statute requires must be stated by the court. These, therefore, become part of the record without any action of the parties, and errors of law arising on them need not be presented by exceptions. They are in the nature of a special verdict, as to which the inquiry is always open in the reviewing court, whether, when taken in connection with everything else that appears, it is sufficient to support the judgment. The S. C. Tryon, 105 U. S. 267, 270, 26 L. Ed. 1026.

99. Walnut *v.* Wade, 103 U. S. 683, 688, 26 L. Ed. 526.

1. Insurance Co. *v.* Sea, 21 Wall. 158, 160, 22 L. Ed. 511, following Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Flanders *v.* Tweed, 9 Wall. 425, 430, 19 L. Ed. 678; Cutler *v.* Huston, 158 U. S. 423, 428, 39 L. Ed. 1040; Insurance Co. *v.* Tweed, 7 Wall. 44, 19 L. Ed. 65.

Where there is no bill of exceptions setting forth the evidence, no error of law can be assigned in respect to any finding of fact by the court. Prentice *v.* Stearns, 113 U. S. 435, 445, 28 L. Ed. 1057.

When a case is heard, upon stipulation of parties, by the court without the intervention of a jury, and its special findings cover all the disputed questions of fact, and there is in the record no bill of exceptions taken to the rulings in the progress of the trial, the correctness of the findings upon the evidence is not open to our consideration. The question, therefore, whether the facts found are sufficient to support the judgment, is the only one of inquiry here. Preston *v.* Prather, 137 U. S. 604, 34 L. Ed. 788.

2. Insurance Co. *v.* Sea, 21 Wall. 158, 160, 22 L. Ed. 511, following Martinton *v.* Fairbanks, 112 U. S. 670, 673, 28 L. Ed. 862; Dirst *v.* Morris, 14 Wall. 484, 20 L. Ed. 722; Boogher *v.* Insurance Co., 103 U.

testimony for review any more than in a trial by jury.[3]

ccc. *Stipulations of Parties.*—The stipulation of counsel as to the evidence bearing on the findings of facts by the court, cannot be noticed by this court to supply an omission to find certain facts.[4]

mm. *Vacating Submission of Cause.*—The court is authorized by § 954 of the Revised Statutes to allow, at any time during the trial, amendments in the pleadings; and where it has done so, it must, in its discretion, determine whether the submission of the cause ought to be vacated.[5] Where the plaintiff is permitted to amend his declaration so as to avoid a variance between it and the proofs, and it appears that neither the nature nor the merits of the issue are thereby changed, the defendant is not entitled to an order setting aside the submission of the cause for trial.[6]

nn. *Presumptions on Appeal.*—A judgment of the circuit court in a case tried by it without the intervention of a jury must be presumed to be right if that court had jurisdiction of the subject matter of the parties.[7] Where a request for special findings is refused, this court will assume that they were not established by the evidence.[8] So, also, where the case is tried by the court pursuant to a stipulation between the parties waiving the intervention of a jury, and the court

S. 90, 26 L. Ed. 310; Lehnen *v.* Dickson, 148 U. S. 71, 72, 37 L. Ed. 373; Grayson *v.* Lynch, 163 U. S. 468, 41 L. Ed. 230; St. Louis *v.* Western Union Tel. Co., 166 U. S. 388, 391, 41 L. Ed. 1044; Kearney *v.* Case, 12 Wall. 275, 20 L. Ed. 395; Miller *v.* Life Insurance Co., 12 Wall. 285, 20 L. Ed. 398; Ins. Co. *v.* Folsom, 18 Wall. 237, 21 L. Ed. 827; Jennisons *v.* Leonard, 21 Wall. 302, 22 L. Ed. 539; Tyng *v.* Grinnell, 92 U. S. 467, 23 L. Ed. 733; Insurance Co. *v.* Boon, 95 U. S. 117, 24 L. Ed. 395; The Abbotsford, 98 U. S. 440, 25 L. Ed. 168; Grayson *v.* Lynch, 163 U. S. 468, 472, 41 L. Ed. 230; Norris *v.* Jackson, 9 Wall. 125, 128, 19 L. Ed. 608, citing Insurance Co. *v.* Tweed, 7 Wall. 44, 19 L. Ed. 65; Boardman *v.* Toffey, 117 U. S. 271, 29 L. Ed. 898.

Where a jury is waived and a cause submitted to the court under the provisions of the act of March 5th, 1865, if the finding be general, only such rulings of the court in the progress of the trial can be reviewed as are presented by a bill of exceptions, or as may arise upon the pleadings. Insurance Co. *v.* Sea, 21 Wall. 158, 22 L. Ed. 511; Flanders *v.* Tweed, 9 Wall. 425, 430, 19 L. Ed. 678; Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608.

3. Norris *v.* Jackson, 9 Wall. 125, 128, 19 L. Ed. 608, citing Insurance Co. *v.* Tweed, 7 Wall. 44, 19 L. Ed. 65; Lehnen *v.* Dickson, 148 U. S. 71, 37 L. Ed. 373; Grayson *v.* Lynch, 163 U. S. 468, 41 L. Ed. 230; St. Louis *v.* Western Union Tel. Co., 166 U. S. 388, 41 L. Ed. 1044; Betts *v.* Mugridge, 154 U. S. 644, 25 L. Ed. 157; Insurance Co. *v.* Sea, 21 Wall. 158, 159, 22 L. Ed. 511; Martinton *v.* Fairbanks, 112 U. S. 670, 673, 28 L. Ed. 862.

Where there is no special finding of facts, but the record shows simply a general finding, inquiry in this court must be limited to the sufficiency of the complaint, and the rulings, if any be preserved, on questions of law arising during the trial. In such cases a bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury. Norris *v.* Jackson, 9 Wall. 125, 128, 19 L. Ed. 608; Lehnen *v.* Dickson, 148 U. S. 71, 37 L. Ed. 373; St. Louis *v.* Western Union Tel. Co., 166 U. S. 388, 390, 41 L. Ed. 1044.

Where a jury is waived and a cause submitted to the court under the provisions of the act of March 5th, 1865, a bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury. Insurance Co. *v.* Sea, 21 Wall. 158, 22 L. Ed. 511; Flanders *v.* Tweed, 9 Wall. 425, 430, 19 L. Ed. 678; Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608.

Where there is no special finding of facts, but simply a general finding, and the rulings of the court for which error is assigned involve a determination of facts, if the evidence which develops the facts is not brought to any notice by exception to its competency or relevancy, no questions of law are presented for our review. Because the rule in such case is that a bill of exceptions cannot be used to bring up the whole testimony for review any more than in a trial by jury. St. Louis *v.* Western Union Tel. Co., 166 U. S. 388, 41 L. Ed. 1044.

4. Stipulations of parties.—Tyre, etc., Co. *v.* Spalding, 116 U. S. 541, 29 L. Ed. 720; Fort Worth City Co. *v.* Smith Bridge Co., 151 U. S. 294, 38 L. Ed. 167.

5. Vacating submission of cause.—Bamberger *v.* Terry, 103 U. S. 40, 26 L. Ed. 317.

6. Bamberger *v.* Terry, 103 U. S. 40, 26 L. Ed. 317.

7. Presumptions on appeal.—Lloyd *v.* McWilliams, 137 U. S. 576, 34 L. Ed. 788.

8. Clark *v.* Fredericks, 105 U. S. 4, 26 L. Ed. 938.

finds "the issues of fact raised by the pleadings in favor of the plaintiffs," this court must assume that the facts were as alleged by the plaintiffs in the pleadings.[9]

oo. *Hearing and Determination*—aaa. *Affirmance.*—Where a case comes up to this court for a review of the findings under the act of congress, if there is no stipulation of the parties or any finding of the facts in the case, and no question upon the pleadings, according to the general course of proceeding in like cases, the judgment below should be affirmed.[10]

bbb. *Dismissal or Reversal.*—While as a general rule where there is no stipulation, nor any finding of the facts, and no question upon the pleadings, the judgment below is affirmed, yet there are cases which, under very special circumstances, the court has made an exception, and simply dismissed the writ of error,[11] or has reversed the judgment below for a mistrial, and remanded it for a new trial.[12]

9. Badger *v.* Cusimano, 130 U. S. 39, 40, 32 L. Ed. 851.

10. Affirmance.—Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678; Pomeroy *v.* Bank, 1 Wall. 592, 17 L. Ed. 638, distinguishing Burr *v.* Des Moines Co., 1 Wall. 99, 17 L. Ed. 561.

In Flanders *v.* Tweed, 9 Wall. 425, 432, 19 L. Ed. 678, Mr. Justice Nelson quoted the passage just cited from the opinion of Chief Justice Taney in Suydam *v.* Boyreau, and said that when a trial by jury had been waived, but there was no stipulation in writing, no finding of the facts, and no question upon the pleadings, the judgment must, according to the course of proceeding in previous cases, be affirmed, unless under very special circumstances this court otherwise ordered. Bond *v.* Dustin, 112 U. S. 604, 607, 28 L. Ed. 835.

In a case where there was no stipulation filed for the waiver of a jury, and where the judge had filed his "statement of facts" three months after the date of the judgment rendered—which statement, so irregularly filed, the court regarded as a nullity—and no question of law was to be considered as properly raised on the pleading, the court stated that, according to the general course of proceeding in former like cases, the judgment below should be affirmed. Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678.

Where in a case tried under the act of congress of March 3d, 1865, 13 Stat. at Large 501, authorizing the circuit courts of the United States, on written stipulation of the parties or their attorneys filed, to try issues of fact in civil cases without the intervention of a jury, owing to the manner in which things have been done below, presents a case as of a judgment rendered on a general verdict in favor of the defendant in error, and does not present any question arising on the pleadings, nor any ruling against the plaintiff in error, the judgment will be affirmed. Bethell *v.* Mathews, 13 Wall. 1, 20 L. Ed. 556.

A judgment affirmed because there was no question of law which this court could consider, in a case where a trial by jury was waived in writing and the case submitted to the court, where the finding of the court was general; where the bill of exceptions embodied all the testimony in the case, but where no exception was taken to the admission or rejection of testimony or to any ruling of the court on the trial, and where no question was raised in the case on the pleadings. Town of Ohio *v.* Marcy, 18 Wall. 552, 21 L. Ed. 811.

11. Dismissal or reversal.—Burr *v.* Des Moines, etc., Co., 1 Wall. 99, 17 L. Ed. 651, cited in Flanders *v.* Tweed, 9 Wall. 425, 431, 19 L. Ed. 678.

12. Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 265. See, also, Guild *v.* Frontin, 18 How. 135, 15 L. Ed. 290; Flanders *v.* Tweed, 9 Wall. 425, 431, 19 L. Ed. 578, followed in Flanders *v.* Tweed, 154 U. S. 569, 19 L. Ed. 680.

Where a cause is submitted to the circuit court without the intervention of the jury, and there is a special finding of facts which embraces only a part of the issues, the judgment will be reversed and a new trial awarded. Ex parte French, 91 U. S. 423, 23 L. Ed. 249; Exchange Nat. Bank *v.* Third Nat. Bank, 112 U. S. 276, 28 L. Ed. 722.

In Flanders *v.* Tweed, 9 Wall. 425, 19 L. Ed. 678, it was apparent that the parties below supposed that they had made up a case, according to the practice in Louisiana, from the finding of the facts by the court, that would entitle them to a re-examination of it here; but one not having been made up by the court and properly filed according to the requirements of the statute, so that, from that cause, the case, which it was meant by both court and parties to get here, could not be properly passed upon; it was held, that the judgment under the circumstances would not be affirmed according to the general course in like proceedings, but would be reversed for mistrial, and remanded for a new trial. Citing Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 265.

ccc. *Rendering or Ordering Final Judgment.*—Where a case is tried by the circuit court, without the intervention of a jury, and the circuit court makes a special finding of facts, and such special finding covers all the issues raised by the pleadings, this court, upon reversing the judgment of the circuit court, has the power, under § 701 of the Revised Statutes, to direct such judgment to be entered for the defendant as the special finding requires, instead of awarding a new trial. But where the special finding embraces only a part of the issues, a different rule prevails.[13]

(3) *In Actions against the Government.*—**In General.**—Under the act of March 3, 1887, c. 359, entitled "An act to provide for the bringing of suits against the government of the United States," and commonly known as the Tucker Act, a judgment of a district or circuit court of the United States in an action at law brought against the government, will be re-examined here only when the record contains a specific finding of facts with the conclusions of law thereon. In such cases, this court will only inquire whether the judgment below is supported by the facts thus found. And it was the purpose of congress to require like specific findings or statements of fact and conclusions of law in cases in equity and in admiralty brought under that act in the district and circuit courts of the United States, and to restrict our inquiry in such cases, as in actions at law, to the sufficiency of the facts so found or stated to support the final judgment.[14]

Judgment on Demurrer.—Under the act of March 3, 1887, c. 359, giving the district and circuit courts concurrent jurisdiction with the court of claims, and providing in § 7 that "it shall be the duty of the court to cause a written opinion to be filed in the cause, setting forth the specific findings by the court of the facts therein, and the conclusions of the court upon all questions of law involved in the case, and to render judgment thereon. If the suit be in equity or admiralty, the court shall proceed with the same according to the rules of such courts," it is held, that where the only judgment entered, and upon which the writ of error is sued out, appears to have been given on a demurrer, which presents an issue of law only, upon which the findings of fact can have no possible bearing or effect, it would seem to follow that the findings of facts cannot be taken into consideration by this court upon the record.[15]

Where the special findings of fact in an action to recover duties paid under protest on importation do not show what the collector charges the plaintiff;

13. Rendering or ordering final judgment.—Fort Scott *v.* Hickman, 112 U. S. 150, 28 L. Ed. 636, citing National Bank *v.* Insurance Co., 95 U. S. 673, 679, 24 L. Ed. 563; Fairfield *v.* County of Gallatin, 100 U. S. 47, 25 L. Ed. 544; Wright *v.* Blakeslee, 101 U. S. 174, 25 L. Ed. 1048; People's Bank *v.* National Bank, 101 U. S. 181, 25 L. Ed. 907; Warnock *v.* Davis, 104 U. S. 775, 26 L. Ed. 924; Lincoln *v.* French, 105 U. S. 614, 26 L. Ed. 1189; Ottowa *v.* Carey, 108 U. S. 110, 27 L. Ed. 669; Kirkbride *v.* Lafayette County, 108 U. S. 208, 27 L. Ed. 705; Retzer *v.* Wood, 109 U. S. 185, 27 L. Ed. 900; Canada Southern R. Co. *v.* Gebhard, 109 U. S. 527, 27 L. Ed. 1020; East St. Louis *v.* Zebley, 110 U. S. 321, 28 L. Ed. 162; Ex parte French, 91 U. S. 423, 23 L. Ed. 249; Meyer *v.* Richards, 163 U. S. 385, 415, 41 L. Ed. 199; Cleveland Rolling Mill *v.* Rhodes, 121 U. S. 255, 30 L. Ed. 920; Stanley *v.* Schwalby, 162 U. S. 255, 282, 40 L. Ed. 960.

Where all the facts of the case are ascertained by the special finding of the court below, as they would be by the special verdict of the jury, this court will not award a new trial upon reversal, but will remand the cause to the circuit court with directions to enter judgment for the defendants. Allen *v.* St. Louis Bank, 120 U. S. 20, 30 L. Ed. 513, citing Fort Scott *v.* Hickman, 112 U. S. 150, 28 L. Ed. 636; Pullman Car Co. *v.* Metropolitan R. Co., 157 U. S. 94, 110, 39 L. Ed. 632.

Where, in a suit on a negotiable security, the defendant has shown strong circumstances of fraud in the origin of the instrument, and the case is submitted to the court without a jury which finds the facts constituting such fraud, and does not find that the plaintiff gave value for the paper, the judgment is rightfully given for the defendant. Smith *v.* Sac County, 11 Wall. 139, 20 L. Ed. 102.

14. In actions against the government.—Chase *v.* United States, 155 U. S. 489, 500, 38 L. Ed. 234; United States *v.* King, 164 U. S. 703, 41 L. Ed. 1182; McCarty *v.* United States, 205 U. S. 537, 51 L. Ed. 920.

15. Hill *v.* United States, 149 U. S. 593, 37 L. Ed. 862.

nor sufficiently describe the articles imported; nor does it appear from the record under what provisions of the tariff act of March 3, 1883, 22 Stat. 488, c. 121, the parties claimed respectively, the facts set forth are not sufficient to support the judgment. Nor can the opinion of the court be resorted to to help out the findings.[16]

(4) *Construction of Findings.*—The supreme court will not so construe findings of facts by trial courts as to render the result arrived at by the court below erroneous, when another construction, much more reasonable and natural, may be given it, and the judgment thus rendered valid.[17]

c. *Review of Judgments Founded upon Agreed Statement of Facts*—(1) *In General.*—Decisions of this court establish the rule that writs of error will lie where the judgment in the court below was founded upon an agreed statement of facts, as well as when founded upon the verdict of a jury.[18] And since the passage of the Revised Statutes, §§ 649 and 700, as before, a judgment upon an agreed statement of facts or case stated, signed by the parties or their counsel, and entered of record, leaving no question of fact to be tried, and presenting nothing but a question of law, may be reviewed on error.[19]

16. Saltonstall *v.* Birtwell, 150 U. S. 417, 37 L. Ed. 1128, citing Dickinson *v.* Planters' Bank, 16 Wall. 250, 21 L. Ed. 278.

17. Construction of findings.—United States *v.* Andrews, 179 U. S. 96, 45 L. Ed. 105.

A finding of the court of claims that "the property of the claimant was taken and carried away while he was traveling in an Indian reservation, over the Chisolm trail, the same being an established trail en route from Texas to a market in Kansas" is equivalent to a finding that the trail was a lawfully established trail permitted by the laws of the United States. An established trail in this case, means a lawfully established trail and the supreme court must presume the court below so intended. United States *v.* Andrews, 179 U. S. 96, 45 L. Ed. 105.

18. Review of judgments founded upon agreed statement of facts in general.—United States *v.* Eliason, 16 Pet. 291, 10 L. Ed. 968; Stimpson *v.* Baltimore, etc., R. Co., 10 How. 329, 13 L. Ed. 441; Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 265; Pomeroy *v.* Bank of Indiana, 1 Wall. 592, 602, 17 L. Ed. 638.

The practice of bringing cases up to this court upon an agreed state of facts has been sanctioned and is now pronounced to be correct. "This objection to the jurisdiction of the appellate court upon a case agreed between the parties in the court below, had its origin, no doubt, in the practice in the English courts, by which we are told that the appellate tribunal will not take recognizance of such a case, as it will upon one standing on exceptions, or on a special verdict." Stimpson *v.* Baltimore, etc., R. Co., 10 How. 329, 13 L. Ed. 441; Pomeroy *v.* Bank of Indiana, 1 Wall. 592, 602, 17 L. Ed. 638.

Where the facts are without dispute, and agreed between the parties, a statement of the same may be drawn up and entered on the record, and submitted directly to the court, for its decision, without any intervention of a jury; or a general verdict may be taken, subject to the opinion of the court upon the facts so agreed; and in either case, the aggrieved party may bring error after final judgment, and have the questions of law, arising upon the facts thus spread upon the record, re-examined, as in the case of a special verdict. Faw *v.* Roberdeau, 3 Cranch 174, 2 L. Ed. 402; Brent *v.* Chapman, 5 Cranch 358, 3 L. Ed. 125; Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978, 980.

19. Supervisors *v.* Kennicott, 103 U. S. 554, 26 L. Ed. 486; United States *v.* Eliason, 16 Pet. 291, 10 L. Ed. 968; Burr *v.* Des Moines, etc., Co., 1 Wall. 99, 17 L. Ed. 561; Campbell *v.* Boyreau, 21 How. 223, 15 L. Ed. 96; Bond *v.* Dustin, 112 U. S. 604, 607, 28 L. Ed. 835.

Even before the act of 1865, c. 86, § 4 (13 Stat. 501, reproduced in § 649 and 700, Rev. Stat.), it was always held that a judgment on agreed facts spread at large on the record could be reviewed here on a writ of error. United States *v.* Eliason, 16 Pet. 291, 10 L. Ed. 968; Stimpson *v.* Baltimore, etc., R. Co., 10 How. 329, 13 L. Ed. 441; Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 265; Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978; Campbell *v.* Boyreau, 21 How. 223, 15 L. Ed. 96; Burr *v.* Des Moines, etc., Co., 1 Wall. 99, 17 L. Ed. 561. Such a statement was considered to be equivalent to a special verdict and to present questions of law alone for the consideration of the court. It is manifest that the act of 1865 was not intended to interfere with this practice. The evident object of that legislation was to give special findings the same effect for the purposes of a writ of error as a special verdict or an agreed case. Supervisors *v.* Kennicott, 103 U. S. 554, 556, 26 L. Ed. 486.

(2) *Nature of Agreed Case.*—A statement of facts by the parties, like a finding of facts by the circuit court, is strictly analogous to a special verdict.[20]

(3) *Form, Sufficiency and Contents of Agreed Statement.*—The agreed statement of facts on which this court will inquire, if there is or is not error in the application of the law to them, is a statement of the ultimate facts or propositions which the evidence is intended to establish, and not the evidence on which those ultimate facts are supposed to rest. The statement must be sufficient in itself, without inferences or comparisons, or balancing of testimony, or weighing evidence, to justify the application of the legal principles which must determine the case. It must leave none of the functions of a jury to be discharged by this court, but must have all the sufficiency, fullness and perspicuity of a special verdict. If it requires of the court to weigh conflicting testimony, or to balance admitted facts, and deduce from these the propositions of fact on which alone a legal conclusion can rest, then it is not such a statement as this court can act upon.[21] This court cannot give judgment as on an agreed statement of facts or case stated, except where facts, and facts only, are stated. If there be question as to the competency or effect of evidence, or any rulings of the court below upon evidence to be examined, the court cannot entertain the case as an agreed statement.[22] Agreed statements rest upon the consent of the parties, and, consequently, the action of the revising tribunal must be confined to the agreed facts, and the facts cannot be said to be agreed while the parties are at issue as to the admissibility or competency of the evidence.[23]

(4) *The Record—Necessity for Bill of Exceptions.*—Error will lie to an agreed statement of facts which, in some manner in the court below, are made a part of the record of the case. The reason that error did not lie on such a statement under the English practice as has been laid down by Sir William Blackstone in his Commentaries, and by Stephen in his Treaties on Pleadings, is that, in the English practice, the agreed statement was not like a special verdict entered on the record, and the appellate court could not therefore notice it. But in the practice of our courts such agreements are signed by the counsel, and spread upon the record at large as part thereof. And thus they become technically a part of the record, into which the appellate court look, with the other parts

20. Nature of agreed case.—Burr *v.* Des Moines, etc., Co., 1 Wall. 99, 17 L. Ed. 561; Raimond *v.* Terrebonne Parish, 132 U. S. 192, 32 L. Ed. 309; Davenport *v.* Paris, 136 U. S. 580, 33 L. Ed. 548.

By the settled construction of the acts of congress defining the appellate jurisdiction of this court, either a statement of facts by the parties, or a finding of facts by the circuit court, is strictly analogous to a special verdict, and must state the ultimate facts of the case, presenting questions of law only, and not be a recital of evidence or of circumstances, which may tend to prove the ultimate facts, or from which they may be inferred. Burr *v.* Des Moines Co., 1 Wall. 99, 17 L. Ed. 561; Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Martinton *v.* Fairbanks, 112 U. S. 670, 28 L. Ed. 862; Raimond *v.* Terrebonne Parrish, 132 U. S. 192, 194, 32 L. Ed. 309; Davenport *v.* Paris, 136 U. S. 580, 34 L. Ed. 548.

21. Form, sufficiency and contents of agreed statement.—Burr *v.* Des Moines, etc., Co., 1 Wall. 99, 102, 17 L. Ed. 561, citing Pennock *v.* Dialogue, 2 Pet. 1, 7 L. Ed. 327; United States *v.* Eliason, 16 Pet. 291, 300, 10 L. Ed. 968; United States *v.* King, 7 How. 833, 844, 12 L. Ed. 934; Bond *v.* Brown, 12 How. 254, 256, 13 L. Ed. 977; Weems *v.* George, 13 How. 190, 14 L. Ed. 108; Arthurs *v.* Hart, 17 How. 6, 7, 15 L. Ed. 30; Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 265; Raimond *v.* Terrebonne Parish, 132 U. S. 192, 32 L. Ed. 309; Glenn *v.* Fant, 134 U. S. 398, 33 L. Ed. 969.

Although this court will give judgment, on error, upon an agreed statement of facts or case stated, if it be signed by counsel and spread upon the record at large, as part thereof, yet it will not do so, except upon that which is professionally and properly known as a case stated; that is to say, upon a case which states facts simply; not one which presents, instead of facts, evidence from which facts may or may not be inferred. Burr *v.* Des Moines, etc., Co., 1 Wall. 99, 17 L. Ed. 561.

22. Pomeroy *v.* Bank of Indiana, 1 Wall. 592, 17 L. Ed. 638, affirming Burr *v.* Des Moines, etc., Co., 1 Wall. 99, 17 L. Ed. 561.

23. Pomeroy *v.* Bank of Indiana, 1 Wall. 592, 603, 17 L. Ed. 638.

of it, to ascertain if there be error.[24] Where the circuit court gives judgment for the defendants on an agreed case, and the record sent here, contains only the agreed statement of facts and the judgment of the circuit court, with the petition for the writ of error and its allowance, the cause will be dismissed for incompleteness of the record.[25]

d. *Review of Judgments Founded upon Special Verdict*[26]—(1) *In General*—Judgments of the circuit court may be revised here upon a writ of error, in cases where they are founded upon a special verdict, or upon demurrer to evidence.[27]

24. The record—necessity for bill of exceptions.—Burr *v.* Des Moines, etc., Co., 1 Wall. 99, 17 L. Ed. 561; Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 265; Pennock *v.* Dialogue, 2 Pet. 1, 7 L. Ed. 327; United States *v.* Eliason, 16 Pet. 291, 300, 10 L. Ed. 968; United States *v.* King, 7 How. 833, 844, 12 L. Ed. 934; Bond *v.* Brown, 12 How. 254, 256, 13 L. Ed. 977; Weems *v.* George, 13 How. 190, 14 L. Ed. 108; Arthurs *v.* Hart, 17 How. 6, 7, 15 L. Ed. 30.

A judgment of a circuit court upon a general statement of facts between the parties, may be reviewed by this court upon a writ of error. The objection to the jurisdiction of the appellate court upon a case agreed upon between the parties in the court below, had its origin, no doubt, in the practice of the English courts, by which we are told that the appellate tribunal will not take cognizance of such a case, as it will upon one standing on exceptions, or on special verdict. But the reason why, according to the practice in English courts, a writ of error will not be allowed after a case agreed, is this, and only this, that in those courts the case agreed never appeared upon or was made a part of the record, and therefore there is no ground of error set forth, upon which an appellate and revising tribunal can act. In the language of Justice Blackstone, nothing appears upon the record but the general verdict, whereby the parties are precluded from the benefit of a writ of error. Stimpson *v.* Baltimore, etc., R. Co., 10 How. 329, 13 L. Ed. 441; Fau *v.* Robereau, 3 Cranch 174, 2 L. Ed. 402; Tucker *v.* Oxley, 5 Cranch 34, 3 L. Ed. 29; Kennedy *v.* Brent, 6 Cranch 187, 3 L. Ed. 194; Brent *v.* Chapman, 5 Cranch 358, 3 L. Ed. 125; Shankland *v.* Washington, 5 Pet. 390, 8 L. Ed. 166; United States *v.* Eliason, 16 Pet. 291, 10 L. Ed. 968; Inglee *v.* Coolidge, 2 Wheat. 363, 4 L. Ed. 261; Miller *v.* Nicholas, 4 Wheat. 311, 4 L. Ed. 578; Pomeroy *v.* Bank of Indiana, 1 Wall. 592, 602, 17 L. Ed. 638.

A case cannot be brought by writ of error from a circuit court of the United States, upon an agreed statement of facts, without any of the proceedings of the court below being in the record. Keene *v.* Whittaker, 13 Pet. 459, 10 L. Ed. 246.

A case submitted to the circuit court for decision on an agreed statement of law and facts, cannot be reviewed here on a writ of error where the legal points have not been raised by a bill of exceptions in the circuit court. Minor *v.* Tillotson, 2 How. 392, 11 L. Ed. 312.

In the District of Columbia, a writ of error lies to the decision of the circuit court, upon an agreed case. The same principle has been applied in cases brought before the supreme court from other parts of the United States because, as the court said: "At the period of the cession, the practice is believed to have been well settled, both in Virginia and Maryland, that in trials at law, where special or agreed cases have been made, they have been signed by the counsel, as representing their clients, and spread at large upon the record, as a part thereof; and as constituting the only legitimate ground for the action of the court, and as furnishing the regular and proper test to be applied by an appellate or revising tribunal to this action. The practice is believed to be the same at this day; it has been repeatedly recognized by the decisions of this court; and, if ever heretofore seriously questioned, has never been overruled." United States *v.* Eliason, 16 Pet. 291, 301, 10 L. Ed. 968; Fau *v.* Roberdeau, 3 Cranch 174, 2 L. Ed. 402; Tucker *v.* Oxley, 5 Cranch 34, 3 L. Ed. 29; Kennedy *v.* Brent, 6 Cranch 187, 3 L. Ed. 194; Brent *v.* Chapman, 5 Cranch 358, 3 L. Ed. 125; Shankland *v.* Washington, 5 Pet. 390, 8 L. Ed. 166; Inglee *v.* Coolidge, 2 Wheat. 363, 4 L. Ed. 261; Miller *v.* Nichols, 4 Wheat. 311, 4 L. Ed. 578.

Dismissal.—Where a cause came on to be heard on the transcript of the record from the circuit court of the United States for the eastern district of Louisiana, and it appeared, upon an inspection of the papers filed in the case, that it had been brought here upon an agreed statement of facts, without any of the proceedings in the court below being in the record, it was adjudged and ordered by this court that this cause be, and the same is, hereby dismissed with costs. Keene *v.* Whittaker, 13 Pet. 459, 10 L. Ed. 246.

25. Keene *v.* Whittaker, 13 Pet. 459, 10 L. Ed. 246; Curtis *v.* Petitpain, 18 How. 109, 15 L. Ed. 280.

26. See the title VERDICT.

27. Review of judgments founded upon special verdicts.—4 Chitty's Gen. Prac. 7; 2 Inst. 427; Suydam *v.* Williamson, 20

(2) *Definition and Nature.*—A special verdict is where the jury find the facts f the case, and refer the decision of the cause upon those facts to the court, with a conditional conclusion, that if the court should be of opinion, upon the whole matter thus found, that the plaintiff has a good cause of action, they then find for the plaintiff; and if otherwise, they then find for the defendant; and it is of the very essence of a special verdict, that the jury should find the facts on which the court is to pronounce the judgment according to law, and the court, in giving judgment, is confined to the facts so found.[28]

(3) *Form and Requisites*—aa. *In General.*—Whether the foundation of the judgment be a statement of facts, a special verdict, or a special finding, the statement must be sufficient in itself, without inferences or comparisons or balancing of testimony or weighing evidence, to justify the application of legal principles which must determine the case.[29] Repeated decisions of this court have deter-

How. 427, 435, 15 L. Ed. 978; Pomeroy *v.* Bank of Indiana, 1 Wall. 592, 602, 17 L. Ed. 638.

In the case of a special verdict, the question is presented as it would be if tried by a jury, whether the facts thus found require a judgment for plaintiff or defendant; and this being matter of law, the ruling of the court on it can be reviewed in this court on that record. Norris *v.* Jackson, 9 Wall. 125, 127, 19 L. Ed. 608.

"Although the finding of the jury is not in the usual form of a special verdict, but the jury makes certain findings, and the statement is that the court reserves certain points of law, if the circuit court, and the counsel for both parties in that court, appear to have treated the finding as not amounting to either a special verdict or an agreed statement of facts, this court will overlook the irregularity and consider the case on its merits." Hartranft *v.* Wiegmann, 121 U. S. 609, 30 L. Ed. 1012, citing Mumford *v.* Wardwell, 6 Wall. 423, 18 L. Ed. 756.

28. Definition and nature.—Suydam *v.* Williamson, 20 How. 427, 432, 15 L. Ed. 978; 3 Bl. Com., p. 377; Collins *v.* Riley, 104 U. S. 322, 324, 26 L. Ed. 752.

Strictly speaking, a special verdict is where the jury find the facts of the case and refer the decision of the cause to the court, with a conditional conclusion, that if the court is of the opinion, upon the whole matter as found, that the plaintiff is entitled to recover, then the jury find for the plaintiff; but if otherwise, then they find for the defendant. Mumford *v.* Wardell, 6 Wall. 423, 432, 18 L. Ed. 756; Suydam *v.* Williamson, 20 How. 432, 15 L. Ed. 978; 3 Blackstone's Commentaries 377. Insurance Co. *v.* Piaggio, 16 Wall. 378, 387, 21 L. Ed. 358.

29. Form and requisites in general.—United States *v.* Adams, 6 Wall. 101, 111, 18 L. Ed. 792; Mumford *v.* Wardwell, 6 Wall. 423, 432, 18 L. Ed. 756; 3 Blackstone's Com. 378.

Undoubtedly a special verdict is erroneous if it does not find all the facts essential to the rendering of the judgment; but if it contain all the facts required for that purpose, the better opinion is that the court of original jurisdiction may render such judgment as the facts found require, and if they err and the error is apparent in the record, that such error may be re-examined on writ of error in this court. Insurance Co. *v.* Piaggio, 16 Wall. 378, 388, 21 L. Ed. 358.

The rule applicable to special verdicts was stated in Collins *v.* Riley, 104 U. S. 322, 327, 26 L. Ed. 752—"that the special verdict must contain all the facts from which the law is to arise; that whatever is not found therein is, for the purposes of a decision, to be considered as not existing; that it must present, in substance, the whole matter upon which the court is asked to determine the legal rights of the parties, and cannot, therefore, be aided by intendment or by extrinsic facts, although such facts may appear elsewhere in the record,"—which needs qualification in its application to such cases as the present; for our jurisdiction, in cases of this description, extending to a determination of the questions of law arising upon the record, may be predicated of facts which appear in any part of it, whether admitted by the parties in the pleadings, or by stipulation, or found by the court. But it is essential that the findings of fact should state the facts, and not the evidence merely, even although the evidence be sufficient to establish the fact. Sun Mutual Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485, 500, 27 L. Ed. 337.

Mr. Chief Justice Marshall stated this rule in Barnes *v.* Williams, 11 Wheat. 415, 6 L. Ed. 508, when he said: "Although, in the opinion of the court, there was sufficient evidence in the special verdict from which the jury might have found the fact, yet they have not found it, and the court could not, upon a special verdict, intend it. The special verdict was defective in stating the evidence of the fact, instead of the fact itself. It was impossible, therefore, that a judgment could be pronounced for the plain-

mined that every special verdict, in order to enable the appellate court to act upon it, must find the facts and not merely state the evidence of facts, as where it states the evidence merely without stating the conclusions of the jury, a court of errors cannot act upon such matters, even though the evidence reported be sufficient to justify the assumed conclusion.[30] Where the essential facts in a special verdict are not distinctly found by the jury, the supreme court will not re-examine them, but the court will award a new venire and remand the cause to the court below, as an appellate court of errors cannot intend what is not found, nor can a judgment be rendered in any case where the special verdict is defective in stating the evidence of the fact instead of the fact itself.[31]

In practice, the formal preparation of such a verdict is made by the counsel of the parties, and it is usually settled by them, subject to the correction of the court, according to the state of facts as found by the jury, with respect to all particulars on which they have passed, and with respect to other particulars, according to the state of facts which it is agreed they ought to find upon the evidence before them.[32]

bb. *Reference of Cause to Court.*—In a special verdict, the jury find the facts of the case and refer the decision of the cause upon those facts to the court, with a conditional conclusion that if the court should be of opinion, upon the whole matter as found, that the plaintiff is entitled to recover, then they find for the plaintiff, but if otherwise, then they find for the defendant. By leave of the court such a verdict may be prepared by the parties, subject to the correction of the court, and it may include agreed facts in addition to those found by the jury. When the facts are settled and the verdict is reduced to form, it is then entered of record, and the questions of law arising on the facts so found are then before the court for hearing as in case of a demurrer.[33]

cc. *Presence and Assent of Court.*—A special verdict requires the presence and assent of the court.[34]

(4) *Review*—aa. *In General.*—After the special verdict is arranged, and it is reduced to form, it is then entered on the record, together with the other proceedings in the cause, and the questions of law arising on the facts found are then decided by the court, as in case of a demurrer; and if either party is dissatisfied with the decision, he may resort to a court of error, where nothing is open for revision, except the questions of law inferentially arising on the facts stated in the special verdict.[35] It is not so much because the proceeding is denominated a special verdict, that the party by virtue of it is authorized to invoke the aid of a revisory tribunal, as it is because it has the effect to incorporate the

tiff." This was approved in Hodges *v.* Easton, 106 U. S. 408, 27 L. Ed. 169. And see Prentice *v.* Zane, 8 How. 470, 12 L. Ed. 1160, and Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608. Sun Mutual Ins. Co. *v.* Ocean Ins. Co., 107 U. S. 485, 501, 27 L. Ed. 337.

30. Suydam *v.* Williamson, 20 How. 427, 432, 15 L. Ed. 978; Glenn *v.* Fant, 134 U. S. 398, 33 L. Ed. 969.

31. Barnes *v.* Williams, 11 Wheat. 415, 416, 6 L. Ed. 508; 2 Tidd's Practice, 4th Amer. Ed. 896.

32. Suydam *v.* Williamson, 20 How. 427, 432, 15 L. Ed. 978.

33. Reference of cause to court.—Mumford *v.* Wardwell, 6 Wall. 423, 432, 18 L. Ed. 756.

Where a paper in the form of a special verdict—except that after stating the facts, it did not refer the decision on them to the court in the conditional and alternative way usual in such verdicts, but found "a general verdict for the plaintiff subject to the opinion of the court upon the foregoing recited facts"—was "agreed to as a special verdict" by counsel in the cause, filed of record and passed on as an agreed case by the court below, this court—remarking that as a special verdict the paper was defective, because not ending with the usual conclusion—in view of the facts just mentioned, considered it as a special verdict or agreed case, and on error to a judgment given on it below, adjudged the case presented by it. Mumford *v.* Wardwell, 6 Wall. 423, 18 L. Ed. 756, followed in Hartranft *v.* Wiegmann, 121 U. S. 609, 612, 30 L. Ed. 1012.

34. Presence and assent of court.—Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978.

35. Review in general.—Suydam *v.* Williamson, 20 How. 427, 432, 15 L. Ed. 978.

facts of the case into the record, which otherwise would have rested in parol, and therefore could not have been reached on a writ of error.[36]

bb. *Exceptions and Objections*—aaa. *In General.*—Exceptions to the order of the court in granting a new trial do not lie in any case, and the losing party in case of judgment in a special case cannot except to the rulings of the court during the trial, unless he seasonably reserved the right to turn the special case into a bill of exceptions, because the court has no power, unless otherwise agreed, to render any judgment except upon the verdict of the jury.[37]

bbb. *Necessity of Bill of Exceptions.*—Special verdicts having a conditional or alternative finding are the proper foundation of a judgment for either party, as the law of the case on the facts found may require, and consequently the judgment of the subordinate court on such a verdict, whether for plaintiff or defendant, may be re-examined in the appellate tribunal without any bill of exceptions.[38] Since the finding of facts in cases of admiralty and maritime jurisdiction has the effect of a special verdict in an action at law, its sufficiency, in connection with the pleadings, to support the decree rendered, is always open to consideration on appeal, although there are no exceptions filed. There is no occasion in any case to except specially to a finding, as its sufficiency, in connection with the pleadings, to support the decree rendered is always open to consideration on appeal.[39]

cc. *Scope of Review.*—**Review of Rulings Admitting or Rejecting Evidence.**—The rulings of the court in admitting or rejecting evidence, can only be brought to this court for revision by a bill of exceptions. Such rulings are never properly included in a special verdict, any more than in an agreed statement of facts.[40]

36. Suydam *v.* Williamson, 20 How. 427, 433, 15 L. Ed. 978.

37. Exceptions and objections in general.—Mumford *v.* Wardwell, 6 Wall. 423, 433, 18 L. Ed. 756.

38. Necessity of bill of exceptions.—Suydam *v.* Williamson, 20 How. 427, 432, 15 L. Ed. 978; Mumford *v.* Wardwell, 6 Wall. 423, 433, 18 L. Ed. 756.

A special verdict was found by the jury, upon which judgment was to be entered according as the opinion of the court might be upon the construction of a certain deed, which deed was referred to, and made part of the special finding of the jury, but was not contained in the record thereof. A deed formed a part of a bill of exceptions taken to the opinion of the court, upon a motion for a new trial; which bill of exceptions, with the said deed, was contained in the record. The court cannot judicially know that this is the same deed which is referred to in the verdict of the jury, or what are the other evidences of title connected with it. M'Arthur *v.* Porter, 1 Pet. 626, 7 L. Ed. 290.

Where the verdict is general, the court may enter judgment on the verdict, or may set it aside and grant a new trial, but the rulings of the court during the trial cannot be revised on writ of error save by a regular bill of exceptions. Judgments also may be rendered on the verdict in a special case, or a new trial may be granted because the verdict is general, and is for plaintiff or defendant. Mumford *v.* Wardwell, 6 Wall. 423, 433, 18 L. Ed. 756.

39. The Adriatic, 107 U. S. 112, 27 L. Ed. 497; The Maggie J. Smith, 123 U. S. 349, 31 L. Ed. 175.

40. Scope of review.—Suydam *v.* Williamson, 20 How. 427, 15 L. Ed. 978, 980.

Special verdicts are where the jury find the facts of the case, and upon those facts refer the decision of the cause to the court, with a conditional conclusion, that if the court should be of opinion that the plaintiff, upon the facts found, has a good cause of action, then they find for the plaintiff; but if otherwise, then they find for the defendant. Rulings of the court, however, in admitting or rejecting evidence, are never properly included in a special verdict, any more than in an agreed statement of facts; because, when reduced to form, the verdict is then entered on the record, and the judgment of the court is based upon the findings of the jury. Pomeroy *v.* Bank of Indiana, 1 Wall. 592, 603, 17 L. Ed. 638.

It should be observed, however, that the rulings previously made by the court, in admitting or rejecting evidence during the progress of the trial, are no more revisable on a special case, as it is called, when the verdict is taken subject to the opinion of the court on an agreed state of facts, than where the agreed statement is submitted directly to the court, without the intervention of the jury; and for the obvious reason that, in the one case as much as in the other, the foundation laid

dd. *Reversal or Affirmance.*—Where in a special verdict, the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, although the counsel agreed below to waive the exception to the verdict, yet if the court there render judgment on that agreement and waiver, as well as on the verdict, their decision is erroneous, both on the merits and on the course of proceeding, and ought to be reversed instead of affirmed.[41] Hence, where in a special verdict, the essential facts are not distinctly found by the jury, although there is sufficient evidence to establish them, this court will not render a judgment, upon such an imperfect special verdict, but remand the cause to the court below for a venire facias de novo.[42] Where there is a case stated, or special verdict, the court of error must not only reverse the judgment below, if found erroneous, but enter a correct and final judgment. If a special verdict be ambiguous, or imperfect—if it find but the evidence of facts, and not facts themselves, or finds but part of the facts in issue and is silent as to others, it is a mistrial, and the court of error must order a venire de novo. They can render no judgment on an imperfect verdict, or case stated.[43]

e. *Review of Findings by Referees, Arbitrators, etc.*—**Right to Review.**—Appellate courts are accustomed to revise decisions of arbitrators, and upon principle there is no objection to the introduction of the same practice in the courts of the United States.[44] But it has been said that it is doubtful whether cases tried in the circuit courts by a referee, in states where such a practice exists, can be reviewed here, even under the act of 1872, c. 255 (§ 914, Rev. Stat.), which provides that, "the practice, pleadings, and forms and modes of proceedings in civil causes, other than equity and admiralty causes, in the circuit and district courts, must conform, as near as may be, to the practice, pleadings, and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such circuit or district courts are held."[45]

Exceptions.—Where no exception is taken in the court below to the manner of proceeding before a referee, it is too late to make it here for the first time. As where there is no written consent to the order for a trial by referee, it would be an error in the court, if objection is made to proceed with a new trial of the case after the report is set aside without a stipulation in writing waiving a jury,

for the action of the revisory tribunal is based upon the consent of the parties to the suit, and consequently the action of the appellate court must be confined to the facts as they were agreed, and as they appear in the record of the case. Arthurs *v.* Hart, 17 How. 6, 15 L. Ed. 30; Bixler *v.* Kunkle, 17 S. & R. 310. At one time an attempt was made to introduce a different practice into this court; but it was distinctly disclaimed, and has never been sanctioned in writs of error to any of the circuit courts in states where the proceedings are according to the course of the common law. Shankland *v.* Washington, 5 Pet. 390, 8 L. Ed. 166.

In Shankland *v.* Washington, 5 Pet. 390, 8 L. Ed. 166, it was agreed by the parties that the question of the admissibility, competency and sufficiency of the evidence to maintain the action, should be submitted to the court, and that, in considering the evidence, the court should draw from it, so far as it was admissible and competent, every inference of fact and law which would have been competent for a jury to have drawn from it; and that agreement was appended to an agreed statement of facts, on which the case was submitted to the determination of the circuit court in the district. Subsequently, it was brought into this court on a writ of error for revision, and was heard and determined upon the matters properly exhibited in the record; but this court, in giving judgment as an unusual one, denied that it was competent for parties to impose any such duties on this court, and expressly declared that the case was not to be drawn into precedent.

41. Reversal or affirmance.—Prentice *v.* Zane, 8 How. 470, 12 L. Ed. 1160.

42. Prentice *v.* Zane, 8 How. 470, 12 L. Ed. 1160, citing Chesapeake Ins. Co. *v.* Stark, 6 Cranch 268, 3 L. Ed. 220; Livingston *v.* Maryland Ins. Co., 6 Cranch 274, 280, 3 L. Ed. 222; Barnes *v.* Williams, 11 Wheat. 415, 6 L. Ed. 508.

43. See Prentice *v.* Zane, 8 How. 470, 484, 12 L. Ed. 1160; Graham *v.* Bayne, 18 How. 60, 15 L. Ed. 265, 267.

44. Review of findings by referees, arbitrators, etc.—York, etc., R. Co. *v.* Myers, 18 How. 246, 15 L. Ed. 380, citing Thornton *v.* Carson, 7 Cranch 596, 597, 3 L. Ed. 451; Lutz *v.* Linthicum, 8 Pet. 165, 166, 8 L. Ed. 904.

45. Boogher *v.* Insurance Co., 103 U. S. 90, 95, 26 L. Ed. 310.

as provided by § 649 of the Revised Statutes.[46]

Scope of Review.—Where an action at law in a circuit court is referred to a referee to determine the issues therein, and he files his report finding facts and conclusions of law, and directs that there be a money judgment for the plaintiff, if the case was not tried by the circuit court on the filing of a waiver in writing of a trial by jury, this court cannot review any of the exceptions taken to the admission or exclusion of evidence, or any of the exceptions to the findings of fact by the referee, or to his refusal to find the facts as requested.[47] When the trial is by rule of court and consent of parties before a referee or arbitrator, no question of law can be reviewed on error, except whether the facts found by him support the judgment below.[48]

This court cannot revise the mistakes of an arbitrator, either of law or fact, if such has been established.[49]

Where the case is referred by the court to a master to report, not the evidence merely, but the facts of the case, and his conclusions of law thereon, his finding, so far as it involves questions of fact, is attended by a presumption of correctness similar to that in the case of a finding by a referee, the special verdict of a jury, the findings of a circuit court in a case tried by the court under Rev. Stat., § 649, or in an admiralty cause appealed to this court. In neither of these cases is the finding absolutely conclusive, as if there be no testimony tending to support it; but so far as it depends upon conflicting testimony, or upon the credibility of witnesses, or so far as there is any testimony consistent with the finding, it must be treated as unassailable.[50] The finding of the

46. Dundee Mortgage, etc., Co. *v.* Hughes, 124 U. S. 157, 31 L. Ed. 357.

47. Roberts *v.* Benjamin, 124 U. S. 64, 31 L. Ed. 334, citing Bond *v.* Dustin, 112 U. S. 604, 607, 28 L. Ed. 835; Paine *v.* Central Vermont R. Co., 118 U. S. 152, 158, 30 L. Ed. 193; Republican River Bridge Co. *v.* Kansas Pac. R. Co., 92 U. S. 315, 23 L. Ed. 515.

This case not having been tried by the circuit court on the filing of a waiver in writing of a trial by jury, this court cannot on this writ of error review any of the exceptions taken to the admission or exclusion of evidence, or any of the exceptions to the findings of fact by the referee, or to his refusal to find facts as requested. Bond *v.* Dustin, 112 U. S. 604, 606, 607, 28 L. Ed. 835; Paine *v.* Central Vermont R. Co., 118 U. S. 152, 158, 30 L. Ed. 193; Roberts *v.* Benjamin, 124 U. S. 64, 74, 31 L. Ed. 334.

48. Campbell *v.* Boyreau, 21 How. 223, 16 L. Ed. 96; Bond *v.* Dustin, 112 U. S. 604, 606, 28 L. Ed. 835; Paine *v.* Central Vermont R. Co., 118 U. S. 152, 30 L. Ed. 193; Andes *v.* Slauson, 130 U. S. 435, 438, 32 L. Ed. 989.

49. York, etc., R. Co. *v.* Myers, 18 How. 246, 15 L. Ed. 380, citing Burchell *v.* Marsh, 17 How. 344, 15 L. Ed. 96.

50. Wiscart *v.* D'Auchy, 3 Dall. 321, 1 L. Ed. 619; Bond *v.* Brown, 12 How. 254, 13 L. Ed. 977; Graham *v.* Bayne, 18 How. 60, 62, 15 L. Ed. 265; Norris *v.* Jackson, 9 Wall. 125, 19 L. Ed. 608; Insurance Co. *v.* Folsom, 18 Wall. 237, 249, 21 L. Ed. 827; The Abbotsford, 98 U. S. 440, 25 L. Ed. 168; Davis *v.* Schwartz, 155 U. S. 631, 636, 38 L. Ed. 289.

"The question of the conclusiveness of findings by a master in chancery under a similar order was directly passed upon in Kimberly *v.* Arms, 129 U. S. 512, 32 L. Ed. 764, in which a distinction is drawn between the findings of a master under the usual order to take and report testimony, and his findings when the case is referred to him by consent of parties, as in this case. While it was held that the court could not, of its motion, or upon the request of one party, abdicate its duty to determine by its own judgment the controversy presented, and devolve that duty upon any of its officers, yet where the parties select and agree upon a special tribunal for the settlement of their controversy, there is no reason why the decision of such tribunal, with respect to the facts, should be treated as of less weight than that of the court itself, where the parties expressly waive a jury, or the law declares that the appellate court shall act upon the finding of a subordinate court. 'Its findings,' said the court, 'like those of an independent tribunal, are to be taken as presumptively correct, subject, indeed, to be reviewed under the reservation contained in the consent and order of the court, when there has been manifest error in the consideration given to the evidence, or in the application of the law, but not otherwise.' As the reference in this case was by consent to find the facts, we think the rule in Kimberly *v.* Arms, 129 U. S. 512, 32 L. Ed. 764, applies, and as there is nothing to show that the findings of fact were unsupported by the evidence, we think they must be treated as conclusive.

master upon conflicting evidence, which finding the court below concurred in, except in some unimportant particulars will be permitted to stand, if no obvious error or mistake has been pointed out to us.[51]

Facts Found by Referee.—Where an action at law in a circuit court is referred to a referee to determine the issues therein, and he files his report finding facts and conclusions of law and directs that there be a money judgment for the plaintiff, the only questions open to review here are whether there was any error of law in the judgment rendered by the circuit court upon the facts found by the referee. The judgment having been entered "pursuant to the report of the referee," the facts found by him are conclusive in this court.[52]

To same effect are Crawford *v.* Neal, 144 U. S. 585, 596, 36 L. Ed. 552; Furrer *v.* Ferris, 145 U. S. 132, 36 L. Ed. 649." Davis *v.* Schwartz, 155 U. S. 631, 637, 38 L. Ed. 289.

51. Warren *v.* Keep, 155 U. S. 255, 265, 38 L. Ed. 144, citing Tilghman *v.* Proctor, 125 U. S. 136, 31 L. Ed. 664; Crawford *v.* Neal, 144 U. S. 585, 36 L. Ed. 552; Furrer *v.* Ferris, 145 U. S. 132, 36 L. Ed. 649.

52. Roberts *v.* Benjamin, 124 U. S. 64, 31 L. Ed. 334, citing Thornton *v.* Carson, 7 Cranch 596, 601, 3 L. Ed. 451; Alexandria Canal *v.* Swann, 5 How. 83, 12 L. Ed. 60; York, etc., R. Co. *v.* Myers, 18 How. 246, 15 L. Ed. 380; Hecker *v.* Fowler, 2 Wall. 123, 17 L. Ed. 759; Bond *v.* Dustin, 112 U. S. 604, 606, 28 L. Ed. 835; Paine *v.* Central Vermont R. Co., 118 U. S. 152, 158, 30 L. Ed. 193; Latta *v.* Granger, 167 U. S. 81, 86, 42 L. Ed. 85.

Where a case is referred to a referee instructions to report the testimony, with the findings of fact and of law to the court, and the court in its judgment ordered his findings to stand as the findings of the court, the only questions before this court are whether the facts found by the referee sustain the judgment. "As the case was not tried by the circuit court upon a waiver in writing of a trial by jury, this court cannot review exceptions to the admission or exclusion of evidence, or to findings of fact by the referee, or to his refusal to find facts as requested. Roberts *v.* Benjamin, 124 U. S. 64, 31 L. Ed. 334; Boogher *v.* Insurance Co., 103 U. S. 90, 26 L. Ed. 310; Bond *v.* Dustin, 112 U. S. 604, 28 L. Ed. 835; Paine *v.* Central Vermont R. Co., 118 U. S. 152, 30 L. Ed. 193; Andes *v.* Slauson, 130 U. S. 435, 32 L. Ed. 989." Shipman *v.* Straitsville Central Min. Co., 158 U. S. 356, 361, 39 L. Ed. 1015.

Where the record shows that the cause came on before the district judge, holding the circuit court, for trial, "without a jury, and a trial by jury having been expressly waived by the written consent of the parties duly filed;" that a referee was appointed by written consent in accordance with the modes of procedure in such cases in the courts of record of New York, and with the rules of the circuit court; and that his findings, rulings and decisions are made those of the court, the question whether the judgment rendered was warranted by the facts found is open for consideration in the circuit court of appeals, and is so here, and that is sufficient for the disposition, of the case. Shipman *v.* Straitsville Central Min. Co., 158 U. S. 356, 39 L. Ed. 1015; Chicago, etc., R. Co. *v.* Clark, 178 U. S. 353, 364, 44 L. Ed. 1099.

Even in actions duly referred by rule of court to an arbitrator, only rulings and decisions in matter of law after the return of the award were reviewable. Thornton *v.* Carson, 7 Cranch 596, 601, 3 L. Ed. 451; Alexandria Canal *v.* Swann, 5 How. 83, 12 L. Ed. 60; York, etc., R. Co. *v.* Myers, 18 How. 246, 15 L. Ed. 380; Hecker *v.* Fowler, 2 Wall. 123, 17 L. Ed. 759; Bond *v.* Dustin, 112 U. S. 604, 606, 28 L. Ed. 835.

Where the case is not submitted to the decision of the court without a jury, pursuant to the Revised Statutes of the United States, §§ 649, 700; but to the decision of the judge as referee, in accordance with the statutes and practice of Vermont; Gen. Stat. 1862, ch. 30, § 52; Rev. Laws 1880, § 985; White *v.* White, 21 Vt. 250; Melendy *v.* Spaulding, 54 Vt. 517, the only question presented by the writ of error is whether there is any error of law in the judgment rendered by the court upon the facts found by the referee. Paine *v.* Central Vermont R. Co., 118 U. S. 152, 158, 30 L. Ed. 193, citing Bond *v.* Dustin, 112 U. S. 604, 606, 607, 28 L. Ed. 835.

In Andes *v.* Slauson, 130 U. S. 435, 32 L. Ed. 989, there was no demurrer, or case stated, or special verdict, or finding of facts by the court or by a referee, presenting a pure question of law. But the pleadings presented issues of fact which, in the legal and regular course of proceedings could be tried by a jury only, and at a stated term of the court, unless the parties either in writing waived the jury and submitted the case to the court's decision, or else agreed that the case should be tried and determined by a referee. There was no waiver of a jury trial and submission and determination of all the issues of fact to the court. But the case was tried by consent of the parties before the judge at chambers un-

Hearing and Determination.—In order to give this court jurisdiction to determine whether the facts found by the referee, and confirmed by the court below, are sufficient to support the judgment, they must be treated as the finding of the court. Otherwise, there has not been such a judicial determination of them as to make them conclusive here.[53]

f. *Other Methods Considered.*—**In General.**—The methods set forth above are probably the only modes by which facts can be submitted to the court though in a few cases attempts, usually futile, have been made to adopt other methods.[54] The supreme court cannot take cognizance of any suit or controversy, which was not brought before them by the regular process of the law.[55]

Review of Case Made.—Where the case made, which, by the terms of the verdict, either party was at liberty to turn into a bill of exceptions, set forth the entire evidence adduced at the trial, but is not an agreed statement of facts, nor a special verdict, nor a finding of facts by the court, and contains no exceptions, it cannot be treated as the basis of any assignment of errors.[56]

der an order providing that it should be so tried, and that "if it should appear to the judge upon such trial that there are questions of fact arising upon the issues therein, if of such a character that the judge would submit them to the jury if one were present" they should be submitted to the jury at the next term of the court, when the only finding of the judge is a general finding for the plaintiff. It was held, that the trial thus ordered consented to and had, was neither a trial by jury, nor a trial by the court, in accordance with the act of congress, but was a trial by the judge as a referee. And since it derived its whole efficacy from the consent of the parties, the bill of exceptions allowed at the trial is irregular and unavailing, and the facts stated in the bill of exceptions cannot be regarded, nor the ruling stated therein reviewed, by this court.

53. Boogher *v.* Insurance Co., 103 U. S. 90, 26 L. Ed. 310.

54. Other methods considered.—See Shankland *v.* Washington, 5 Pet. 390, 8 L. Ed. 166.

55. Dewhurst *v.* Coulthard, 3 Dall. 409, 1 L. Ed. 658.

An agreed statement of a case was presented to the court, at the instance of the attorneys for both the parties, in a suit in a circuit court, with a request that it might be considered and decided, and it was agreed that judgment, in accordance with the opinion of the court, be entered. Held, that the court will not take cognizance of the case. Dewhurst *v.* Coulthard, 3 Dall. 409, 1 L. Ed. 658.

56. Redfield *v.* Ystalyfera Iron Co., 110 U. S. 174, 175, 28 L. Ed. 109. See Andes *v.* Slauson, 130 U. S. 435, 438, 32 L. Ed. 989.

Review on written stipulation alone.—"To obviate any objection that this court could not review the judgment in this case because there was no general verdict of the jury, and no special verdict in any form known to the common law, and no waiver in writing of a jury trial, and no such finding by the court below upon the facts as is provided for by § 649 of the Revised Statutes, the parties have filed in this court a written stipulation, agreeing 'that the facts appearing from the special verdict and stated by the bill of exceptions to have been proved, shall be taken and considered as the facts in this case for all purposes, and as fully as if they had been specifically found by the circuit court;' and 'that the circuit court submitted certain questions to the jury by agreement of the parties, and that the other facts were to be found and stated as shown by the bill of exceptions, and that upon the whole case, as thus shown, judgment was to be pronounced by the court below, as they should determine the law,' and the court on this written stipulation reviewed the case on a writ of error, and reversed the judgment below." Geekie *v.* Kirby Carpenter Co., 106 U. S. 379, 383, 27 L. Ed. 157.

UC SOUTHERN REGIONAL LIBRARY FACILITY
D 000 321 960 7